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THE
AMERICAN STATE REPORTS,

CONTAINING THE

CASES OF GENERAL VALUE AND AUTHORITY

**SUBSEQUENT TO THOSE CONTAINED IN THE "AMERICAN
DECISIONS" AND THE "AMERICAN REPORTS,"**

DECIDED IN THE

COURTS OF LAST RESORT

OF THE SEVERAL STATES.

SELECTED, REPORTED, AND ANNOTATED

By A. C. FREEMAN,
AND THE ASSOCIATE EDITORS OF THE "AMERICAN DECISIONS,"

VOL. LXIX.

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VOL. LXIX.

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VOL. LXIX.

CASES
IN THE
SUPREME COURT
OF
CALIFORNIA.

GLOOK v. HOWARD AND WILSON COLONY COMPANY.

[128 CALIFORNIA, 1.]

TIME—EFFECT OF DECLARING IT TO BE OF THE ESSENCE OF A CONTRACT.—Equity, where time is expressly made of the essence of a contract, will not ignore the provision, for equity follows the law, and will neither make a new contract for the parties nor violate that which they have freely and advisedly entered into.

VENDOR AND VENDEE.—UPON THE BREACH OF THE VENDEE'S COVENANT TO PAY FOR REAL PROPERTY the vendor may: 1. Stand upon the precise terms of his contract, and sue for its breach; 2. Remain inactive and retain for his own use the moneys paid by the vendee, whether the contract declares that such moneys shall be forfeited or not; 3. Go into equity and seek specific performance; and 4. Agree with his vendee for a mutual abandonment and rescission, in which event alone the vendee, on default, becomes entitled to the repayment of his money. The vendor may also maintain a suit against his vendee to compel him to show why all his rights under the contract should not be at an end. [Per Henshaw, McFarland, and Temple, judges.]

VENDOR—RIGHT TO RETAIN MONEY PAID BY THE VENDEE.—If a vendee does not complete his payments as stipulated in his contract to purchase, the vendor may always retain the moneys received by him, unless the vendee shows some equitable ground for relief, and it is not material whether or not the contract stipulated that the vendor might retain such moneys. [Per Henshaw, McFarland, and Temple, judges.]

VENDOR AND VENDEE—RIGHTS OF, AFTER DEFAULT.—WHERE TIME IS DECLARED TO BE OF THE ESSENCE OF A CONTRACT for the purchase of real property, a vendee who fails to make his payments as agreed upon loses all rights in the property and in the moneys already paid by him, unless there are equitable circumstances entitling him to relief, and he cannot, by a subsequent tender of the amount remaining unpaid, entitle himself either to the specific performance of the contract or the return of the moneys paid by him before his default.

Raleigh E. Rhodes, for the appellant.

Robert L. Hargrove, for the respondent.

HENSHAW, J. This action was brought to recover from the corporation defendant moneys paid by plaintiff on a contract for the purchase and sale of a tract of land situated in the then county of Fresno, now in the county of Madera.

Plaintiff had judgment, and defendant appeals therefrom and from the order denying its motion for a new trial. The appeal is supported by a bill of exceptions. The facts briefly stated are the following:

On the twenty-first day of February, 1891, the defendant, as party of the first part, entered into a written agreement with the plaintiff, as the party of the second part, whereby said party of the first part agreed that upon the performance of the covenants to be kept by the plaintiff it would convey to him a tract of five acres of land situate in the county of Fresno, and certain water rights, all of which are fully described. Plaintiff was to pay therefor six hundred and twenty-five dollars, as follows: One hundred and twenty-five dollars down, the receipt whereof ³ was acknowledged; one hundred and twenty-five dollars on or before February 21, 1892, and a like sum annually until and including February 21, 1895, with interest payable annually on all deferred payments at six per cent per annum. Plaintiff also by the agreement requested the defendant to plant the tract of land to fruit trees, and to cultivate them for three years from February 21, 1891, for all of which plaintiff was to pay three hundred and seventy-five dollars, as follows: Sixty-two dollars and fifty cents on execution of the agreement, the receipt whereof was acknowledged, and a like sum semi-annually on the twenty-first days of August and February, until and including August 21, 1893.

Plaintiff further agreed to pay all taxes, state and local, all water rates and dues, assessed or due and payable on said property from and after the date of the agreement. Time was made of the essence of the contract, and performance by the plaintiff was made a condition precedent whereon depended the agreement of defendant to convey, and, if plaintiff failed to perform his covenants, defendant was to be released from all obligations to convey, and plaintiff was to forfeit all moneys paid and all rights under the agreement, and the sums so paid were to be treated not as a penalty, but as liquidated damages.

Plaintiff paid on account of the agreement the sum of three

hundred and eighty-two dollars and fifty cents, viz., two payments of one hundred and twenty-five dollars and interest, as provided in the agreement, and two payments of sixty-two dollars and fifty cents and interest, on account of the planting and care of the trees, which sums were accepted by defendant.

On the ninth day of August, 1895, plaintiff in writing tendered to defendant all sums due the latter on account of the agreement, and offered to comply with all the terms and conditions of his contract, demanded a deed, and tendered to defendant a deed for its execution. The tender also contained a further demand that if defendant refused to accept the sum of one thousand dollars tendered, and to execute a deed, that defendant return to plaintiff the sum of three hundred and eighty-two dollars and fifty cents paid it on account of the contract, all of which was refused by defendant. Plaintiff has never been in possession of the property nor any part thereof.

* The complaint contains two counts. The foregoing facts are pleaded in the first count. By the second count the plaintiff seeks a recovery as for money had and received.

By the first count, which seems to have been framed upon some theory of equitable relief, the averments of the plaintiff amount to this, and to no more; that he entered into a contract for the purchase of land; that he made certain payments according to his covenants; that he defaulted in later payments; that three years and a half after his first default, and more than six months after default in the time of final payment, he made a tender to defendant of the full amount due under the contract, which tender was refused; that by the express declaration of the parties time was made essential in the contract, and that payment of the moneys upon time was a condition precedent to the right to a conveyance; that for failure to pay upon time defendant by the terms of the agreement is released from all obligation to convey, and the moneys paid are forfeited as liquidated damages; yet, notwithstanding these covenants, by a tender made and refused long after plaintiff's default, defendant is himself in some way placed in default, and plaintiff may recover his money. This, moreover, without the slightest averment or the shadowiest proof in excuse of plaintiff's breach of contract.

The case stands, then, upon this proposition, that under a contract for the sale of realty, where time is of the essence, a vendee, after breach of covenant to pay, performance of which is made a condition precedent to his right to a conveyance, may,

without excusing his default, by a tender of the amount due, acquire some legal or equitable right which warrants his recovery of the moneys he has paid.

Respondent insists that his position finds abundant support in the line of cases beginning with *Drew v. Pedlar*, 87 Cal. 443; 22 Am. St. Rep. 257. The trial judge evidently entertained the same view. If this be the law, it is important that it be so declared without equivocation. If it be not, then it is equally important that the misunderstanding and doubts of the profession should be promptly removed. Land is one of the very highest forms of property. Contracts for its sale are required to be solemnly evidenced by signed writings. The value of such sales amounts to untold millions of dollars annually. It becomes a matter of the utmost consequence, then, that the reciprocal rights and duties of vendors and vendees under the conditions and covenants usually found in such contracts—conditions and covenants in such general use that their employment may be said to be universal—should be clearly defined and understood.

It is in this view alone that this case becomes important, for the amount involved is only about three hundred and eighty dollars. But the doubts which seem to exist concerning legal and equitable rights under such contracts demand for their removal a somewhat extended examination of the subject.

It may be as well at the outset to quote the code provisions bearing upon the question. Their consideration will arise as the discussion proceeds.

“The detriment caused by the breach of an agreement to convey an estate in real property is deemed to be the price paid, and the expenses properly incurred in examining the title and preparing the necessary papers, with interest thereon; but adding thereto, in case of bad faith, the difference between the price agreed to be paid and the value of the estate agreed to be conveyed at the time of the breach, and the expenses properly incurred in preparing to enter upon the land”: Civ. Code, sec. 3306.

“The detriment caused by the breach of an agreement to purchase an estate in real property is deemed to be the excess, if any, of the amount which would have been due to the seller under the contract over the value of the property to him”: Civ. Code, sec. 3307.

“Every contract by which the amount of damage to be paid, or other compensation to be made for a breach of an obligation,

is determined in anticipation thereof, is to that extent void, except as expressly provided in the next section": Civ. Code, sec. 1670.

"The parties to a contract may agree therein upon an amount which shall be presumed to be the amount of damage sustained by a breach thereof, when from the nature of the case it would be impracticable or extremely difficult to fix the actual damage": Civ. Code, sec. 1671.

• "Except as otherwise provided in this article, the specific performance of an obligation may be compelled": Civ. Code, sec. 3884.

"It is to be presumed that the breach of an agreement to transfer real property cannot be adequately relieved by pecuniary compensation, and that the breach of an agreement to transfer personal property can be thus relieved": Civ. Code, sec. 3387.

"A contract, otherwise proper to be specifically enforced, may be thus enforced, though a penalty is imposed or the damages are liquidated for its breach, and the party in default is willing to pay the same": Civ. Code, sec. 3389.

Of any contract for the sale of land there may be a breach, either by the vendee refusing to pay, or by the vendor refusing to convey. Actions at law for the breach of contracts are as old as the law itself. As the common law long antedated the system of equity jurisprudence, there was a time when the only recovery available to the injured party was a recovery in damages—money, for money is the only recompense which the law affords for a private injury. The establishment of equity jurisprudence afforded a different redress, one unknown to the law. Acting upon the wrongdoer, it forced him specifically to perform his contract. This, however, but increased the suitor's remedies, and left it optional with him in proper cases either to rest upon his legal action for damages, or to seek in equity the relief of compulsory performance. Even so, however, there still were, and there must always be, breaches of such contracts for which equity is powerless to afford redress. Thus, if a vendor contracts to convey land to which he has no title, equity cannot compel him to obtain title, and the vendee must of necessity be limited to his action at law. If there was not such an action and a rule and measure of damage under it, he would be remediless. Again, it is to be remembered that equity, designed but to supplement the deficiencies of the law, will withhold its aid where the law affords full redress. For both these classes of cases, then—that is to say, for those where the law is suffi-

cient, and for those where equity is powerless to aid—the injured party must seek legal redress.

The two sections of the code first above quoted deal with the legal redress to which the party is entitled, either at his option or from the compulsion of circumstances. It is true that under our system the court of law and the court of equity are merged into one, and that a party is awarded such legal or equitable redress as a simple pleading of ultimate facts shows that he merits; but, nevertheless, the distinctions between the kinds of redress and the modes in which they are administered cannot and are not sought to be obliterated.

It was well recognized, however, that the damages of the law afforded inadequate compensation for the breach of many contracts. In contracts for the sale of chattels, for a breach, the vendee usually (though not always) received adequate compensation in money, since with the money he could buy another article identical in kind and value. In contracts for the sale of land it was otherwise. No other piece of land upon the earth could duplicate that which the purchaser desired. Pretium affectionis was an important element of the vendee's contract, and this could not be measured. A pecuniary recompense, then, failed to meet the case.

On the part of the vendor, since he is selling his land for a money price, it would appear logically that an action at law for the recovery of damages, upon a breach of the vendee, would answer the requirements of his case, and that he should not be allowed, therefore, to resort to equity for relief. But mutuality is an essential element in contracts for which specific performance may be decreed, and, moreover, as was said by Lord Eldon in expressing his dissatisfaction with the relief against forfeitures granted by equity: "The result of experience is, that where a man having contracted to sell his estate is placed in this situation that he cannot know whether he is to receive the price when it ought to be paid, the very circumstance that the condition is not performed at the time stipulated may prove his ruin, notwithstanding all the court can offer as compensation": *Hill v. Barclay*, 18 Ves. 59. It may frequently be of the utmost consequence to the vendor that he should have the right to enforce the contract and receive payment for his land in money, since he may much prefer the full purchase price to retaining the estate and receiving smaller monetary compensation by way of damages. And, finally, it is to be considered that during the life of such contracts the vendor foregoes his right to

• convey to another. He may thus lose an opportunity to make an advantageous sale, and, while this right is admittedly valuable, it is extremely difficult to put a price upon it. For these reasons, the equitable action for specific performance is as available to the vendor as to the vendee: Pomeroy on Specific Performance, secs. 6-12.

From this difficulty in meting out adequate compensation at law arose two things: 1. The parties by convention were allowed to agree upon the value of the injury occasioned by the breach as liquidated or stipulated damages. These damages were not only recoverable at law, but courts of equity would not and could not relieve against them: Story's Equity Jurisprudence, sec. 1318; Williams v. Green, 14 Ark. 315; Westerman v. Means, 12 Pa. St. 97. 2. Equity immediately took cognizance of the violation of such contracts, and made whole the injured party by decreeing specific performance. It also did the same in the case of contracts for the sale of chattels, where the particular circumstances warranted it. Thus, in Senter v. Davis, 38 Cal. 450, it is said: "The jurisdiction of a court of equity to decree specific performance does not turn at all upon the question whether the contract relates to real or personal property, but altogether upon the question whether the breach complained of can be adequately compensated in damages. If it can, the plaintiff's remedy is at law only; if not, he may go into a court of equity, which will grant full redress by compelling specific performance on the part of the defendant. Accordingly, while it is a general rule that contracts for the sale and transfer of personal property will not be specifically enforced, yet, if there are circumstances in view of which a judgment for damages would fall short of the redress which the plaintiff's situation demands . . . equity will decree specific performance." In Krouse v. Woodward, 110 Cal. 638, this court was again called upon to consider the question, and decreed the return of specific stock pledged, refusing to allow compensation money in lieu thereof, because of the peculiar circumstances which renders damages inadequate and equitable relief necessary. But the presumption is, that damages are adequate for the breach of a contract to transfer personal property, and are inadequate, for the reasons we have been considering, for the breach of a contract to convey real property. This is the • precise declaration of section 3387 of our Civil Code. It presents the sole reason why liquidated damages are countenanced under section 1671 of the Civil Code, and specific performance

is decreed. In further confirmation is found section 3389 of the Civil Code recognizing the universal rule that liquidated damages are proper in such contracts, and, notwithstanding the fact that damages may be thus stipulated, specific performance will be decreed. This declaration was to set at rest a question which somewhat vexed the courts, namely, that as the parties made their damages certain by stipulation, uncertainty, which alone justified the interposition of equity, was removed, and therefore only redress at law remained: *Whitney v. Stone*, 23 Cal. 275; *Bagley v. Peddie*, 16 N. Y. 469; 69 Am. Dec. 713; *Williams v. Dakin*, 22 Wend. 201; *Hahn v. Concordia Society*, 42 Md. 460; *Chilliner v. Chilliner*, 2 Ves. Sr. 528; *McCaull v. Braham*, 16 Fed. Rep. 37; *Diamond Watch Co. v. Roeber*, 106 N. Y. 473; 60 Am. Rep. 464. Thus, so far as this state is concerned, the question is concluded by the code, and a party may either rest satisfied with a recovery of stipulated damages, or, waiving them, may resort to equity for specific performance.

One other point invites brief attention before application is made of these well-settled principles to the contract and facts in the case at bar. In this, as is usual in such contracts, time is expressly declared to be essential. It was always considered essential at law, but it has sometimes been said that equity will not or does not so regard it. This, however, means no more than that, if equitable grounds in excuse of the default are shown, equity to avoid forfeiture will relieve the vendee and uphold a tender made after time. It is the more willing to do this, since, the price having been agreed upon, the vendor can usually be compensated for the delay by adding interest. In no other sense is the expression true. Where time is expressly made of the essence of the contract, equity will not ignore the provision, for equity follows the law, and will neither make a new contract for the parties nor violate that which they have freely and advisedly entered into: *Grey v. Tubbs*, 43 Cal. 359; *Martin v. Morgan*, 87 Cal. 203; 22 Am. St. Rep. 240; *Woodruff v. Semi-Tropic etc. Co.*, 87 Cal. 275; *Vorwerk v. Nolte*, 87 Cal. 236; *Newton v. Hull*, 90 Cal. 487; *Bennett v. Hyde*, 92 Cal. 131. The equitable rule ¹⁰ where time is not of the essence is succinctly stated in section 1492 of the Civil Code.

Now, in such contracts, upon a breach by the vendor of the covenant to convey, what courses are open to the vendee? Obviously these: he may stand upon the contract and sue at law for damages for the breach. Here his recovery will be governed by section 3306 of the Civil Code; or, still standing upon his con-

tract, he may go into equity, seeking its specific performance; or he may sue at law to recover the amount that may have been agreed upon as stipulated damages; or, finally, treating the vendor's breach as an abandonment, he may himself abandon it, when, the contract having thus come to an end, he may sue at law to recover what he has paid, in an action for money had and received; for, the contract being at an end, the vendor holds money of the vendee to which he has no right, and to repay which, therefore, the law implies his promise.

Upon the other hand, after the vendee's breach of the covenant to pay, what are the vendor's rights? 1. To stand upon the terms of his contract and sue for its breach under section 3307 of the Civil Code; 2. Still resting upon the contract, he may remain inactive, yet retain to his own use the moneys paid by the vendee; so that it is of no moment whether or not the contract declares that such moneys shall upon the breach be forfeited as liquidated damages; 3. Going into equity, still upon his contract, he may seek specific performance; or, finally, if his generosity prompts him so to do, he may agree with the vendee for a mutual abandonment and rescission, in which last case, and in which last case alone, the vendee in default would be entitled to a repayment of his money.

One thing more he may do, but this is rather incidental to the fact that he has made the contract than a right growing out of it. It has heretofore been said that in certain cases equity will relieve the vendee from the effect of a breach of his covenant to pay upon a day certain. When such relief is granted, it is only after a showing of fraud, mistake, surprise, or other ground of purely equitable cognizance, excusing the breach. Now, as the vendee in default may maintain such an action, so may the vendor call the defaulting vendee into a court of equity and compel him to show why all his rights under the contract should ¹¹ not be held to be at an end. The vendor, when he prosecutes such an action, does so to cut off the possibility of any future claim by the vendee to equitable relief, which might embarrass or cloud his title. In some forums this is designated an action for rescission. With us it is commonly called an action to foreclose the vendee's rights: *Keller v. Lewis*, 53 Cal. 113; *Fairchild v. Mullan*, 90 Cal. 190.

In the foregoing statement of the rights of the vendor and vendee, it has been said that the vendee, upon the breach of the vendor, is entitled to recover the moneys stipulated as liquidated damages. The foregoing discussion sets forth the reason—the

inability of the law to afford adequate compensation in money, and the right consequently accorded to the contracting parties to stipulate what should be the measure and amount of the detriment caused by the default—a reason recognized by sections 3387 and 3389 of the Civil Code.

In the case of the vendor, where the vendee's breach is merely a failure to pay money, under the general principle that damages for a failure to pay money can usually be accurately measured and compensation made by the allowance of interest, courts have inclined to disallow stipulated damages to the vendor, and have limited him to compensatory damages actually proved. But where the breach of the vendee is of some act not thus readily to be measured, stipulated damages will be allowed the vendor: *Tingley v. Cutler*, 7 Conn. 291; *Leggett v. Mutual Life Ins. Co.*, 53 N. Y. 394; *Decamp v. Feay*, 5 Serg. & R. 323; 9 Am. Dec. 372; *Remington v. Irwin*, 14 Pa. St. 143; *Grigg v. Landis*, 21 N. J. Eq. 494.

But while equity will thus, in the cases indicated, refuse to recognize stipulated damages, and will often permit a vendee in default to excuse his breach as to the time of payment, and after excuse made compel the vendor to perform, it does not do so arbitrarily. The vendee must always show equitable grounds for relief before equity will interpose: *Pomeroy on Specific Performance*, sec. 335.

When an equitable showing is not made to excuse the breach, the vendor has the right in equity, as he always has at law, to retain the moneys paid by the vendee. Therefore, we have said that it matters not in such contracts that the parties have declared ¹² that the vendor may retain the moneys paid as stipulated damages. The name which the parties thus give does not alter the fact nor change the vendor's rights. If it be said that the clause for stipulated damages is void, still the vendor is entitled to retain the money. Thus, in *Hansbrough v. Peck*, 5 Wall. 497, the supreme court of the United States, having under consideration this identical question, say: "No rule in respect to the contract is better settled than this, that the party who has advanced money or done an act in part performance of the agreement, and then stops short and refuses to proceed to its ultimate conclusion, the other party being ready and willing to proceed and fulfill all his stipulations according to the contract, will not be permitted to recover back what has thus been advanced or done."

In precise illustration of the proposition may be quoted the

language of the learned Chancellor Walworth in *Egerton v. Peckham*, 11 Paige, 352: "The contract, it is true, contains a general provision that if default be made in either of the payments Strobeck shall forfeit all the previous payments and give up the possession of the premises. This, however, is but the legal effect of the contract without such a provision. For, if no such provision had been contained in the agreement, the defendant might have brought an action of ejectment to recover the possession of the premises; which ejectment suit this court would not have restrained, except upon the terms of paying the balance of the purchase money and the costs of suit. Nor could the payments already made pursuant to the terms of the contract have been recovered back if the vendee had refused to complete his purchase, even if this clause of forfeiture had not been inserted in the contract. The question here presented, then, is whether this clause was intended by the parties to deprive the purchaser of all legal and equitable right to the premises, or to the previous payments, if for any cause the last payment should not be made at the precise moment when it became due and payable; and, if so, whether it is not the duty of this court to relieve against such forfeiture."

Professor Pomeroy, in his *Equity Jurisprudence*, section 455, thus considers the matter: "Where an ordinary contract for the sale of land is so drawn that the vendee's estate, interest, and ¹⁸ right under it are liable to be forfeited and lost upon his failure to pay the price at the time specified, the question whether equity will relieve him ought to be a very plain and simple one; but in the face of the authorities it is impossible to be answered in any general and certain manner. I shall, therefore, simply state the general conclusion derived from the decided cases. It is well settled that where the parties have so stipulated as to make the time of payment of the essence of the contract, within the view of equity as well as of the law, a court of equity cannot relieve a vendee who has made default. With respect to this rule there is no doubt. The only difficulty is in determining when time has thus been made essential. It is also equally certain that when the contract is made to depend upon a condition precedent, in other words, when no right shall vest until certain acts have been done, as for example, until the vendee has paid certain sums at certain specified times, then also a court of equity will not relieve the vendee against the forfeiture incurred by a breach of such condition precedent."

It has been said that after the vendee's breach the vendor may

agree to a mutual abandonment and rescission, in which last instance, and in which alone, the vendee in default would be entitled to a repayment of his money. Such was the precise condition of affairs pleaded and not denied in *Drew v. Pedlar*, 87 Cal. 443, 22 Am. St. Rep. 257, where it is said: "Both the complaint and answer admitted that the agreement had been rescinded and annulled by the parties, and, as the judgment on the pleadings partly rests upon this fact, it is conclusive evidence of the fact." And again: "From the time the defendants elected to rescind the contract, or to consider and treat it as rescinded, it was their duty to refund the money they had received under the contract, and no demand before suit was necessary." Such, indeed is the law, and if *Drew v. Pedlar*, 87 Cal. 443, 22 Am. St. Rep. 257, be confined to cases in the condition thus represented, that is to say, to case where the vendor has rescinded after vendee's breach, then no misunderstanding need arise and no confusion will result. What is there said as to the covenant for liquidated damages being void is, as we have seen, of no consequence in contracts such as that and the one at bar, where the liquidated damages are expressed as the moneys paid by the vendee, for in all such cases, as has been shown, the ¹⁴ vendor is entitled to retain these moneys, whether designated liquidated damages or not. *Phelps v. Brown*, 95 Cal. 572, affords a typical instance of such rescission by the vendor. There the vendee was in default, but the vendor elected to rescind, and, notwithstanding the default, refunded to the real estate agent the moneys that had been paid by the vendee under the contract. The action was against the real estate agent, and it was decided, and indeed over the decision there could be no question, that in such a case the vendee is entitled to recover his money.

But, while it is essentially true that in case of a rescission the vendee may demand that he be restored to his original condition, it does not follow that a vendor who refuses to convey after such breach by the vendee thereby rescinds. To the contrary, in refusing to convey after the vendee's default he is not treating the contract as at an end, but is expressly standing upon it, and basing his rights upon its terms, covenants and conditions. The misleading feature in *Drew v. Pedlar* 87 Cal. 443, 22 Am. St. Rep. 257, comes from the lengthy statement of facts, from which it appears that all the plaintiff vendee did was to make tender long after his default, which tender the vendor refused to accept. But the vendee likewise pleaded a mutual abandonment and rescission, and, as appears from the opinion, the pleading as to these matters was not denied.

It would be to the last degree unjust and inequitable to allow a vendee, after his default under such contract, to put the vendor in default by a mere tender. The practical effect of such a rule would be that a vendee without risk could speculate indefinitely in the land of the unfortunate vendor. The vendee would enter into a contract in which time would be declared of the essence, and stipulate under condition precedent, as in this case, to make payment at a certain time. Failing to make payment he would three months, six months, one year, or as in this case over three years, after the date of the failure make an offer to perform, and if the land had risen in value, according to the theory of respondents here, could compel performance; but in every case he could recover the moneys paid.

Lord Loughborough, in *Lloyd v. Collett*, 4 Bro. C. C. 469, well says: "There is nothing of more importance than that the ordinary ¹⁵ contracts between man and man, which are so necessary in their intercourse with each other, should be certain and fixed, and that it should certainly be known when a man is bound and when he is not. There is a difficulty to comprehend how the essentials of a contract should be different in equity and at law. It is one thing to say that time is so essential that in no case in which the day has been by any means suffered to lapse the court would relieve against it and decree performance. The conduct of the parties, inevitable accident, et cetera, might induce the court to relieve; but it is a different thing to say that the appointment of a day is to have no effect at all, and that it is not in the power of the parties to contract that if the agreement is not executed at a particular time they shall be able to rescind it. . . . I want a case to prove that where nothing has been done by the parties this court will hold in a contract of buying and selling a rule that the time is not an essential part of the contract. Here no step had been taken from the day of the sale for six months after the expiration of the time at which the contract was to be completed. If a given default will not do, what length of time will do? An equity arising out of one's own neglect! It is a singular head of equity."

In *Bradford v. Parkhurst*, 96 Cal. 102, 31 Am. St. Rep. 189, this court, having under consideration *Drew v. Pedlar*, 87 Cal. 443, 22 Am. St. Rep. 257, said: "That case does not go to the extent of holding that a vendee can elect to consider the contract at an end and recover what he has paid when the vendor has not abandoned the contract."

In *Merrill v. Merrill*, 103 Cal. 287, *Drew v. Pedlar*, 87 Cal. 443, 22 Am. St. Rep. 257, was again under review, and it is said: "Nor do I think it was held in any of the cases cited that a rescission was effected simply by the act of a vendor in claiming a forfeiture. In some of the cases the contract provided that the vendor might rescind upon default of the vendee. In such cases the rescission is by consent of the parties. In others it seems to be held that when the vendor refuses further performance, and claims the damages according to the contract, he abandons the contract, and thereupon the vendee may also abandon it and reclaim his money. Whether the conclusion be correct or not is not a question here. Unless the rescission is by consent, it is difficult to understand how it has been brought about. . For, as respondent ¹⁶ justly says, it is, in effect, enacted in section 1691 of the Civil Code that rescission cannot be otherwise effected without a compliance with that section. The idea must be that the abandonment of the contract by the vendor is equivalent to a claim of rescission on his part which may be acquiesced in by the vendee.

"In *Cleary v. Folger*, 84 Cal. 316, 18 Am. St. Rep. 187, it was simply held that the vendor was also in default, in that he did not tender a deed on the very day it was due on the contract. Both being in default, either could treat the contract as rescinded. It was not there held that when a vendor refuses to complete performance because of a breach on the part of the vendee, and claims damages as stipulated in the contract, he thereby rescinds or consents to a rescission.

"It has been said in several cases that this doctrine was announced in *Drew v. Pedlar*, 87 Cal. 443; 22 Am. St. Rep. 257. Perhaps it does so hold, but such conclusion seems to be based in that case partly upon the pleadings in which both parties recognize the fact of a rescission. In other words, it is a rescission by mutual consent."

In the case at bar the payment of the final amount under the contract, at the time and in the manner agreed upon, was a condition precedent to the right of the vendee to demand a conveyance. Upon his failure to make payment the vendee committed a breach, and no affirmative act upon the part of the vendor was necessary to bring about this result. Months after, and without any equitable showing to relieve the default, the vendee makes tender, and because of its refusal claims the right of recovery. But the vendor, in refusing to accept the tender and to repay the money, is neither violating his contract nor rescind-

ing it, nor treating it as at an end. He is standing squarely upon its terms. The vendee is within the rule declared by *Pomerooy*, and above quoted. The contract is made to depend upon a condition precedent. By its terms no right is to vest in the vendee until certain acts of payment have been done by him, and a court of equity no more than a court of law will relieve a vendee under such circumstances from the penalties arising from the breach of such condition, in the absence of an equitable showing to excuse his default. None is here even attempted to be made.

¹⁷ It follows that the judgment and order should be reversed and the cause remanded, and it is ordered accordingly.

McFarland, J., and Temple, J., concurred.

TIME AS ESSENCE OF THE CONTRACT.—In equity, time is not regarded as of the essence of a contract unless expressly stated to be so: *Tate v. Pensacola Gulf etc. Co.*, 37 Fla. 439; 53 Am. St. Rep. 251.

VENDOR AND VENDEE—REMEDIES OF VENDOR.—The general rule is, that in case of a breach of contract for the sale of land, the vendor can either sue at law for damages, or resort to equity for specific performance: *Hogan v. Kyle*, 7 Wash. 595; 38 Am. St. Rep. 910.

VENDOR AND VENDEE—RIGHT OF VENDOR TO RETAIN PURCHASE MONEY, AND OF VENDEE TO RECOVER BACK THE SAME.—A purchaser of land under a parol contract for the sale thereof, who repudiates the contract, and refuses to fulfill, is not entitled to recover an installment of purchase money previously paid by him, if the vendor is willing, and offers to perform on his part, notwithstanding the contract is within the statute of frauds: *McKinney v. Harvie*, 38 Minn. 18; 8 Am. St. Rep. 640. Defaulting purchasers cannot recover for improvements made upon land: *Chabot v. Winter Park Co.*, 34 Fla. 258; 43 Am. St. Rep. 192. A vendee of real estate may recover moneys paid by him under a contract for its purchase: 1. Where the rescission is voluntary, by mutual consent, and without default on either side; 2. Where vendor cannot, or will not, perform the contract on his part; 3. Where the vendor has been guilty of fraud in making the contract; 4. Where, by the terms of contract, it is left in the power of vendee to rescind by act on his part, and he does it; 5. Where neither party is ready at the stipulated time, but each is in default: *Baston v. Clifford*, 68 Ill. 67; 18 Am. Rep. 547. See, also, *McKinnon v. Vollmar*, 75 Wis. 82; 17 Am. St. Rep. 178; *Sims v. Hutchins*, 8 Smedes & M. 328; 47 Am. Dec. 90.

PEOPLE v. NATIONAL BANK.

[123 CALIFORNIA, 53.]

TAXATION—ASSESSMENT LIST MADE BY TAXPAYER, EFFECT OF.—Though a taxpayer returns a verified list of his property, this does not prevent the assessor who knows of other property belonging to such taxpayer from including it in the assessment, without first issuing a subpoena and holding an examination of the taxpayer in reference thereto.

NATIONAL BANKS—TAXATION OF BY THE STATES.—Personal property of a national bank cannot be assessed to it by the state for the purposes of taxation.

TAXATION.—DEPOSITS IN A NATIONAL BANK, whether general or special, are assessable to the depositors, but not to the bank.

W. T. Fitzgerald, attorney general, and Henry E. Carter, deputy attorney general, for the appellant.

Lloyd & Wood and W. S. Wood, for the respondent.

⁵⁵ **TEMPLE, J.** The action was brought to recover taxes assessed to respondent, a national banking association, organized under the acts of Congress.

On the first Monday in March, 1895, it had real property in Sacramento, also personal property consisting of safes and fixtures, and money on hand and money on special deposit.

The blank form for a statement, with demand for a list, was served on it by the assessor and it was returned with a description of certain real estate, and safes and fixtures, valued at five thousand dollars. The assessor was dissatisfied with this and returned it to the president of the bank, insisting that the personal assets of the bank were liable to taxation. After considerable conversation and discussion, during which the amount of the deposits as they were afterward assessed was stated by the president and cashier, the list was changed by erasing the item as to the safes and fixtures, and in that condition was verified and returned to the assessor by the cashier. The assessor then proceeded, without issuing any subpoena to any officer or employé of the bank, or to any other person, to assess to and against the defendant the safes and fixtures, valued at five thousand dollars, and deposits to the amount of eight hundred thousand dollars. In due time the defendant tendered the amount of the tax upon the real estate, but declines to pay the tax upon the personal property, claiming that it is exempt under the act of Congress creating national banks as an instrumentality of the federal government.

⁵⁶ All the findings, save one, were agreed upon by the parties. It is not found, and does not appear, that the assessor considered that the defendant had after demand refused to make a statement as to its property, or that he made an entry to that effect on the assessment book as authorized by section 3633 of the Political Code, but it does appear that the board of equalization refused to consider the objections made by the bank to the assessment on the ground that the "assessment had been arbitrarily made, and that the board of equalization had no power to review the same." It is admitted that the bank did have the property which was assessed to it, and also that if it is not exempt from taxation it ought to have been given in by the bank and assessed to it. The refusal of the board to consider defendant's objections has not injured it, if the assessment was proper and would have been maintained.

Judgment was for the defendant, and the people appeal from the judgment and from an order denying a new trial.

It is contended that the assessment was illegal for two reasons: 1. After the taxpayer has returned to the assessor his verified list, although the assessor knows of other property belonging to the taxpayer; although, in fact, the taxpayer has had his attention called to the matter and admits the possession and ownership of other property, as was the fact in this case, still the assessor cannot include such property in the assessment without first issuing a subpoena and holding an examination, as he is authorized to do under section 3632 of the Political Code.

The proposition is, that an addition to the list furnished by the taxpayer, without the examination, renders the assessment void—at least, as to the property thus added to the list.

Unless the statute has given such effect to the list, this position cannot be maintained. The general duty of the assessor is to list all taxable property in his county or district. The law compelling the taxpayer to furnish the list is undoubtedly designed to assist the assessor in the performance of his duties. The assessment is not judicial, and must necessarily be summary. All property should be assessed, or the burden of taxation is not imposed alike upon all. The assessor must not knowingly permit any to escape. Must he, then, when he not only is fully informed as to the property, but the taxpayer admits ⁵⁷ and states to him all the facts in regard to it, but simply contends that it is by law exempt, resort to this—in that case—useless proceeding before he can lawfully assess such property?

In many states the law does give the verified list some effect,

but I think it has generally been held that, unless the statute provides otherwise, it does not in any way limit the powers of the assessor: Welty on Assessments, sec. 4; Cooley on Taxation, 357; 1 Desty on Taxation, 545. In Massachusetts it is made conclusive upon the assessor, although it has been held there that the commissioners who revise and equalize may add other property. In New York, the taxpayer may make an affidavit which may have the effect to reduce his assessment, and the different states, as was to have been expected, have various schemes upon the subject. In Nevada, a similar law was construed, and it was held that the statement was merely in aid of the assessor and had no binding effect upon him: *State v. Kruttschnit*, 4 Nev. 178. See, also, *Wabash etc. Co. v. Johnson*, 108 Ill. 1; *Felsenthal v. Johnson*, 104 Ill. 21; *Morris v. Jones*, 150 Ill. 542; *Thompson v. Tinkcorn*, 15 Minn. 295. The last-named case is particularly interesting upon this point. The statute there considered was quite similar to ours, and it was held that the assessor was not only at liberty to add omitted property of which he had knowledge, but was bound by his oath so to do, and it was said when the statute "does not directly or by implication make the oath of the party conclusive, it is merely a step in the proceedings to enable the assessor to make a complete return of all the property in his district." I believe this to be a correct statement of the general current of decision upon the subject.

The question, then, is, Is there anything in our statute which will preclude the assessor from listing any property to the taxpayer except such as he returns in his verified list, or shall admit on examination under oath after service of a subpoena upon him? The subpoena cannot be issued until after he has made his statement, and the statute does not expressly authorize the assessor to add to the list after the issuance of the subpoena and the examination of the taxpayer under oath, even if further property should be discovered upon such examination. Under the statute, and upon the stricti juris theory of construction, ⁵⁸ so much insisted upon by respondent, the assessor has no more power to add to the list after the issuance of the subpoena and after the examination than he had before, and although the existence of other taxable property may have been admitted by the taxpayer. It must be observed, also, that this construction makes the taxpayer the judge of what property is exempt from taxation, quoad the assessor.

Counsel for respondent say it must be intended that upon the

discovery of other property upon such examination the assessor should list it. To this I agree, but I know of no reason why property so discovered should be listed and property discovered through the unsworn admissions of the taxpayer should not be. The provision as to the examination is but an aid to the assessor to enable him to perform the duty enjoined upon him, and which, upon making his return, he is compelled to state under oath that he has done: Pol. Code, sec. 3652.

In respect to this, reliance is placed upon *Weyse v. Crawford*, 85 Cal. 196, which, it is contended, holds that the assessor cannot add to a list returned by a taxpayer unless he has been so subpoenaed and examined. I do not so understand that opinion. It holds that the assessor cannot make an assessment which shall not be revisable by the board of equalization unless the taxpayer has refused to make out his list under oath or had refused to comply with some other requirement of the law.

Properly understood, I have no quarrel with that decision. Unless there has been some dereliction on the part of the taxpayer, unless he has failed to render the assistance to the assessor which the law requires him to render, he cannot be subjected to the penalty of a nonrevisable assessment. This, I think, is all that was decided upon this matter in *Weyse v. Crawford*, 85 Cal. 196. It denominates such an assessment "an arbitrary assessment." The term is not found in the statute. As used in the opinion it evidently has reference only to an assessment which cannot be revised by the board of equalization. This is not a ruling that the assessor cannot assess property not found in the verified lists made by a property owner.

2. As a second reason for claiming that the assessment is illegal, it is contended that the personal assets of the bank are exempt from taxation by the terms of the national banking act. ⁵⁰ It is provided in section 5219 of the Revised Statutes of the United States that nothing in that act shall prevent all shares in any association from being included in the individual assessment of the owner, in assessments made for the purpose of state taxation; "but the legislature of each state may determine and direct the manner and place of taxing all the shares of national banking associations located within the state, subject only to the two restrictions, that the taxation shall not be at a greater rate than is assessed upon other moneyed capital in the hands of individual citizens of such state," et cetera. It was also provided that shares owned by nonresidents should be taxed in the city or town where the bank is located, and not otherwise. The

original act required a list of shareholders to be kept open at the bank during business hours for the inspection of state officers, and no other visitorial power was allowed.

The attorney general does not deny that a national bank is a fiscal agent of the United States, created by it as a means of exercising its powers. Nor does he apparently question the power of Congress to limit or deny the right of the state to tax its property; but he contends that, although the state cannot tax an agency of the United States, it may tax the property of its agents, at least where there is no express inhibition by Congress, and that taxation of the personal property of a bank, as other like property in the state is taxed, is not prohibited either expressly or impliedly by the act of Congress.

Upon all these questions the decisions of the supreme court of the United States are final, and accordingly counsel have most elaborately considered numerous cases decided by that tribunal. I think counsel really disagree, however, only on one point, viz., whether taxation of such property is prohibited by the act of Congress.

Appellant states his contention as follows: "An important question raised here is whether the inherent right rests in a state to tax the property of a federal corporation, unless prohibited by Congress, or whether its right to tax the property of such corporation is derived from the federal government?"

The respondent submits two propositions: 1. Congress has the power; and 2. Has limited the power of the state to tax the property of national banks, and, of course, that it has denied to the states the right to tax any property of national banks except their real estate, although permitting the taxation of the shares to the shareholders.

Since, therefore, respondent bases its claim to exemption upon the proposition that Congress has prohibited the tax, it is only important as a matter of argument to determine whether the state may tax such property unless forbidden by Congress, or whether it derives its power to tax from the permission given by Congress.

It is an important consideration in regard to this question that Congress has expressly provided for the taxation of the shares of the bank to the shareholders, and has directed the mode in which this shall be done. It has been repeatedly declared by the supreme court of the United States that by this provision Congress has not deprived the states of a resource from which they could properly derive a revenue. The shares of

stock may be taxed, and it is hornbook law that the stock represents the value of all the assets of the bank. It has been so expressly adjudicated in this state: *People v. Badlam*, 57 Cal. 594; *Spring Valley Water Works v. Schottler*, 62 Cal. 69; *San Francisco v. Fry*, 63 Cal. 470. It is assumed in *Van Allen v. Assessors*, 3 Wall. 573, also in *People v. Weaver*, 100 U. S. 539, where it is asserted that the limitation was intended only "to protect the bank from anything beyond their general share of the public burdens."

In many other cases the proposition is taken for granted, and it is, I think, quite obvious. Under our decisions, we cannot deny that when the capital stock is assessed the assets of the corporation are subjected to the tax. In the case of national banks, the value of the shares was in part made up of United States bonds, in which a portion of the capital must be invested. The bonds are not subject to state taxation, yet no deduction is required from the assessment for the investment in the bonds. So the real estate may be assessed as well as the stock, but the value of the shares is made up in part by the real estate. The trouble is, that we do not tax to the individual shareholders the stock; but, on the other hand, we assess to the corporation all its assets, which we have held gives the value to the stock. Under our methods of classification, made for the purpose of equalizing ⁶¹ the burdens of taxation, it has been held that we cannot assess the shares of stock in a national bank as other money capital is assessed.

But, conceding that Congress could direct the extent and mode of taxing the property of the bank, if the mode provided would, if pursued, subject the property of the bank to taxation to the same extent that other like property is taxed, the conclusion is irresistible that it was intended that the tax expressly permitted should be the only tax to which the property is to be subjected.

But it seems to me that the precise question was determined in *Rusenblatt v. Johnston*, 104 U. S. 462. A state attempted to tax the personal assets of an insolvent national bank. It was quite naturally thought that it had then ceased to be a governmental instrumentality. In a short opinion by the chief justice, it was held that as the assets still belonged to the corporation they were exempt under section 5234 of the Revised Statutes of the United States.

In *Covington City Bank v. Covington*, 21 Fed. Rep. 489, Mr. Justice Mathews refers to the case. After asserting the power

of Congress in the premises, he says: "It has, in fact, withdrawn them and their property from the domain of state taxation, except so far as it has expressly consented that they may be taxed. That consent, so far as it has been given, is contained in section 5219 of the Revised Statutes. It does not permit taxation of any property belonging to the bank, except only its real estate, as clearly appears from *Rusenblatt v. Johnston*, 104 U. S. 462."

General and special deposits are assessable to the depositors: *Yuba v. Adams*, 7 Cal. 35.

The judgment and order are affirmed.

McFarland, J., and Henshaw, J., concurred.

TAXATION—ASSESSMENT OF OMITTED PROPERTY.—Omitted property must be assessed in the manner prescribed by statute: *Buck v. Miller*, 147 Ind. 586; 62 Am. St. Rep. 436. An assessment of "new property, not valued and returned by the proper assessor," without giving notice of such assessment, as required by statute, is void: *Myers v. County Commrs.*, 83 Md. 385; 55 Am. St. Rep. 349. An owner of real estate, who does not return his property, nor pay his tax, as required by statute, cannot dispute the legality of an assessment in the name of another, made upon the return of the owner's agent: *Kingman v. Glover*, 8 Rich. Law, 27; 45 Am. Dec. 756.

State Taxation of National Banks.*

Review of Federal Statutes.—On February 25, 1863, the Congress of the United States passed the statute entitled, "An act to provide a national currency secured by a pledge of United States bonds, and to provide for the circulation and redemption thereof," which provided nothing as to the taxation of national banks by the states. On June 3, 1864, Congress passed a new act with the same title, in which much of the earlier act was included with many new provisions, and this later act was subsequently amended by an act passed by Congress on February 10, 1868, entitled, "An act in relation to taxing shares of national banks." On June 27, 1866, Congress passed an act providing for the appointment of a commission to revise, simplify, arrange, and consolidate the statute law of the United States. The result of the work of this commission was the Revised Statutes, which went into effect December 1, 1873, and which included the different enactments already referred to herein. Section 5214 of the Revised Statutes provides for the federal taxation of national banks, which is to be "in lieu of all existing taxes." The particular section, however, which has been the prolific cause and subject of litigation is section 5219, reading as follows: "Nothing herein shall prevent all the shares in any association from being included in the valuation of the personal property of the owner or

* REFERENCE TO MONOGRAPHIC NOTES.

Power of states to tax shares, capital stock, real estate or other property of national banks; 96 Am. Dec. 290-297.

Situs of personal property for the purpose of taxation: 62 Am. St. Rep. 469.

holder of such shares, in assessing taxes imposed by authority of the state within which the association is located, but the legislature of each state may determine and direct the manner and place of taxing all the shares of national banking associations located within the state, subject only to the two restrictions, that the taxation shall not be at a greater rate than is assessed upon other moneyed capital in the hands of individual citizens of such state, and that the shares of any national banking association owned by nonresidents of any state shall be taxed in the city or town where the bank is located, and not elsewhere. Nothing herein shall be construed to exempt the real property of associations from either state, county, or municipal taxes, to the same extent, according to its value, as other real property is taxed."

To assist in the collection of taxes assessed upon shares in national banks, section 5210 of the Revised Statutes provides that a list of the shareholders and their residences should be kept by the bank, open during business hours, to the inspection of officers authorized to assess taxes under state authority. The federal taxation provided for in section 5214 covers the average amount of notes in circulation, the average amount of deposits, and the average amount of capital stock beyond the amount invested in United States bonds. The state taxation provided for in section 5219 covers the shares of stock, which are to be taxed to the individual owners or holders, and the real estate owned by the banks, which is to be taxed to the banks themselves. In some minds there may still linger doubts as to whether or not Congress has power to create national banks and regulate the manner and extent to which they shall be subject to taxation by the different states. But such doubts, if they exist, can scarcely be considered reasonable, and we shall consider the affirmative of the proposition as being established, and shall not go, even in the slightest degree, into the once great controversy concerning the respective spheres of state and national government, the delegated powers of the latter, the reserved powers of the former, and the concurrent powers of both, a controversy which, in different phases, came before the supreme court of the United States during the incumbency of Chief Justice Marshall. That controversy has, at present, little more than an historical interest, but it must be remembered that at the time when the federal statutes to which we have referred were enacted, Congress had reason to fear that corporations formed under its authority would be the object of hostile legislation in some of the states, and therefore deemed it advisable to provide against such a contingency in the national bank act.

National Banks as Agencies of the Federal Government.—The creation of national banks was incidental to the adoption of a new system of currency. The banks themselves must be viewed as agencies of the national government. That the instrumentalities and means of the federal government are exempt from state taxation is well settled: *McCulloch v. Maryland*, 4 Wheat. 316; *Osborn v. United States Bank*, 9 Wheat. 739; *Western Union Tel. Co. v. Richmond*,

26 Gratt. 1; and upon this theory national banks are held exempt from state taxation, except in so far as such exemption has been expressly waived by Congress: *McHenry v. Downer*, 116 Cal. 20; *Farmers' etc. Bank v. Dearing*, 91 U. S. 29; *Rich v. Packard Nat. Bank*, 138 Mass. 527; *Carthage v. First Nat. Bank*, 71 Mo. 508; 36 Am. Rep. 494; *Pittsburg v. First Nat. Bank*, 55 Pa. St. 45. The effect of all the decisions is, that Congress has prescribed the manner, and limited the extent, of taxation of national banks by state governments, and that taxation of national banks by the states in any other manner than that allowed by the federal statutes above referred to is unconstitutional and void: *Pittsburg v. First Nat. Bank*, 55 Pa. St. 45; *Carthage v. First Nat. Bank*, 71 Mo. 588; 36 Am. Rep. 494; *Van Allen v. Assessors*, 3 Wall. 573; *Lionberger v. Rouse*, 9 Wall. 468. Having established these agencies, the national government granted to the states the power to tax them, but this grant of power is to be strictly construed, and no presumption is indulged in favor of a given exercise of the power.

Real and Personal Property of National Banks.—The taxation of the real estate of national banks by the different states is directly provided for in the federal statutes above referred to. Hence it is agreed that such property is subject to taxation in the townships where located: *National Commercial Bank v. Mayor*, 62 Ala. 284, 34 Am. Rep. 15; *Loftin v. Citizens' Nat. Bank*, 85 Ind. 341; *National State Bank v. Young*, 25 Iowa, 311; *State v. First Nat. Bank*, 4 Nev. 848; *Second Nat. Bank v. Caldwell*, 13 Fed. Rep. 429; *Covington City Nat. Bank v. Covington*, 21 Fed. Rep. 484. In Pennsylvania, the real estate of national banks is subject to taxation distinct from their other capital: *Second Nat. Bank v. Caldwell*, 13 Fed. Rep. 429. Such real estate should be assessed as realty, and not as a part of the capital stock of the bank: *Loftin v. Citizens' Nat. Bank*, 85 Ind. 341. Where the statutes of a state do not authorize the taxation of the real estate of a national bank, any assessment of tax thereon is invalid: *Rosenberg v. Weekes*, 67 Tex. 578. It has also been held that where shares of national bank stock are subject to taxation in the hands of the owners or holders, an additional tax assessed upon the banking office and lot eo nomine, lawfully owned and occupied as its place of business by a national bank, constitutes double taxation and the latter assessment is void. This is upon the argument that "the aggregate capital stock of any corporation is but the representative of its entire property, including the corporate franchise, and the actual cash value of the former depends wholly upon the productive character and real cash value of the latter. Intrinsically, it possesses no value, and can have none, as separate and distinct from the corporate property it represents; nor is the property, character, or value of such stock increased, or in any way affected by its division into a given number of shares, unless the proposition be conceded that all the parts are greater or less than the whole. Each share but represents a proportional interest in the corporate property, determined by the exact ratio existing between it and the entire stock, and it possesses a like corresponding value. Sever the connection between the stock and the shares comprising it, on the

one hand, and the corporation and its property, on the other, and nothing remains of the former but a mere shadow, to which no real property or commercial value can be imparted by any legislative device whatever": Board of Commrs. v. Citizens' Nat. Bank, 23 Minn. 280; County Commrs. v. Farmers' etc. Nat. Bank, 48 Md. 117. The mere fact that part of the banking building is rented by the bank to others who use it for other than banking purposes does not render the foregoing reasoning inapplicable nor subject such rented portion to separate taxation: County of Lackawanna v. First Nat. Bank, 94 Pa. St. 221. See Second Nat. Bank v. Caldwell, 13 Fed. Rep. 429, showing that the Pennsylvania rule has been changed by a statute enacted subsequently to the decision last cited, making the real estate of national banks a distinct subject of taxation. The taxation of national banks, with all other banks, upon their real and personal property, and also upon their franchises to be assessed by subtracting the value of the tangible property from the value of the capital stock is valid and not in conflict with section 5219 of the United States Revised Statutes: First Nat. Bank v. Stone, 38 Fed. Rep. 400.

In holding that the personal assets of a national bank, as distinguished from the shares of stock held by its shareholders, are exempt from taxation, the principal case has the support of authority. An examination of the federal statutes shows that no power is therein given to the states to subject such property to taxation, and hence it is concluded that states are prohibited from exercising such power: First Nat. Bank v. Province, 20 Mont. 374; Miller v. Hellbron, 58 Cal. 133; National State Bank v. Young, 25 Iowa, 311; Covington City Nat. Bank v. Covington, 21 Fed. Rep. 484. The personal property of an insolvent national bank in the hands of a receiver is exempt from taxation under state laws: Rosenblatt v. Johnston, 104 U. S. 462; Woodward v. Ellsworth, 4 Colo. 580. The notes, bills, bonds, et cetera, of national banks are exempt from state taxation: State v. First Nat. Bank, 4 Nev. 349; State v. Mayor, 39 N. J. L. 380; but national bank notes in the hands of individuals are not exempt: Board of Commrs. v. Elston, 32 Ind. 27; 2 Am. Rep. 327. States cannot tax the safes, office furniture, cash on hand and due from other banks, and bills of discount belonging to national banks and making up their assets: National State Bank v. Young, 25 Iowa, 311; nor may they tax mortgages held by such banks: First Nat. Bank v. Krieg, 21 Nev. 404. National banks are not liable to a privilege tax imposed by a city ordinance: National Bank of Chattanooga v. Mayor, 8 Heisk. 814; nor to a tax imposed by a city ordinance upon the average quarterly business of all banks and banking institutions established and doing business in the city: Pittsburg v. First Nat. Bank, 55 Pa. St. 45.

Surplus Funds.—As to whether or not the surplus fund, or undivided profits of a national bank is subject to state taxation there is some doubt. Where a state statute taxes the shares of a stockholder at their actual or market or full value, that necessarily includes such value beyond its par or nominal value as is imparted

to the stock by the fact that the bank has a surplus fund or undivided profits; for that reason such fund, or undivided profits, cannot be made a distinct subject of taxation: *Covington City Nat. Bank v. Covington*, 21 Fed. Rep. 484. In New Hampshire, under the laws in force when *First Nat. Bank v. Peterborough*, 56 N. H. 38, 22 Am. Rep. 416, was decided, shares in national banks were taxed to the holders at their par value. In that case, the court was called upon to pass upon the validity of certain statutes subjecting the surplus capital of banks to taxation against the banks, as applicable to national banks. Such statutes were held not to conflict with the national bank legislation of Congress, and the surplus capital of national banks, in excess of the amount which they are required by law to keep on hand, was held taxable by the states in which the banks were located. It was reasoned that if other states were allowed to reach such surplus funds by the indirect method of taxing shares at their real or market value, a direct tax thereon must be permissible. "The surplus," said the court, "is the exclusive property of the bank. The national government has no interest in it. It shares in none of the profits of the bank, and is responsible for none of its defaults; and it is difficult to see how the taxation of this surplus can interfere in any way with the operations of the bank as an instrument of the national government to carry its delegated powers into execution. If taxed at all, as the law now stands, it must be taxed as surplus. No reason is perceived why so large a sum should escape the tax which it is as able to bear at least as most other kinds of property. The power to tax the people and property of the several states has never been surrendered by the states to the general government": See, also, *Strafford Nat. Bank v. Dover*, 58 N. H. 316. While the undivided surplus belonging to a national bank might otherwise be taxed against the bank, it has been held in New Jersey, yet if the state law seems to contemplate that it be taxed in connection with the capital stock in the hands of the stockholders, it should be taken into consideration in estimating the taxable value of the stock: *State v. Newark*, 39 N. J. L. 380.

Taxation of Shares and of Capital Stock.—The matters which fall under the heading of this paragraph embrace the greater portion, indeed, almost the whole, of our subject. Considerable might be written upon the distinct matter of the taxation of the capital stock of national banks, but, in general, such taxation merely constitutes a phase of the larger subject of the taxation of the shares of such banks; for the method usually adopted to effect the taxation of the capital stock is that of assessing the shares in solido against the banks instead of separately to the individual shareholders. This manner of assessment may, however, be adopted merely as a convenient and effective way of collecting taxes assessed primarily against individual shareholders. When so utilized, it is not identical with a tax upon the capital of the banks. A distinction is drawn between "the property or interest of a stockholder in an incorporated bank, commonly called a share, the shares in their aggregate totality being called sometimes the capi-

tal stock of the bank," and the moneyed capital of the bank, held and owned by the corporation. The latter, in whatever it may be invested, is owned by the bank as a corporate entity, and not by the stockholders: *Aberdeen Bank v. Chehalis*, 166 U. S. 440; *National Bank v. Commonwealth*, 9 Wall. 353; *Van Allen v. Assessors*, 3 Wall. 573. It is the former interest which the act of Congress has left subject to taxation by the states, under the limitations prescribed, as will be seen by referring to it. Accordingly, it has been established by a unanimity of the authorities which, under the wording of the federal legislation bearing upon the matter, was perfectly inevitable, that the states are limited to taxation of the shares in national banks, as distinguished from taxation upon the capital of the banks.

The method prescribed by statute for the taxation of national bank shares is, that they may be "included in the valuation of the personal property of the owner or holder of such shares": U. S. Rev. Stats., sec. 5219. That taxation of such shares is unobjectionable when made in literal compliance with the statute is a proposition to which many cases might be cited, but which is too self-evident to render such citation justifiable. Cases arising under clause of the statute are interesting only when they construe it, when they pass upon the validity of attempts made to tax national bank shares by methods framed for compliance with the spirit rather than the letter of the statute. It has been said in many cases that assessments of national bank shares should be, *eo nomine*, against the individual shareholders: *People v. Moore*, 1 Idaho, 504; *Smith v. Webb*, 11 Minn. 500. Taxation of such shares in gross against the banks themselves has been spoken of as unauthorized and invalid, because it was claimed that the only method recognized by federal statute is assessment against the individual shareholders: *National Com. Bank v. Mayor*, 62 Ala. 284; 34 Am. Rep. 15; *National Bank v. Fisher*, 45 Kan. 726; *Miller v. First Nat. Bank*, 46 Ohio St. 424; *First Nat. Bank v. Richmond*, 39 Fed. Rep. 309; *Collins v. Chicago*, 4 Biss. 472; *First Nat. Bank v. Smith*, 65 Ill. 44; *Sumter Co. v. National Bank of Gainesville*, 62 Ala. 464; 34 Am. Rep. 30; *First Nat. Bank v. Douglas County*, 3 Dill. 298; *Salt Lake City Nat. Bank v. Golding*, 2 Utah, 1; *Smith v. First Nat. Bank*, 17 Mich. 479. See *Van Allen v. Assessors*, 3 Wall. 573; *Bradley v. People*, 4 Wall. 459. Such assessment has also been claimed to be invalid, because it tends to deprive shareholders of the right usually accorded under taxation laws to deduct debts from the value of property listed for taxation. Such a deprivation would constitute a discrimination against national bank shares prohibited by the same statute in the provision that the taxation of such shares "shall not be at a greater rate than is assessed upon moneyed capital in the hands of individual citizens." Upon the matter of such discrimination, however, we shall have something to say in a later paragraph of this note.

Possibly, if it be shown that a state, in resorting to the method of assessing the shares of stock in a national bank to it in solido, has thereby made the burden of its stockholders more onerous un-

der its laws than if their shares were separately assessed to them, such assessment might be regarded as offending the spirit of national legislation upon this subject, and hence not enforceable. In the absence, however, of a showing of this character, there is no doubt that the assessment of the entire shares of stock of a bank may, by state legislation, be authorized to be made directly to the corporation, which in turn will be presumed to be authorized to reimburse itself by collecting or withholding from each of its stockholders his proportion of the taxes levied and collected upon such assessment: *Aberdeen Bank v. Chehalis*, 166 U. S. 440; *National Bank v. Commonwealth*, 9 Wall. 353; *First Nat. Bank v. Douglas Co.*, 3 Dill. 330. Though the statute authorizes the assessment of all the shares of stock to be nominally against the corporation, the ultimate effect of the law is merely to impose upon the corporation the duty of acting as the collecting agent of the state, a duty which it is obviously better able to perform than any other agency which can be selected.

National Banks as Agencies for the Collection of Taxes.—The practice of making the banks liable for taxes assessed against individual shareholders, in a sense constituting them agents of the state in the collection of such taxes, has frequently been upheld: *National Com. Bank v. Mayor*, 62 Ala. 284; 34 Am. Rep. 15; *National Bank v. Commonwealth*, 9 Wall. 353; *Aberdeen Bank v. Chehalis Co.*, 166 U. S. 440; *Waite v. Dowley*, 94 U. S. 527; *Whitney Nat. Bank v. Parker*, 41 Fed. Rep. 402; *Commonwealth v. First Nat. Bank*, 4 Bush, 98; 96 Am. Dec. 285; *Miller v. First Nat. Bank*, 46 Ohio St. 424. The validity of a state statute authorizing the collection of taxes on national bank shares from the bank instead of the shareholders first came before the supreme court of the United States in *National Bank v. Commonwealth*, 9 Wall. 353. In holding the statute valid the court expressed the opinion that the tax thereby levied was a tax upon the shares, and did not lose its character as such by the fact that it was to be collected from the bank itself. In delivering the opinion of the court, Mr. Justice Miller said: "It is only when the state law incapacitates the banks from discharging their duties to the government that it becomes unconstitutional. We do not see the remotest probability of this, in their being required to pay the tax which their stockholders owe to the state for the shares of their capital stock, when the federal government authorizes the tax. . . . The mode under consideration is the one which Congress itself has adopted in collecting its tax on dividends, and on the income arising from bonds of corporations. It is the only mode which certainly and without loss secures the payment of the tax on all the shares, resident or nonresident; and as we have already stated, it is the mode which experience has justified in the New England states as the most convenient and proper in regard to the numerous wealthy corporations of those states. It is not to be readily inferred, therefore, that Congress intended to prohibit this mode of collecting a tax which they expressly permitted the states to levy."

In the absence of statutory recognition of such procedure, how-

ever, the tax is collectible of the shareholders in the same manner as other taxes are collectible of individuals: *Sumter Co. v. National Bank*, 62 Ala. 464; 34 Am. Rep. 30. Where a national bank lists for taxation against itself, shares of its stock belonging to shareholders, it will not be heard to complain of an assessment based upon such listing: *Albuquerque Nat. Bank v. Perea*, 5 N. Mex. 664. Under the legislation of Nebraska, shares in national banks may be taxed, and the tax enforced by distraint against the property of the bank: *First Nat. Bank v. Douglas County*, 3 Dill. 330. Under the laws of Texas in force in 1876, a national bank was not liable to pay state and county taxes for that year, assessed on shares of stock in the bank not owned by it, but owned by individual shareholders. Special statutory authority is a prerequisite to the collection of shareholders' taxes from national banks: *Waco Nat. Bank v. Rogers*, 51 Tex. 606. It is the manifest intent of the national bank legislation of Congress to permit the taxation by states of national bank shares, though the same be owned by other national banks: *Bank of Redemption v. Boston*, 125 U. S. 60. Territories possess the same powers of taxing shares in national banks which states enjoy: *Talbott v. Silver Bow County*, 139 U. S. 438; *People v. Moore*, 1 Idaho, 504; *Board of Commrs. v. Davis*, 6 Mont. 306; *Salt Lake City Nat. Bank v. Golding*, 2 Utah, 1.

Effect of Investment of Bank's Funds in United States Bonds or Other Untaxable Securities.—States are not allowed, in the exercise of their powers of taxation, to impede agencies of the federal government in the performance of their functions. Accordingly, United States bonds, being important instruments utilized by the central government in the maintenance of its credit and the transaction of its business, are exempt from taxation by the states. The question arose soon after the establishment of national banks, whether or not the fact that the whole or a part of the funds of such a bank is invested in United States bonds or other untaxable securities exempts its shares of stock from state taxation. Here, again, the distinction, above noticed between the capital of a bank and the aggregate of the shares of its stock, was recognized, and the reasons which had been held to exempt the former from state taxation were held to exempt it even more conclusively, if such a thing were possible, where such capital was invested in United States bonds. As to this, of course, there never could have been an intelligent doubt, and we cite no cases to a conclusion so well-established. The claim that such an investment of banking capital exempted the shares of a national bank from the tax which Congress has authorized the states to impose has been almost unanimously denied by the authorities. A tax on the capital of a national bank is not the same thing as a tax upon the shares of which the capital is imposed, and conversely. This proposition, announced in *Van Allen v. Assessors*, 3 Wall. 573, has seldom been questioned. Therefore, it is generally held that shares of national banks are subject to state taxation regardless of the fact that the capital of such banks may be invested in government bonds or other exempt securities: *Van Allen v. Assessors*, 3 Wall. 573; *People v. Commissioners*, 4

Wall. 244; National Bank v. Commonwealth, 9 Wall. 353; Exchange Nat. Bank v. Miller, 19 Fed. Rep. 372; First Nat. Bank v. Lindsay, 45 Fed. Rep. 619; People v. Bradley, 39 Ill. 130; Hubbard v. Board of Supervisors, 23 Iowa, 130; Bank of Shreveport v. Board of Assessors, 41 La. Ann. 181; Utica v. Churchill, 83 N. Y. 161; People v. Commissioners, 35 N. Y. 423; Frazer v. Selbern, 16 Ohio St. 615.

A contrary doctrine has, however, been maintained. In a few instances the soundness of the established distinction between the shares and the capital of a national bank for purposes of taxation has been questioned or denied. In Hubbard v. Board of Supervisors, 23 Iowa, 130, while admitting that the distinction was too well established to admit of disregard, Mr. Justice Wright said: "For myself, I cannot but remark that the argument, . . . based upon a distinction between the capital and the shares, does not strike me with the most conclusive force." In State v. Haight, 31 N. J. L. 399, the distinction was repudiated as being "entirely too metaphysical to find any place in a science so practical as that of the law." The question under consideration was whether the taxation of stock in the hands of shareholders in a national bank is a tax upon exempt securities owned by the bank. Said the court: "The correct theory is, that the national prerogative to borrow money shall be free from all interference or obstruction, either direct or indirect, and it is not one mode of interference or obstruction with the exercise of such prerogative, but every mode which is interdicted by the constitution. I think the consequence must be that a tax upon the value of the shares of stock, which derive such value, in whole or in part, from national securities in the possession of the artificial trustee of the shareholder, must be held in a constitutional view to be a tax upon the securities themselves. Such taxation would, as it seems to me, lessen the value of the public securities to the same extent precisely as the taxation of them as the property of the corporation would do; and it is this depreciation of the securities by state taxation which is the object of constitutional inhibition." To the same effect, see State v. Hart, 31 N. J. L. 434; State v. Boyd, 32 N. J. L. 273. Compare Salt Lake City Nat. Bank v. Golding, 2 Utah, 1.

Discrimination against National Banks—"Moneyed Capital."—In passing the national bank act, Congress reasonably anticipated that the banks formed thereunder would not be welcomed in all of the states with an equal degree of good feeling. They must come into a direct competition with state banks, distinctly disadvantageous to the latter. Therefore, Congress endeavored to avoid legislative hostility to the national banks on the part of the state by providing that the taxation of national bank shares "shall not be at a greater rate than is assessed upon other moneyed capital in the hands of individual citizens" of the different states: U. S. Rev. Stats., sec. 5219. The term "moneyed capital" has often been defined. It should be construed in the light of the intent with which it was used, which was to prevent states from discriminating against national banks in favor of institutions or individuals carry-

ing on a similar business and investments of a like character. "Moneyed capital" does not mean "all capital the value of which is measured in terms of money, neither does it necessarily include all forms of investments in which the interest of the owner is expressed in money. . . . The result seems to be that the term 'moneyed capital,' as used in the federal statute, does not include capital which does not come into competition with the business of national banks": *National Bank v. Chapman*, 173 U. S. 205. Shares of stock in railroad companies, mining companies, manufacturing companies, and other corporations, are represented by certificates showing that the owner is entitled to an interest, expressed in money value, in the entire capital and property of the corporation, but the property of the corporation which constitutes its invested capital may consist mainly of real and personal property which, in the hands of individuals, no one would think of calling moneyed capital, and its business may not consist in any kind of dealing in money or commercial representatives of money: *Mercantile Bank v. New York*, 121 U. S. 138; *First Nat. Bank v. Ayers*, 160 U. S. 660; *Aberdeen v. Chehalis County*, 166 U. S. 440; *Palmer v. McMahon*, 133 U. S. 660; *Talbott v. Silver Bow County*, 139 U. S. 438; *First Nat. Bank v. Waters*, 19 Blatchf. 242; *Mercantile Nat. Bank v. Shields*, 59 Fed. Rep. 952.

It is held that "moneyed capital," as used in the section, signifies something more than money lent out at interest, and comprehends investments in stocks and securities: *Hepburn v. School Directors*, 23 Wall. 481; that it refers to like property similarly invested: *Adams v. Nashville*, 95 U. S. 19; and that shareholders in national banks may be taxed at a higher rate than shareholders in corporations not moneyed: *First Nat. Bank v. Waters*, 19 Blatchf. 242. The term refers to taxable moneyed capital, and the valuation of shares in national banks for taxation is not, within the meaning of that section, at a greater rate than the assessment of "other moneyed capital," unless such other moneyed capital be subject or liable to taxation: *Exchange Nat. Bank v. Miller*, 19 Fed. Rep. 372. "Moneyed capital," it has been said, means money employed in a business whose object is to make profit by investing such money in securities by way of loan, discount, or otherwise, which from time to time, in the course of business, are reduced again to money and reinvested: *Mercantile Nat. Bank v. Shields*, 59 Fed. Rep. 952. Mines and mining lands, and the share of corporations whose funds are invested therein, are not "moneyed capital" within the definitions given: *Talbott v. Silver Bow Co.*, 139 U. S. 438; nor are shares in a building and loan association: *Consolidated Nat. Bank v. Pima Co.*, Ariz. Sup. Ct., April, 1897. As to all kinds of property not embraced in the term "moneyed capital," it is needless to say that the states are left free to tax them as they will without regard to restrictions imposed by the national bank legislation of Congress.

Discrimination against National Banks—Exemption of Other Property from Taxation.—It is agreed by all the cases that it was not intended by Congress to limit the states in the exercise of their power to exempt property from taxation, when the proviso that shares in na-

tional banks should not be taxed at a higher rate than that assessed upon other moneyed capital was inserted in the national bank act. The object of the provision was solely to prohibit tax discriminations against national banks. The authorities support the opinion announced in *National Bank v. Chapman*, 173 U. S. 205, that "exemptions from taxation, however large, such as deposits in savings banks, or moneys belonging to charitable institutions, which are exempted for reasons of public policy, and not as an unfriendly discrimination as against investments in national bank shares, cannot be regarded as forbidden by the federal statute": *People v. Commissioners*, 4 Wall. 244; *Adams v. Nashville*, 95 U. S. 19; *Aberdeen Bank v. Chehalls County*, 166 U. S. 440. Deposits in savings banks are exempted from taxation for just reasons, and such exemption cannot be regarded as a discrimination against national banks: *Mercantile Bank v. New York*, 121 U. S. 138. By Pennsylvania statute, mortgages, judgments, recognizances, and moneys owing upon articles of agreement for the sale of real estate are exempt from taxation in that borough, except for state purposes. This was held no discrimination against national banks, whose shares were not similarly exempt. Said the court: "It could not have been the intention of Congress to exempt bank shares from taxation because other moneyed capital was exempt. Certainly there is no presumption in favor of such an intention": *Hepburn v. School Directors*, 23 Wall. 480. The exemption of shares of life insurance companies, of stocks and bonds of New York city, and of bonds of other state municipalities, under the laws of New York, does not indicate any unfriendly discrimination against national bank shares: *Mercantile Nat. Bank v. New York*, 28 Fed. Rep. 776. See, also, *First Nat. Bank v. Waters*, 19 Blatchf. 242; *Everitt's Appeal*, 71 Pa. St. 216; *Gorgas' Appeal*, 79 Pa. St. 149; *McLaughlin v. Chadwell*, 7 Helsk. 389.

But the exemption of other moneyed capital from taxation may be carried to such an extent as to constitute the discrimination against national bank shares prohibited by the federal statute. Such was held to be the case in *Whitney Nat. Bank v. Parker*, 41 Fed. Rep. 402. A most excellent discussion of this phase of the question is given in *Boyer v. Boyer*, 113 U. S. 690, wherein Mr. Justice Harlan reviews the previous decisions of the court for which he spoke, and reached the conclusion that they did not sustain the proposition that national bank shares may be subjected, under the authority of the states, to local taxation, where a very material part, relatively, of other moneyed capital in the hands of individual citizens within the same jurisdiction or taxing district is exempt from taxation. As to facts presented in that case, the learned justice said: "It seems difficult to avoid the conclusion that, in respect of county taxation of national bank shares, there has been, and is, such a discrimination in favor of other moneyed capital against capital invested in such shares as is not consistent with the legislation of Congress. The exemptions in favor of other moneyed capital appear to be of such a substantial character as to take the present case out of the operation of the rule that it is not absolute

equality that is contemplated by the act of Congress; a rule which rests upon the ground that exact uniformity or equality of taxation cannot, in the nature of things, be expected or attained under any system. But, as substantial equality is attainable, and is required by the supreme law of the land, in respect of state taxation of national bank shares, when the inequality is so palpable as to show that the discrimination against capital invested in such shares is serious, the courts have no discretion but to interfere": See, also, *Boyer's Appeal*, 103 Pa. St. 387.

Discrimination against National Banks—Rates and Systems of Taxation.—The United States statute, after referring to the taxation of national bank shares by state authority, provides: "But not at a greater rate than is assessed upon other moneyed capital in the hands of individual citizens of such states." In the systematic dissection and interpretation to which litigation has subjected the statute, courts have frequently been called upon to determine what is meant by the phrase, "not at a greater rate." "The answer is," said Nelson, justice, in *People v. Commissioners*, 4 Wall. 244, "that upon a true construction of this clause of the act, the meaning and intent of the lawmakers were, that the rate of taxation of the shares should be the same, or not greater, than upon the moneyed capital of the individual citizen which is subject or liable to taxation. That is, no greater proportion or percentage of tax in the valuation of the shares should be levied than upon other moneyed, taxable capital in the hands of the citizens." The same court, in the later case of *People v. Weaver*, 100 U. S. 539, discussed minutely the interpretation to be put upon this phrase and concluded: "We see that Congress had in mind an assessment, a rate of assessment, and a valuation, and, taking all these together, the taxation on these shares was not to be greater than on other moneyed capital": Compare *Gorgas' Appeal*, 79 Pa. St. 149. It has been held, on the other hand, that the provision simply requires that no greater percentage of tax on the valuation of shares shall be levied; it does not apply to an overvaluation: *Williams v. Weaver*, 75 N. Y. 30, reversed in *People v. Weaver*, 100 U. S. 539, above noticed and quoted from, which latter case states the proper interpretation to be given to the phrase under consideration, and has been directly followed in *McHenry v. Downer*, 116 Cal. 20.

Discrimination against national bank shares may result from a system of taxation framed with a view to accomplish such a result, or, since, at best, no system of taxation is absolutely free from inequalities and defects, such discrimination may come as an incident to the defective operation of a system of taxation, unanticipated and unintended. To what extent the latter form of discrimination violates the United States statute is an unsettled matter. As to intentional discrimination no doubt can arise, for it comes directly within the purview of the statute: *Pelton v. National Bank*, 101 U. S. 143. If, however, a state statute creating a system of taxation does not on its face discriminate against national banks, and there is neither evidence of a legislative intent to make such discrimination, nor proof that the statute works an actual and ma-

terial discrimination, there is no cause for holding it to be unconstitutional: *Davenport Bank v. Davenport Board of Equalization*, 123 U. S. 83. From an examination of the cases it appears that courts treat the infirmities of tax systems with considerable leniency. The element of legislative intent to discriminate against national bank shares is the court's guiding star, and such intent must either be distinctly proven, or conclusively presumed from the fact that a given system results in actual and material discrimination against those shares in favor of "other moneyed capital": *Appeal of McMahon v. Palmer*, 102 N. Y. 176; 55 Am. Rep. 796; affirmed, 133 U. S. 660; *Exchange Nat. Bank v. Miller*, 19 Fed. Rep. 372; *McHenry v. Downer*, 116 Cal. 20; *Mercantile Nat. Bank v. New York*, 28 Fed. Rep. 776. The presumption in any case is against the existence of discrimination: *Van Slyke v. State*, 23 Wis. 655.

Discrimination against National Bank Shares—Allowance of Deductions.—State statutes which allow taxpayers to deduct the amount of their debts from the valuation of other moneyed capital held by them, must grant the same privilege to holders of national bank shares in order to avoid conflict with section 5219 of the United States Revised Statutes. A failure to accord to the holders of national bank shares equal privileges in this regard constitutes the discrimination inhibited by that statute: *People v. Weaver*, 100 U. S. 539; *Supervisors v. Stanley*, 105 U. S. 305; *National Albany Exch. Bank v. Wells*, 18 Blatchf. 478; *Richards v. Rock Rapids*, 31 Fed. Rep. 505; *First Nat. Bank v. Richmond*, 39 Fed. Rep. 309; *Whitney Nat. Bank v. Parker*, 41 Fed. Rep. 402; *Mercantile Nat. Bank v. Shields*, 59 Fed. Rep. 952; *City Nat. Bank v. Paducah*, 2 Flip. C. C. 61; *Evansville Nat. Bank v. Britton*, 10 Biss. 503; 105 U. S. 322; *Wasson v. First Nat. Bank*, 107 Ind. 206; *National Bank v. Fisher*, 45 Kan. 726; *McAden v. Board of Commrs.*, 97 N. C. 355; *Ruggles v. Fond du Lac*, 53 Wis. 436; *Weston v. Manchester*, 62 N. H. 574. The effect of these cases is to hold that shares in a national bank owned by a taxpayer are to be considered as part of debts due or to become due him, from which he is entitled to deduct the amount of his bona fide indebtedness. In Nebraska, where deductions for debts is not allowed to any "bank company or corporation exercising banking powers or privileges," the owner of national bank stock is not entitled to deduct his bona fide indebtedness from the value of such shares of stock: *Bressler v. County of Wayne*, 32 Neb. 834. Although owners of national bank stock are entitled to the same deductions that are allowed owners of other moneyed capital, of course no double deduction or exemption can be allowed any stockholder: *National Bank v. Fisher*, 45 Kan. 726. In order to invalidate a state statute allowing deductions to the owners of some forms of capital, and not to the owners of national bank stock, it must appear that there is a material discrimination against such stock: *First Nat. Bank v. Ayers*, 160 U. S. 660; *National Bank v. Chapman*, 173 U. S. 205. The fact that state banks are allowed to deduct from their tax assessment funds invested in nontaxable securities does not constitute a discrimination against national bank shares, the owners of which are not allowed similar deductions:

First Nat. Bank v. Farwell, 10 Biss. 270; **Exchange Nat. Bank v. Miller**, 19 Fed. Rep. 372.

Miscellaneous Instances. — Discrimination against national bank shares in favor of other moneyed capital is not excused by the fact that the same discrimination is made against other corporations: **Whitney Nat. Bank v. Parker**, 41 Fed. Rep. 402. Where, at the time of the passage of the national banking act, a state had already disabled itself from taxing two existing banks of issue beyond a certain amount, the collection of a tax at a higher rate upon national bank shares does not constitute discrimination, where other moneyed capital, aside from those two banks, is properly taxed: **Lionberger v. Rouse**, 9 Wall. 468; 43 Mo. 67. Likewise, when a state taxing statute by its terms is designed to operate equally upon all banks, state and national, but, through the application of the doctrine of res judicata, certain state banks are exempted from its operation, this does constitute the inhibited discrimination: **First Nat. Bank v. Stone**, 88 Fed. Rep. 408. If national bank shares and state banks are taxed by different standards, resulting in actual discrimination against the former, such discrimination is not excused by the fact that the former are in fact assessed below their true money value: **First Nat. Bank v. Lucas Co.**, 25 Fed. Rep. 749. To justify a state in taxing national bank shares, it is not necessary that there should exist any state banks: **Smith v. Webb**, 11 Minn. 500. According to Wisconsin decisions, the fact that state banks are taxed on their capital, and not on the shares, does not make the taxation of national bank shares unlawful discrimination against them, provided there is no substantial inequality and the two systems impose equivalent burdens: **Bagnall v. State**, 25 Wis. 112; **Van Slyke v. State**, 23 Wis. 655. But a contrary view is held by the United States supreme court and some of the state courts, which hold that where a state taxes state banks on their capital, exempting the shares from taxation in the hands of the owners, it cannot lay a tax on the shares of national banks: **Bradley v. People**, 4 Wall. 459; **Hubbard v. Supervisors**, 23 Iowa, 130; **Craft v. Tuttle**, 27 Ind. 332; **Wright v. Stilz**, 27 Ind. 338.

Valuation of Shares and Situs for Purposes of Taxation. — The object of the restrictions in the national bank act being solely to prevent discriminations of the character which we have been considering, it results that the states are not restricted to a particular mode of assessing taxes on national bank shares. Such shares may be valued for such purposes at an amount above their par value: **Hepburn v. School Directors**, 23 Wall. 480; though previous to the case last cited it had been held that state taxation of national bank shares was in the nature of a royalty upon their nominal value; hence, that they could not be valued at an amount above their par value: **Union Nat. Bank v. Chicago**, 3 Biss. 82. The power of the states to tax such shares at their actual value cannot now be questioned: **People v. Commissioners**, 94 U. S. 415; **Exchange Nat. Bank**, 19 Fed. Rep. 372. This may be considered to mean their current value in the market where the bank is located: **Everitt's Appeal**, 71 Pa. St. 216; it may be ascertained from a view

of the bank's property so far as it imparts value to the shares: *St. Louis Nat. Bank v. Papin*, 4 Dill. 29. A tax on each share of national bank stock in the hands of the individual holders may be considered as being upon his interest in the whole of the bank's property: *Covington City Bank v. Covington*, 21 Fed. Rep. 484.

In the original national bank act, national bank shares were permitted to be taxed by the states "at the place where the bank is located and not elsewhere." A conflict arose among the state courts as to the meaning of the clause quoted. By some it was held to refer to the town or district in which the bank was located; by others it was held to apply to the state instead of to any of its territorial divisions. The amendatory act of 1868 put an end to the controversy by declaring that the word "place" meant the "state" wherein the bank was located. The situs of national bank shares for taxing purposes is discussed in our late note to *Buck v. Miller*, 62 Am. St. Rep. 469, on the situs of personal property for purposes of taxation.

PEOPLE v. KEHOE.

[128 CALIFORNIA, 224.]

SEDUCTION BY A MINOR MADE UNDER PROMISE OF MARRIAGE.—A boy only sixteen years of age and who is, therefore, incapable of contracting marriage, may be guilty of seduction under promise of marriage. If a previously chaste woman submits herself to the embraces of a man under promise of marriage made by him, upon which she in fact relies, his conviction cannot be avoided by proof that his promise was not legal and binding.

SEDUCTION.—ONE INFANT MAY BE GUILTY OF THE SEDUCTION OF ANOTHER UNDER PROMISE OF MARRIAGE, provided they have reached the age of puberty, though the seducer has not reached the age at which he can contract marriage.

SEDUCTION.—EVIDENCE OF SUBSEQUENT IMPROPER CONDUCT.—In a prosecution for seduction evidence that the prosecutrix had sexual intercourse with other men is not admissible.

SEDUCTION.—CHASTITY, AS THE TERM IS EMPLOYED in statutes defining the crime of seduction, means, in the case of an unmarried woman, simply that she is virgo intacta. Hence, want of chastity is not established by her permitting familiarities, liberties, or even indecencies at the thought of which other women would blush.

S. M. Buck, for the appellant.

W. F. Fitzgerald, attorney general, and W. H. Anderson, assistant attorney general, for the respondent.

225 HENSHAW, J. The defendant was convicted of the crime of seduction under promise of marriage, and appeals from the judgment and from an order denying him a new trial. The

sections of the Penal Code bearing upon the offense are the following:

"Sec. 268. Every person who, under a promise of marriage, seduces and has sexual intercourse with an unmarried female of previous chaste character, is punishable by imprisonment in the state prison for not more than five years, or by a fine of not more than five thousand dollars, or by both such fine and imprisonment."

"Sec. 269. Intermarriage of the parties subsequent to the ~~act~~ commission of the offense is a bar to a prosecution for a violation of the last section, provided such marriage take place prior to the finding of an indictment or the filing of an information charging such offense."

Defendant and the girl with whose seduction he was charged were both school children, and about the same age. At the time of the seduction, and of the first act of sexual intercourse, each was about sixteen years old. The girl testified that she submitted to his embraces under his promise to marry her "when he was old enough" and "when they were old enough." She says: "There was no time ever set when we were to be married, only after he became of age and became old enough to be married we would be. I didn't know whether we would be married in one year or two years or three years or five years. I knew when he would become of age." The girl's evidence, if believed by the jury, was sufficient to support the conviction. It proved the promise and her reliance upon it in submitting herself to the defendant's desires.

But it is very earnestly pressed upon the consideration of this court that the defendant, under the facts, does not come within the purview of this statute. It is argued that a boy of sixteen is incapable under our law of consenting to and consummating marriage; that only an unmarried male of eighteen years or upward can do so: Civ. Code, sec. 56; that, even when the male has reached the age of eighteen years, he is still under disability, and may not obtain the requisite marriage license without the consent of his parent or guardian, and that if such consent should be withheld—and in this case it was withheld—he could not legally marry until he attained the age of twenty-one years: Civ. Code, sec. 69; that, as a boy of sixteen is incapable of consenting to and consummating marriage, so his promise to marry is invalid, and could not be made the foundation of a civil action, much less of a criminal; that section 269

of the Penal Code makes provision for barring a criminal prosecution under the preceding section of the code by intermarriage of the parties; and that, if section 268 of the Penal Code be held to apply to a case such as this, it must result in the hardship, if not in the absurdity of the law, that an adult offender, who has arrived at years of discretion, whose judgment²²⁷ is matured, and whose passions presumably are better under control, may avail himself of marriage with his victim and so escape criminal prosecution, while the same avenue of escape would be absolutely closed to a young lad of immature judgment and tender years, who at the worst had but indulged the innate propensity of youth. Still further, it is pointed out that a boy of fourteen or fifteen years of age may be thus convicted of the seduction of a mature woman of thirty or forty; and, finally, it is insisted that the statute has in contemplation only male offenders who have passed their nonage.

This argument is not without much force, yet, after having given to it the full weight to which we deem it entitled, we are, nevertheless, of opinion that it cannot prevail. The law is designed to protect female chastity, for, as said by Judge Cooley, "whenever it shall be true of any country that the women as a general fact are not chaste, the foundations of civil society will be broken up": *People v. Brewer*, 27 Mich. 134. If a previously chaste woman submits herself to the embraces of a man under promise of marriage from him, upon which she in fact relies, the conviction, generally speaking, may not be avoided by proof that the promise was not legal and binding. The exceptions to the rule are found in those cases in which the promise itself is base and meretricious, and known to be such by the consenting woman. Thus, if a married man seduces a woman under promise of marriage, she not knowing that he has a wife, his promise is illegal and invalid, but this fact does not excuse him. The woman, in ignorance of the fact, was justified in relying upon that promise; but if, at the time of giving her consent, she knew the fact to be that the man was married, and that, therefore, the promise was necessarily conditional upon the death or the putting away of his present wife, so base a contract would not excuse her in law for the surrender of her chastity. The contract itself would be void as against public policy, and the woman's reliance upon it could not be extenuated or excused: *People v. Alger*, 1 Park. C. C. 333.

But within the limitations thus indicated the general rule is, and we think it should be, that the promise need not be such a

legal promise as would support an action for its breach, provided it be such a promise as will justify the reliance upon it ²²⁸ of the woman betrayed. In this case the promise was not legally binding, and, as the girl knew the age of the defendant, and is chargeable with knowledge of the law, it may even be presumed against her that she knew that the boy was incapable at the time of making a legally binding contract of marriage; that any promise which he made could certainly be repudiated by him upon attaining his majority. But this is not determinative of the main question. The boy was not incapable of making a promise of marriage, which in good faith and in good morals it was his bounden duty to perform. In such a case as this, where the presumption of legal knowledge upon the part of the girl is, to say the least, a strained one, it is far more natural to assume that her reliance sprang from her confidence in the defendant, and from her belief that, aside from any question of the legally binding force of his words, he would keep faith with her. It is precisely such confidence and such belief which is to be protected by the law, and herein we quote with approval the language of the supreme court of Indiana in *Callahan v. State*, 63 Ind. 198, 30 Am. Rep. 211: "There is nothing in the statute that requires the promise of marriage to be free from all legal objections, viewed as the foundation of an action for its breach. Its purpose was to prevent the obtaining of the female's consent to sexual intercourse by means of a promise of marriage; to protect her from the arts of designing and unprincipled men, in whom she may repose trust and confidence, and to whose solicitations she may yield, believing that their promises of marriage are made in good faith and will be fulfilled. It is not to be supposed that she will pause to consider, even if she were capable of judging whether the promise is valid in law, and one on which she could maintain an action if broken. It is not to be assumed in such case that her consent to the intercourse is given in consequence of her reliance upon an action upon the promise for damages in case of its breach; but it may be given upon the confidence she places in the good faith of the promise, believing, not that it will be broken, but fulfilled." In *Kenyon v. People*, 26 N. Y. 203, 84 Am. Dec. 177, it is said that it is not necessary that the promise should be a valid and binding one between the parties. The offense consists in seducing and having illicit connection with an ²²⁹ unmarried female under promise of marriage. It is enough that a promise is made which is a consideration for or induce-

ment to the intercourse." In *Polk v. State*, 40 Ark. 482, 48 Am. Rep. 17, the indictment charged merely that the parties to the act were past the age of puberty, and did not charge that they were of full age and able to make valid and binding promises to marry. The court say: "The offense consists in having illicit connection with an unmarried female who yields to the solicitations of her seducer under the inducement of a promise of marriage. And it may be committed by an infant upon an infant, provided they have reached the age of puberty." In *Crozier v. People*, 1 Park. C. C. 455, it is said: "Whether the promise is binding or not, if the prosecutrix believes it, the danger and wrong are the same. If the promise is the consideration for, or the inducement to the illicit intercourse, the offense is complete. . . . Though infancy may be a good defense to an action for a breach of promise of marriage, I apprehend it would not avail against a prosecution under this act. The offense is certainly of no less magnitude morally, and there is no less necessity for its punishment, because the promise was intended to be and was, in fact, a false pretense."

There was sufficient evidence to justify the finding of the jury that the complaining witness was of previous chaste character. There was affirmative testimony of the girl herself to this effect. The rejected evidence offered by defendant that she had had sexual intercourse with other men after the date of the alleged seduction was properly excluded, and the admitted evidence that she had permitted certain liberties to be taken with herself by her young male companions was not sufficient to show that at the time of the seduction she was of "unchaste character," within the meaning of the law. Chastity, as here employed, means, in the case of an unmarried female, simply that she is *virgo intacta*, and, though one woman may permit familiarities, liberties, or even indecencies, at the thought of which another woman would blush, so long as that woman has not surrendered her virtue she is not put without the pale of the law: *Crozier v. People*, 1 Park. C. C. 455. It is conceivable that a woman may permit or suffer many things which would be regarded as improprieties, and yet hold firmly to her ²³⁰ virtue. As is happily said in *State v. Brinkhaus*, 34 Minn. 285: "Although a female may, from ignorance or other causes, have so low a standard of propriety as to commit or permit indelicate acts or familiarities, yet, if she have enough sense of virtue that she would not surrender her person unless seduced to do so under promise of marriage, she could not be said to be an unchaste woman, within the meaning of the statute."

The alleged errors of the court in giving and refusing to give instructions do not call for detailed consideration. Of the instructions given, some are criticized as assuming the existence of facts proved against defendant, but the criticism is not borne out by the court's language. Where so assuming facts, it is apparent that the instruction is an abstract consideration of the crime and of its elements, and is not directed to the particular circumstances of the case at bar. When the court came the more specifically to deal with the evidence in the case, it was careful to leave all questions of fact for the determination of the jury. For example, the opening sentence of a long instruction given by the court is as follows: "The law does not require that the promise of marriage should be made at the time the sexual intercourse is had, but it is sufficient if the promise was made at any time before the act was done." It is said of this that it assumes the existence of two facts, the first the promise of marriage, and the second that the act of sexual intercourse charged had been committed; but a reading of the whole instruction discloses, as has been said, that the court is here abstractly analyzing the necessary elements of the crime, and this very instruction concludes with the following unambiguous and unassailable proposition of law: "Therefore, I instruct you that, if you find that the defendant seduced and had sexual intercourse with Loleta Brewer, that she was of previous chaste character, and that he had previously promised Loleta Brewer to marry her, that she yielded and consented to the act because of such promise, and that she would not have consented if such promise had not been made, then the law will not hold the defendant guiltless." The instructions proposed by the defendant and refused by the court were either erroneous in point of law for the very reasons which we have hereinbefore considered, or were open to the objection of charging upon the ²³¹ effect of evidence. Upon the whole, the instructions given upon behalf of defendant were certainly quite as favorable to him as the law permits. We do not think that undue latitude was allowed in the cross-examination of defendant.

The judgment and order appealed from are therefore affirmed.

Temple, J., and McFarland, J., concurred.

Hearing in Bank denied.

SEDUCTION — INFANCY — VALID CONTRACT OF MARRIAGE.—It is not necessary that the promise of marriage should be a valid and binding one between the parties; it is enough if the

promise was the inducement or consideration for the intercourse: *Callahan v. State*, 63 Ind. 198; 30 Am. Rep. 211; *Kenyon v. People*, 26 N. Y. 203; 84 Am. Dec. 177. See *People v. Nelson*, 153 N. Y. 90; 60 Am. St. Rep. 592. Seduction of an infant by an infant: See note to *People v. De Fore*, 8 Am. St. Rep. 870.

SEDUCTION—EVIDENCE OF SUBSEQUENT IMPROPER CONDUCT.—Evidence that the prosecutrix had been criminally intimate with other men after the date of her alleged seduction is inadmissible: *Bracken v. State*, 111 Ala. 68; 56 Am. St. Rep. 23.

SEDUCTION.—PREVIOUSLY CHASTE CHARACTER signifies that which the person really is, in distinction from that which she may be reputed to be: *People v. Nelson*, 153 N. Y. 90; 60 Am. St. Rep. 592; *Carroll v. State*, 74 Miss. 688; 60 Am. St. Rep. 539. "Previous chastity," in a seduction statute, would signify mere actual chastity or freedom from sexual intercourse; but "previously chaste character" does not signify merely this, but also purity of mind and innocence of heart: *Andre v. State*, 5 Iowa, 389; 68 Am. Dec. 708. See note to *State v. Carron*, 87 Am. Dec. 406.

EX PARTE SYLVIA.

[128 CALIFORNIA, 293.]

CONTEMPT OF COURT IN NONPAYMENT OF MONEY.—An order of court directing the imprisonment of a defendant until he shall have paid a certain sum awarded as alimony pendente lite must show that he has been found able to comply with such order.

HOMESTEAD—COMPELLING SALE OF TO PAY ALIMONY.—A husband cannot be compelled to sell or encumber his homestead for the purpose of paying alimony. If an order of imprisonment until he pays such alimony fails to show that he can pay it otherwise than by such sale or encumbrance, he is entitled to his release on habeas corpus.

T. J. Geary and F. A. Meyer, for the petitioner.

John P. Rodgers, for Leonora Silvia.

293 THE COURT. The return to the writ of habeas corpus issued herein shows that the petitioner is held in custody under orders directing his imprisonment until he shall have paid a certain sum of money awarded as alimony pendente lite. When an alleged contempt consists in the failure to obey an order of court the party charged with such failure may be imprisoned until **294** he complies, provided he has the ability to comply. If it is not in his power to do what he has been commanded to do, he cannot be condemned to perpetual imprisonment for failure to perform an impossibility. This being so, and every court being, in contempt proceedings, a court of strictly limited jurisdiction, it is essential to the validity of a judgment directing the impris-

onment of a person until he complies with an order of the court that it should be found that he is able to comply.

In this case the first order of imprisonment did contain a recital that the petitioner was able to pay the alimony in question, but upon a subsequent proceeding in habeas corpus before the same court, in which his ability to pay was the principal question to be determined, the order remanding him, and under which he is now held, fails to show that he is able to pay without selling or encumbering his homestead, and the question is presented whether a man can be compelled, by duress of imprisonment, to sell or encumber the homestead, which under the constitution and laws of the state is exempt from forced sale, except in certain enumerated cases, of which payment of temporary alimony is not one.

In our opinion this cannot be done. The prisoner having no means aside from his homestead, in a legal sense, has not the ability to pay the alimony, and his continued imprisonment is unlawful.

It is ordered that he be discharged from custody.

McFarland, J., dissented.

Garoutte, J., and Harrison, J., did not participate in the decision.

CONTEMPT OF COURT IN NONPAYMENT OF MONEY—ORDER OF COMMITMENT.—Either the order or judgment finding a party guilty of civil contempt in disobeying the command of the court, and the order of commitment for such contempt, must recite that it was in defendant's power to perform the required act, or the commitment is void: *Ex parte Robertson*, 27 Tex. App. 628; 11 Am. St. Rep. 207. One unable pecuniarily to pay alimony adjudged against him is not guilty of contempt of court in not paying it when he has not voluntarily created the inability for the purpose of avoiding payment: *Lewis v. Lewis*, 80 Ga. 706; 12 Am. St. Rep. 281. As to whether failure to pay temporary alimony is contempt, see note to *Ex parte Spencer*, 17 Am. St. Rep. 272.

HOMESTEAD—LIABILITY FOR ALIMONY.—A homestead is exempt from liability for alimony decreed in favor of the wife in a divorce suit: See note to *Mertz v. Berry*, 45 Am. St. Rep. 889; *Stanley v. Sullivan*, 71 Wis. 585; 5 Am. St. Rep. 245.

MATTEUCCI v. WHELAN.

[128 CALIFORNIA, 812.]

PRACTICE.—AN AMENDMENT OF AN ANSWER MAY BE PERMITTED after a motion has been made by the plaintiff for judgment on the pleadings.

EXECUTION SALE—CHANGE OF POSSESSION.—Upon the sale of personal property under execution to a stranger to the writ it is not necessary that there be a change of possession. The property may be left in the possession of the former owner on any contract of bailment that the law allows in any other case.

At the trial, the plaintiff moved for a judgment on the pleadings, on the ground that the denials in the answer were insufficient. The court permitted the answer to be amended so as to supply the deficiency supposed to exist thereunder, and then denied the motion.

A. D. Splivalo, for the appellants.

Reddy, Campbell & Metson, for the respondent.

812 McFARLAND, J. This action was brought to recover certain personal property situated in a building used as a restaurant. The defendant was sheriff, and on the second day of November, 1895, attached the said property as the property of one M. Zaro, under a writ of attachment issued in an action commenced against Zaro by one Witt. The jury, under instruction of the court, returned a verdict for defendant, upon which judgment in defendant's favor was rendered. Plaintiffs appeal from the judgment and from an order denying their motion for a new trial.

The pleadings, evidence, and the conduct of the trial leave the case in an unfinished and confused condition. The learned judge of the court below well said that it was "a remarkable case."

The two main points made by appellants for reversal are: 1. That the court erred in denying plaintiff's motion for judgment upon the pleadings; and 2. That the court erred in instructing the jury to find a verdict for the defendant.

1. The court did not err in denying the motion for a judgment in favor of the plaintiff on the pleadings. It is not necessary to determine whether or not the original answer sufficiently denies that at the time of the commencement of the action plaintiffs were the owners of or entitled to the possession of the property in question; the amended answer does contain such

denial, and the court did not err in allowing the amended answer to be filed under the circumstances presented in the record.

2. On the 20th of June, 1895, the sheriff of the city and county of San Francisco, where the property involved was situated, by virtue of an execution issued in the case of one E. Isaacs against the said M. Zaro, sold the property in question here ³¹⁴ at public auction to the plaintiffs in this present action and gave possession thereof to the plaintiffs, together with a certificate of sale thereof. At that time Zaro was using the property in conducting a restaurant at No. 161 Steuart street, in the city of San Francisco. Zaro had been acting as cook of the establishment and had in his employ a man named Giovanni, whom the plaintiffs employed to take charge of the business, and they hired another man to assist him. The plaintiffs were merchants and visited the restaurant about once a day, supplying it with groceries, wines, et cetera, and paying the bills incurred in the business. They also paid the rent of the premises for two months. They desired to sell the property as soon as they could find a purchaser; but, after conducting the business in this way for about two weeks and finding that it did not pay, they told Zaro that if he could make it pay he might take the business himself at his own expense until such time as the plaintiffs could find a purchaser. Under this agreement Zaro went into possession and ran the business from June until the next November, when the attachment in the case of Witt v. Zaro was levied. This last attachment suit by Witt was for meat furnished Zaro a short time before the attachment was levied. The foregoing were substantially all the facts proven. There was no evidence at all connecting the plaintiffs with Isaacs, under whose judgment against Zaro the property was sold by the sheriff under execution in June. From all that appears the plaintiffs were strangers to that suit and execution, and purchased at the public sheriff's sale as any other stranger would have had the right to do. It was with reference to this sale under the execution in June that the court said in the presence of the jury: "There is no evidence to show such an actual, continued, exclusive change of possession as is required under the statute of frauds," and instructed the jury, after the case had been submitted, as follows: "In this case I am satisfied that there was no such change of possession of this property as the law required; that this alleged sale and alleged delivery of possession of the restaurant was void as against this creditor represented by Mr. Witt, who commenced the attachment suit; and the defendant is en-

titled to a verdict at your hands. Therefore, I direct you to find a verdict in this case in favor of the defendant; the clerk will give you the verdict, and you will select a foreman, ³¹⁵ who will sign the same." The court evidently went upon the theory that section 3440 of the Civil Code applies absolutely to public judicial sales made by a sheriff under an execution; but this principle does not apply to such a sale, at least where the purchaser is a stranger and not a party in any way to the proceeding. Section 698 of the Code of Civil Procedure provides that a sale under execution by an officer conveys to the purchaser all the right which the debtor had in the property on the day the execution was levied. It has been held in some cases, although the authorities are not uniform on the point, that where the purchaser in such a case is the execution creditor the rule applies; but we have been referred to no case where it has been applied to a purchaser who is a stranger to the suit. We have found no decision by this court in which the point was raised, except the case of O'Brien v. Chamberlain, 50 Cal. 285; and in that case the court expressly declined to decide the point. There the execution debtor was Moffitt and the purchaser was O'Brien, and the court below refused to instruct the jury that if Moffitt continued in the possession of the goods after the sale they might take that fact into consideration in determining whether or not Moffitt or O'Brien was the real purchaser. This court reversed the judgment for error in not giving the instruction and said: "If the purchaser permits the property to remain in the possession of the judgment debtor, and allows him to exercise actual ownership over it after the sale, the jury is authorized to consider this circumstance in determining the question of actual fraud." That was clearly correct; and if in the case at bar it could be held that there was any question of actual fraud involved, it would have been proper enough for the court to have instructed the jury that in determining that question it could have considered the fact that Zaro was allowed to resume possession of the property; but under any circumstances it would not have been proper for the court to have instructed the jury that this fact alone, as matter of law, was determinative of an issue within the province of the jury. The cases on the point are largely cited by Mr. Freeman in his work on Executions, in his notes to paragraph 151. In the text he says that "When the plaintiff in execution becomes the purchaser some of the American cases have considered that the necessity for a change of possession is as imperative ³¹⁶ as though the

sale were voluntary; but in England the question has been determined otherwise"; and that: "It seems to be almost universally conceded that when a stranger to the writ purchases and pays for property at an execution sale, the fact that he does not choose to remove it from the control of the defendant neither renders the sale fraudulent per se, nor, unless connected with other circumstances of a suspicious character, creates any presumption against its good faith." One of the quotations which he gives from adjudicated cases is as follows: "Retention of possession by the former owner of a chattel sold at sheriff's sale is not an index of fraud, because the sale is not the act of the person retaining, but of the law; and because a judicial sale, being conducted by the sworn officer of the court, shall be deemed fair till it is proved otherwise. It may, like a judgment, be shown to be collusive and fraudulent in fact, but the presumption of the law is favorable to it in the first instance. A chattel thus purchased, then, may safely be felt in the possession of the former owner on any contract of bailment that the law allows in any other case." We are of opinion that the court erred in instructing the jury in this case to find a verdict for the defendant, and for this reason the judgment must be reversed. (In the testimony of one of the plaintiffs there was an incidental reference to some other attachment, but what it was does not appear, and no importance seems to have been attached to it.)

In this case we decide merely the questions presented; if there be any other reasons why the judgment should have been for the respondent they are not before us.

The judgment and order appealed from are reversed.

Temple, J., and Henshaw, J., concurred.

PRACTICE—AMENDMENT OF PLEADINGS.—Under the code system of pleading courts have power to allow amendments both before and after judgment, the only limitation being that no vested right shall be disturbed, and that the cause of action or defense shall not be substantially changed: *Brown v. Mitchell*, 102 N. C. 347; 11 Am. St. Rep. 748; *Connecticut Mut. Life Ins. Co. v. Smith*, 117 Mo. 261; 38 Am. St. Rep. 656; see note to *Stevenson v. Mudgett*, 34 Am. Dec. 160. Motion to amend declaration after nonsuit has been directed is in season, where the nonsuit is taken off and a new trial ordered: *Medbury v. Watson*, 6 Met. 246; 39 Am. Dec. 728. Under the Alabama code, the court has discretion to allow an amendment of a complaint after the jury have been instructed: *Prater v. Miller*, 25 Ala. 320; 60 Am. Dec. 521.

EXECUTION SALE—CHANGE OF POSSESSION.—Allowing chattel purchased at sheriff's sale to remain in possession of debtor is not fraudulent as to creditors, when the purchaser was not a

creditor, and purchased bona fide: *Garrett v. Rhame*, 9 Rich. Law, 407; 67 Am. Dec. 557; *Garland v. Chambers*, 11 Smedes & M. 337; 49 Am. Dec. 63; *Boardman v. Keeler*, 1 Aik. 158; 15 Am. Dec. 670, and note thereto. An auction sale by a sheriff, made by agreement of parties without previous advertisement, nor under a legal precept warranting it, is not a sheriff's sale, and does not fall within the exception: *Batchelder v. Carter*, 2 Vt. 168; 19 Am. Dec. 707.

FIRST NATIONAL BANK v. MAXWELL.

[128 CALIFORNIA, 360.]

ESTOPPEL BY CONDUCT DOES NOT EXIST where the party claiming the estoppel has not relied upon the conduct of the other and been induced by it to do something which he otherwise would not have done.

FRAUDULENT TRANSFERS—WAIVER OF RIGHT TO ASSAIL.—If a transfer has been made by a debtor for the purpose of defrauding his creditors, one of them who, with knowledge of the transfer, subsequently accepts a promissory note for his debt secured by a mortgage on the property, does not thereby waive his right to assail the transfer as void under a judgment recovered for a deficiency remaining after foreclosing his mortgage and selling the mortgaged premises.

A FRAUDULENT TRANSFER IS VOID AGAINST ALL THE CREDITORS OF THE DEBTOR, and, as against the fraudulent transferee, the creditor may seize the property as that of the fraudulent grantor.

JUDGMENT LIEN—EFFECT OF UPON PROPERTY PREVIOUSLY FRAUDULENTLY TRANSFERRED.—A judgment against one who has transferred real property for the purpose of defrauding his creditors is a lien thereon, and a judgment creditor is entitled to redeem such real property from execution sale.

FRAUDULENT TRANSFER WHERE THE DEBTOR OWNS OTHER PROPERTY SUBJECT TO EXECUTION.—If a transfer is made with an actual intent to defraud the creditors of the grantor, it is void as against them, though he has other property sufficient to satisfy their demands.

Graves, O'Melveny & Shanklin, for the appellant.

Works & Lee and Calvin Edgerton, for the respondents.

363 HAYNES, C. Suit to remove a cloud and quiet title to real estate. Findings and judgment were for the defendants, and the plaintiff appeals from the judgment and from an order denying a new trial. Walter S. Maxwell, the husband of Amelia, their three children, all minors, and Charles A. Baskerville, as trustee, were the other defendants. The property involved was the separate property of Mrs. Maxwell.

The facts, briefly stated, are as follows: On and prior to August 23, 1893, Mr. and Mrs. Maxwell were indebted to the plain-

tiff in the sum of nine thousand three hundred dollars, and plaintiff had instructed its attorneys to commence proceedings by attachment against them to collect said indebtedness, and to attach the property here in controversy. Before commencing suit plaintiff sent for Mr. and Mrs. Maxwell and informed them that an immediate settlement must be made, or proceedings would be taken for its collection; that said defendants requested delay, saying they had reasonable prospects of settling in a few days. Plaintiff then agreed, "on condition that Mrs. Maxwell would make no disposition of her property and make no change in the situation of it, that proceedings would be postponed until Saturday"; that Mrs. Maxwell then promised, "on her honor, using those words," that she would make or suffer no change in the situation of her property, whereupon plaintiff instructed its attorneys to delay proceedings until the following Saturday; ~~and~~ that Mrs. Maxwell, the same day, went to her attorneys and executed a deed to the defendant, Baskerville, conveying to him the property here in controversy in trust for her three minor children, by the terms of which the trustee was to pay the rents and profits thereof, not exceeding three hundred dollars per month, to Mrs. Maxwell, for the clothing, support, education, et cetera, of said children, and any surplus over that sum to be deposited in a savings bank in the name of the children, to be accumulated until the youngest should arrive at majority, when it should be distributed to them.

This deed was recorded the same day, and on the next plaintiff was informed of it, and with knowledge that it had been executed and recorded the plaintiff took from the Maxwells their promissory note payable one year after date, with interest payable quarterly, and if not so paid the principal to become due and payable upon such default, and a mortgage upon the interest of Mrs. Maxwell in the Lefranco block, in the city of Los Angeles, to secure said note. Default was made in the payment of the first quarter's interest, and plaintiff thereupon foreclosed the mortgage, and, after exhausting the mortgaged property, on April 7, 1894, docketed a deficiency judgment for the sum of five thousand one hundred and sixty-seven dollars and five cents.

At and prior to the execution of said trust deed one Etchepare held the promissory note of Mr. and Mrs. Maxwell, then past due, upon which he brought suit in December, 1893, and obtained judgment for seventeen hundred and twenty-three dollars and thirty cents and costs, and an execution issued thereon was levied upon the property described in said trust deed, and

the interest of Mrs. Maxwell therein was sold to Etchepare on February 19, 1894.

Upon the plaintiff's deficiency judgment being docketed (April 7, 1894) an execution was issued thereon, which was returned nulla bona, and thereafter the plaintiff performed all the acts necessary to redeem the said premises from Etchepare, and in due time the sheriff executed and delivered to the plaintiff, as such redemptioner, a deed for the said premises, and said deed was duly recorded prior to the commencement of this action.

The foregoing facts are shown by the evidence without conflict, and, excepting the directions of the plaintiff to its attorneys, ³⁰⁵ and the interview between Mr. Elliott, the president of the bank, and Mr. and Mrs. Maxwell, are incorporated in the findings.

The court, however, made some additional findings, which are to the effect that prior to the execution of the mortgage to the plaintiff upon the one-fourth interest in the Lanfranco block, the French Bank had taken a mortgage upon all the interests therein for sixty thousand dollars, upon which Mrs. Maxwell had paid twenty thousand dollars; that at the time of the execution of the mortgage to the plaintiff she owned other real estate in the city of Los Angeles "aggregating several thousand dollars over encumbrances, and was possessed of a large amount of personal property, unincumbered, aggregating in value between five and six thousand dollars."

The seventeenth finding is as follows: "The plaintiff knew of the execution of the said trust deed and the financial condition of the said defendants, Walter S. Maxwell and Amelia C. Maxwell, his wife, at the time of the execution and delivery of the said note and mortgage by them to the plaintiff on the twenty-fourth day of August, 1893."

From these findings the court drew the following conclusions of law: "1. That plaintiff waived its right to attack said trust deed; that no legal redemption in this case was had, and that plaintiff did not become substituted to the rights of the purchaser at the sheriff's sale on the Etchepare judgment, and is not the owner of the property and not entitled to have the same removed as a cloud thereon, or to quiet its title thereto"; and that defendants are entitled to judgment.

The complaint alleged that said trust deed was made with the intent to delay and defraud creditors, and especially the plaintiff, and that the defendants, Mr. and Mrs. Maxwell, were insolvent, and these allegations were denied.

After the findings were filed, but before judgment was entered thereon, the plaintiff, upon due notice, moved the court to amend and supplement its findings in several particulars, among them to find upon the question of fraudulent intent in making the trust deed, and to find that the Etchepare note was made before the deed of trust was executed. The motion was denied, and plaintiff excepted.

~~300~~ As to the latter request, it need only be said that it was so alleged in the complaint, and not denied in the answer. A finding is unnecessary where a fact is admitted by the pleadings.

The other proposed amendments and additions to the findings will be noticed, so far as material, in another connection.

Two principal questions were presented to the trial court: 1. Was said trust deed made by Mrs. Maxwell with intent to delay or defraud her creditors? 2. If so, did the plaintiff waive its right to attack it and to have it declared void?

It is conceded that if the plaintiff is estopped from attacking said trust deed upon the ground that it was made with intent to delay or defraud creditors, it is immaterial to the plaintiff whether it was so made or not.

Appellant contends, however, that the conclusion of the court "that plaintiff waived its right to attack said trust deed," if regarded as a conclusion of law, is not sustained by the findings; and, if regarded as a finding of an ultimate fact, is not justified by the evidence; and this contention I think must be sustained.

This question of waiver cannot be discussed without assuming that the trust deed was made with the fraudulent intent charged, for unless there was first a fraud there could be no waiver; and the court, in finding that the plaintiff waived the fraud, impliedly found that the deed was fraudulent and would have been void as to the plaintiff but for the waiver.

The facts upon which counsel for respondent base their argument that plaintiff waived the fraud are stated in their brief to be: that the bank had full knowledge of the making of the trust deed by which the property was conveyed for the benefit of the children; that it was recorded; that it knew of the mortgage upon the homestead and of the general embarrassment of the defendants in meeting their obligations; that all the encumbrances on Mrs. Maxwell's property were of record, and "after knowing these facts he (the president of the bank) entered into an agreement whereby he accepted for the bank a

mortgage to the bank"; and the principle which counsel say must control is "that a man who does not speak when he ought, shall not be heard when he desires to speak."

If Mrs. Maxwell had informed the bank of her intention to place the property in question beyond the reach of her creditors, ³⁸⁷ or sought Mr. Elliott's advice in the matter, the maxim might have an application. But "it is an essential element of estoppel by conduct that the party claiming the estoppel should have relied upon the conduct of the other, and was induced by it to do something which he otherwise would not have done": *McCormick v. Orient Ins. Co.*, 86 Cal. 260. It is not pretended that the plaintiff induced the trust deed to be made, or advised that it be made, or that subsequent to the making of it anything was done in relation to the trust property by Mrs. Maxwell or the trustee which, but for the conduct of the plaintiff, would not have been done. On the contrary, a delay in the commencement of legal proceedings and an attachment of the property conveyed by the trust deed was made upon the express condition that no conveyance of her property or change in its situation should be made. This promise is not controverted, except by the testimony of Mrs. Maxwell that she did "not remember it." Neither the statement of counsel for respondent, nor the findings of the court, nor the testimony of any witness shows that Mrs. Maxwell did anything in relation to the property in question, in consequence of the conduct of the plaintiff, that she would otherwise not have done, except to convey the property to the trustee in consequence of the announced intention of the plaintiff to commence legal proceedings for the collection of its claim against her. The equitable maxim, invoked by counsel, surely cannot be based on that, nor indeed, do they claim any such basis for the waiver or estoppel existed, nor even that there was any verbal agreement or understanding that the validity of the trust deed would not be attacked.

It was said by Sir Edward Coke, referring to the statute of 13 Elizabeth, that if there is actual fraud at the outset of a transaction nothing afterward can "anyways salve or amend the matter." It is conceded that this is not now the broad and unbending rule. The exceptions to it are stated in *Bigelow on Fraud*, volume 2, pages 407, 408, to be cases of present or subsequent consent or ratification by the creditor, and an undoing of the fraud, as by a reconveyance before proceedings are commenced. We do not think that the acts of the plaintiff, which defendants call "a waiver," amount to a subsequent consent or

ratification by the creditor. "To make out a case of abandonment ³⁶⁸ or waiver of a legal right there must be a clear, unequivocal, and decisive act of the party showing such a purpose, or acts amounting to an estoppel on his part": *Ross v. Swan*, 7 Lea, 467.

"A waiver is the intentional relinquishment of a known right": 28 Am. & Eng. Ency of Law, 526.

The conclusion of the court below that plaintiff waived the fraud of defendants was based, as the evidence and the findings conclusively show, wholly upon the fact that it took the note and mortgage with knowledge of the financial embarrassment of Mr. and Mrs. Maxwell, and of the making and recording of the trust deed. Those facts do not justify the inference that the plaintiff intended to waive the fraud. Nothing was said upon that subject. No stipulation to that effect was inserted in the note or mortgage. The only inference to be drawn from the mortgage is that of a condition attached by the law to all mortgages, namely, that the mortgaged property shall be first exhausted, and if that proves insufficient a judgment for the deficiency shall be docketed which may be enforced against any other property liable to execution. It is not contended that this statutory right was waived as to any other property than that fraudulently conveyed, though I can see no logical or satisfactory reason why the supposed waiver would not equally apply to such other property. Any other interpretation of the law, or inference of fact, would make fraud a virtue to be carefully protected and nurtured into full fruition. There was no dealing with the trustee in relation to the trust property. From the time the trust deed was delivered Mrs. Maxwell was a stranger to the title of the property thereby conveyed. She had no authority to act concerning it. She could neither exempt it from the payment of her debts nor apply it thereto. The giving of a mortgage as security for an antecedent debt requires no new consideration to support it, nor does it impose upon the mortgagee any condition not expressed upon its face other than those provided by law. The note and mortgage were in writing and expressed the whole agreement of the parties. This transaction falls far short of "clear, unequivocal, and decisive" evidence of a purpose on the part of the plaintiff to waive a legal right given it by the solemn act of the mortgagors and in the absence of such evidence a court ³⁶⁹ of equity will not infer a waiver. As in all cases where a mortgage is taken to secure a

debt then due, the taking of the security operated to suspend the right of proceeding against the property fraudulently conveyed, or any other property of the debtor, until the mortgaged property should be exhausted and a deficiency judgment docketed; but we cannot perceive any principle upon which such suspension of the remedy without more should operate more favorably upon property fraudulently conveyed than upon property still remaining in the hands of the debtor, all being alike subject to the process of the law in favor of existing creditors.

Respondents cite several authorities, but none of them sustain their contention that the facts of this case show a waiver on the part of the plaintiff. Our attention is particularly called to the case of *Pell v. Tredwell*, 5 Wend. 661, from which they quote the following passage: "A family settlement—that is, a conveyance by a parent of all his real estate to a daughter for the benefit of herself and her brothers and sisters—made bona fide, will not be set aside in favor of a creditor at the time of the conveyance by whose advice and procurement the settlement was made, the creditor having at the time ample security for the money due him by mortgages upon specific portions of the estate, but which, after a lapse of ten years, proved insufficient at a forced sale to satisfy his demand. Nor will the creditor be permitted to raise the residuum of his debts by sale of the lands not covered by his mortgages." No one doubts that a voluntary conveyance, "made by the advise and procurement of a creditor," is valid as to him.

Wolf v. Van Metre, 23 Iowa, 397, cited by respondents, lends no support to their contention. There the husband gave a note to the plaintiff for his personal debt, and his wife signed it as surety and gave a mortgage on one parcel of land to secure it. She afterward, in good faith, made a voluntary conveyance of other lands to her children, and, after the last-mentioned conveyance was made, the plaintiff, with knowledge thereof, surrendered his note and mortgage and took a new note, and a mortgage executed by the wife, on the lands conveyed to the children. The court held: "Where the voluntary conveyance is made in good faith, and the subsequent purchaser or encumbrancer has ³⁷⁰ notice of it, he cannot defeat it." One material distinction between that case and this is that here the voluntary conveyance was not made in good faith, but with an undisputed fraudulent intent; and another is that under the laws of Iowa, as declared by the court in that case, the wife was not personally liable upon the note; that she could only create

a liability against her property, and could not, therefore, make a conveyance in fraud of her creditors, who could have no legal or equitable right in any of her property except that specially charged.

In the case of *Zuver v. Clark*, 104 Pa. St. 222, the statement of facts shows that the creditor was present at the execution of the deeds alleged to be fraudulent, and was a subscribing witness to their execution, and that the exchange of properties was made upon his recommendation.

Bobb v. Woodward, 50 Mo. 95, cited by respondents, was the case of an assignment to hinder and delay creditors. It was held that the creditors might have treated the sale as a nullity, but, having failed to do so, and having lain by and suffered the assignee to carry on the business in his own name and with his own money and credit, to sell out and replenish the stock, and engage in other transactions based on their acquiescence, the creditors were estopped. But here there was no change in the property by the trustee or the beneficiaries induced or acquiesced in by the creditors. None of the cases cited by respondent are more nearly in point than those above noticed. The burden of proving a waiver of or acquiescence in the fraud is upon the defendants, and such waiver or acquiescence cannot be inferred from the facts appearing in the evidence in this case.

It is further contended by respondents that plaintiff was not a judgment creditor having a lien upon the property in controversy, and was not, for that reason, entitled to redeem from the sheriff's sale to Etchepare.

This contention is based upon two grounds: 1. That plaintiff waived the fraud, and thereby admitted the title of the trustee; and 2. That admitting the trust deed was made to delay and defraud creditors as alleged, the judgment lien could not attach to the land because the conveyance was operative between the parties, and hence there was no title or interest in Mrs. Maxwell to which the lien could attach.

371 The first of these grounds has been disposed of and need not be further noticed.

The second ground is wholly untenable. The code expressly declares that such transfer "is void against all creditors of the debtor." "A void thing is as no thing." So far as existing creditors are concerned, the title and ownership of the property remains in the fraudulent grantor as fully as though no transfer had been attempted.

In 1 Freeman on Executions, section 136, it is said: "As

against the fraudulent transferee the creditor may seize the property, whether real or personal, as that of the fraudulent vendor, and may proceed to sell it under execution. The title transferred by such sale (on execution) is not a mere equity—not the right to control the legal title and to have the fraudulent transfer vacated by some appropriate proceeding; it is the legal title itself, against which the fraudulent transfer is no transfer at all.”

This language was quoted and approved by this court in *Judson v. Lyford*, 84 Cal. 507. See, also, *Bull v. Ford*, 66 Cal. 176, where the same point was decided.

The case of *In re Estes*, 6 Saw. 459, cited by respondents, appears to sustain their contention; but as the point is conclusively settled by our own decisions it is not necessary to review that case.

If it be true, as the authorities clearly hold, that so far as it is necessary for the protection of creditors the title and ownership remains in the fraudulent grantor, and that a sale under execution will pass the legal title to the purchaser, it must logically follow that a judgment duly docketed becomes a lien on the real estate so fraudulently conveyed. If there is nothing to which a judgment lien could attach, there can be nothing which would pass by a sale on execution.

I therefore conclude that the plaintiff had a judgment lien, and was entitled to redeem the property from the sale under execution issued upon the Etchepare judgment.

Another question should be briefly noticed. The answer alleges, and the court found, that aside from the property embraced in the trust deed Mrs. Maxwell owned real estate aggregating several thousand dollars over encumbrances, and was possessed of a large amount of personal property, unincumbered, aggregating in value between five and six thousand dollars.

³⁷² This is not a finding that the trust deed was not made to delay and defraud creditors, though competent as evidence tending in some measure toward that conclusion, though far from being in itself conclusive. In *Bigelow on Fraud*, volume 2, page 393, it is said: “Indeed, it matters not, where personal intent to defraud is shown, that the fraudulent conveyance, if allowed to stand, would not harm anyone, by reason of the fact that the debtor has other property ample in amount within the reach of his creditors”; and in *Hager v. Shindler*, 29 Cal. 60, it was said: “A rich man may make a fraudulent deed as well as one who is insolvent”: See, also, *Bull v. Bray*, 89 Cal. 300.

There can be no question, upon the evidence appearing in the record, that there was on the part of the grantor such personal intent to defraud, and the facts stated in said finding do not overcome that evidence; and, besides, it is a finding of probative facts merely, and not of the fact of fraudulent intent or its opposite.

The evidence upon which that finding is based is also used, in argument, to show that there was personal property out of which plaintiff's deficiency judgment could have been satisfied. The return of the sheriff of no property found, and Mrs. Maxwell's statement to the officer that she had no property, is conclusive upon that point, if it were material, a point we need not discuss. Besides, the finding relates to the date of the trust deed, and not to the date of the execution.

The conclusion "that plaintiff waived its right to attack said trust deed," not being justified by the findings or the evidence, a finding upon the issue of the fraudulent intent with which it was charged to have been made is essential.

I advise that the judgment and order appealed from be reversed and the cause remanded.

Searls, C., and Chipman, C., concurred.

For the reasons given in the foregoing opinion the judgment and order appealed from are reversed and the cause remanded.

Henshaw, J., Garoutte, J.,
Harrison, J., McFarland, J.,
Temple, J.

ESTOPPEL.—Estoppel in pais can be set up and relied upon only by a party who has been actually misled to his injury: *Boylston v. Rankin*, 114 Ala. 408; 62 Am. St. Rep. 111.

FRAUDULENT TRANSFERS—WAIVER OF RIGHT TO ASSAIL.—As to when a creditor waives his right to attack a conveyance as fraudulent, see monographic note to *Adlum v. Yard*, 18 Am. Dec. 621.

FRAUDULENT TRANSFERS—WHO MAY ATTACK.—Only those persons whose rights are interfered with; those who are injured by conveyances alleged to be fraudulent, have the right to interfere to set them aside: *Yeend v. Weeks*, 104 Ala. 331; 53 Am. St. Rep. 50. Existing creditors may avoid a conveyance for fraud at law; subsequent creditors can only do so on proof of actual or express fraud against them: See note to *Henderson v. Henderson*, 19 Am. St. Rep. 657. A voluntary conveyance, however, made with intent to hinder, delay, and defraud creditors, is void as against subsequent, as well as prior creditors: *Gilliland v. Jones*, 144 Ind. 662; 55 Am. St. Rep. 210. A creditor, in order to reach property conveyed by a fraudulent trust deed, void as to him, must get possession of the property by obtaining judgment and having it seized

under execution: *Grimsley v. Hooker*, 3 Jones's Eq. 4; 67 Am. Dec. 227.

JUDGMENT LIEN.—A judgment recovered subsequently to a fraudulent conveyance, and based upon indebtedness contracted partly prior and partly subsequent thereto, is a lien upon the property of the judgment debtor only to the extent of the indebtedness contracted prior to the fraudulent conveyance: *Henderson v. Henderson*, 133 Pa. St. 399; 19 Am. St. Rep. 650.

FRAUDULENT TRANSFER WHERE DEBTOR OWNS OTHER PROPERTY.—In Indiana, to avoid a fraudulent conveyance it must be both alleged and proved that at its execution and also when the suit was brought the debtor did not have sufficient property, subject to execution, to pay his debts: *Nevers v. Hack*, 138 Ind. 260; 46 Am. St. Rep. 380; *Brumbaugh v. Richcreek*, 127 Ind. 240; 22 Am. St. Rep. 649. Contra, *Probert v. McDonald*, 2 S. Dak. 495; 39 Am. St. Rep. 796.

ESTATE OF BROWN.

[123 CALIFORNIA, 309.]

EXECUTION, EXEMPTION OF PROCEEDS OF LIFE INSURANCE WHERE THE PREMIUMS EXCEED THE AMOUNT SPECIFIED IN THE STATUTE.—If a statute exempts from execution all moneys arising out of any life insurance on the life of the debtor, if the annual premium paid does not exceed five hundred dollars, and a policy is obtained, the annual premium on which is a greater sum, no part of the proceeds of such policy is exempt.

Harold Wheeler, for the appellant.

Roger Johnson, Morrison, Foerster & Cope, Mullany, Grant & Cushing, George C. Ross, T. C. Coogan, and Edward F. Fitzpatrick, for the respondents.

400 THE COURT. The appeal in this case is from an order of the superior court denying appellant's petition asking that certain life insurance moneys be set apart to her and to her minor children. There is no controversy as to the facts.

The decedent, A. Page Brown, died testate in 1896, leaving a widow and three minor children. The inventory showed the value of the estate to be forty-three thousand eight hundred and sixty-nine dollars and twenty-one cents, of which twenty-five thousand dollars consisted of moneys collected by appellant, as executrix, from the New York Life Insurance Company upon its policy, No. 356,577, issued to her husband some six years prior to his death, and which was made payable to his estate. All of the estate was community property. The estate was indebted to such extent that the total assets of the estate, after deducting expenses of administration, a homestead, family allowance, ⁴⁰¹ et cetera, is not sufficient for the judgment of the creditors in full.

The widow's petition is based upon the provision of section 1465 of the Code of Civil Procedure, which requires the court to set apart to the widow all property exempt from execution, and upon that portion of section 690 of the Code of Civil Procedure, which reads as follows:

"The following property is exempt from execution, except as herein specially provided: 11. All moneys, benefits, privileges, or immunities accruing, or in any manner growing out of any life insurance on the life of the debtor, if the annual premiums paid do not exceed five hundred dollars."

Exemptions are the creatures of statutes and exceptions to the general rule. No property is exempt unless made so by express provision of law. No assumed legislative policy can justify the courts in adding to the statutory list of exemptions. Legislators are presumed to understand the force and effect of the language which is used and to have contemplated all circumstances which would make it desirable that other property not in the lists of exemptions should be added thereto. The language used is entirely unambiguous. The legislative intent is clear, and is to no extent defeated by executing the law as it reads. Under such circumstances it is fruitless to talk of the literal meaning of the language, and of other meaning than the literal meaning. In fact, no attempt is made to find any other meaning in the language. The attempt is to defeat the express legislative will, not by giving the language used another meaning, for that is impossible, but by saying the law as it plainly reads is unreasonable. What chance is there for the construction of the law? It simply says that moneys accruing upon an insurance policy issued upon the life of the judgment debtor are exempt if the annual premiums paid do not exceed five hundred dollars. It is as plainly said that if the annual premiums paid do exceed five hundred dollars no part of the same is exempt, as though it had been so added in words. And, besides, we do not expect to find in such a statute negative words, for nothing is exempt save what is expressly made so, and when a statute gives a list of exempt property it expressly provides that no other property is exempt. To construe an unambiguous ⁴⁰² statute is an attempt to defeat the expressed legislative will and not to ascertain it. Probably no one would ever have questioned this view, or contended that a statute means something different from what it plainly expresses, were it not for the fact that in 1868 a statute was enacted upon this subject, which, it is contended, was the source from which the present code provisions were derived: Stats. 1867-68, p. 500.

That provision is that moneys accruing from certain life insurance policies shall be exempt, "provided, however, this exemption shall not extend beyond such moneys, benefits, rights, privileges, and immunities as have been or might have been secured by the payment of an annual premium of five hundred dollars." The difference in the two statutes is obvious. The statute of 1868 exempts some portions of all moneys accruing upon certain policies, with a proviso that an exemption shall only extend to such benefit as might have been secured by the annual payment of five hundred dollars. It expressly exempts some portion of larger policies. The code provision only exempts money accruing upon policies where the annual premiums do not exceed five hundred dollars. It cannot be construed as exempting part only of any policy.

It is said that the statute is remedial and should be liberally construed to effect the purpose of the legislature. That is so, but that is not a liberal construction which defeats the plainly expressed purpose of the legislature. The purpose here is as plainly expressed as it could be, and is entirely accomplished by executing the unambiguous statute. An example of liberal construction would be to make such words as "tools of the mechanic," "implements of husbandry," et cetera, as comprehensive as possible. But it would not be a liberal construction of a statute which simply makes exempt policies upon which the annual premiums are less than five hundred dollars, to hold that it also makes exempt moneys due upon a policy upon which the annual premiums exceed five hundred dollars to the extent of benefits which could have been earned by an annual premium of exactly five hundred dollars.

The order appealed from is affirmed.

Hearing in Bank denied.

THE QUESTION PRESENTED in the principal case has not elsewhere, so far as we are aware, received judicial consideration. It is but a few years since the first statutes were enacted, in the United States, exempting from execution policies of life insurance and their proceeds, and, very singularly, but few cases have been presented to the courts of last resort under these statutes, though each of them, so far as our observation extends, was expressed in ambiguous language, well calculated to create doubt, and, consequently, to invite litigation. While, in the principal case, the court seemed to regard the question before it as too clear for controversy, we should ourselves, but for the decision, also have regarded it as beyond substantial doubt, but should have reached a conclusion directly adverse to that announced; or, in other words, we should have thought that so much of the proceeds would be exempt as might have resulted from a policy the annual premium of which was the amount designated in the statute.

HALL v. GLASS.

[123 CALIFORNIA, 500.]

A CHATTEL MORTGAGE MAY COVER UNPLANTED CROPS.

A CHATTEL MORTGAGE ON ALL CROPS AND PRODUCTS which are standing or growing, or which may thereafter during the continuance of the mortgage be sown, planted, cut, or harvested on designated land, sufficiently describes the crops which are to be subject thereto, and includes all crops planted during the life of the mortgage debt, though in the meantime the mortgagor has been declared an insolvent debtor, and the real property described in the mortgage and upon which the crops have been grown has been dedicated as a homestead.

INSOLVENCY PROCEEDINGS DO NOT SO DISCHARGE A DEBT SECURED BY A CHATTEL MORTGAGE ON UNPLANTED CROPS as to prevent the lien of the mortgage from attaching to such crops when subsequently planted by the mortgagor.

CHATTEL MORTGAGE—WHEN NOT A CONTRACT FOR CONTINUING PERSONAL SERVICES.—A covenant in a chattel mortgage of crops growing and to be grown, that the mortgagor will tend, protect, and take care of the crop, and deliver it to the mortgagee, is not a contract for continuing personal services, but is merely collateral to the real indebtedness and for the proper enforcement of the lien.

HOMESTEAD.—A DECLARATION OF HOMESTEAD ON PREMISES DESCRIBED IN A CHATTEL MORTGAGE of crops growing and to be grown thereon does not affect such mortgage with respect to crops planted after such declaration.

APPELLATE PROCEDURE—HARMLESS ERROR.—The failure to make a specific finding respecting an issue is not a ground for the reversal of a judgment, when it clearly appears that such failure can have injured no one.

W. S. Tinning, for the appellants.

Snook and Church, for the respondent.

501 PRINGLE, C. Appeal from judgment; with bill of exceptions. Action brought to foreclose a chattel mortgage upon crops growing and to be grown. Mortgage made to secure the payment of a note for fifteen hundred and fifty dollars, bearing date January 24, 1895, payable one day after date, and also 502 such other sums as the mortgagee might advance to the mortgagor during the continuance of the mortgage, provided that such advances shall be at the exclusive discretion and option of the mortgagee. The mortgage covers "all the crop and products of whatever nature which are now standing, or growing, or which shall or may hereafter at any time be sown, planted, cut, or harvested by the said party of the first part during the continuance of this mortgage, on the following described

lands and premises, and every part and portion thereof, to wit." Now follows description of two parcels of land, one owned by the mortgagor, A. W. Glass, and known as the "Glass ranch," and the other held by him under lease. "This mortgage is intended to cover all the land farmed by the said A. W. Glass." The mortgagor covenants that "he will carefully tend, take care of, and protect the said crop while growing and until fit for harvesting, and then faithfully and without delay, harvest, thresh, clean, and sack all the grain of every description raised upon said premises, and bale all the hay raised thereon in bales of approved and merchantable sizes, and put all the other products raised upon said premises in shape for market, and immediately deliver all said products into the possession of the party of the second part in the town of Pleasanton," et cetera.

A. W. Glass, the mortgagor, filed his petition in insolvency on October 23, 1895, and was discharged from his debts on March 11, 1896.

"Prior to the filing of the petition in insolvency, but subsequent to the making of note and mortgage," L. B. Glass made a declaration of homestead upon the "Glass ranch," and the same was set apart as homestead by the insolvency court by order of December 7, 1895. A. W. Glass has always continued in possession of the "Glass ranch."

In the foreclosure proceedings a receiver was appointed to take possession and manage the crops of the year 1895. And another receiver was appointed to take possession and manage the crops of 1896.

A decree was entered in favor of the plaintiff, directing the receivers to apply the proceeds of the crops of those two years in their hands toward the payment of the amount found due to plaintiff. No other relief is granted. Appeal from the ⁵⁰³ judgment is taken by A. W. Glass and L. B. Glass, who answered, as the wife of A. W. Glass. The defendant Veale sued as sheriff of Contra Costa county, and appointed assignee in insolvency of A. W. Glass, does not appeal.

There is no contest over the proceeds of the crop of the year 1895. The contention of the appellants is that the mortgage is not a lien upon the crop of 1896.

The first point made by the appellants is that the crops to be grown after 1895 are not designated with sufficient certainty to create a lien thereon, against the homestead right of the appellants or the insolvency of A. W. Glass. There is no serious contention that a chattel mortgage cannot cover crops un-

planted. That point was directly decided in *Arques v. Wasson*, 51 Cal. 620; 21 Am. Rep. 718. The contention is, that the subject of the mortgage must be clearly defined, and that this mortgage does not define them with sufficient certainty, there being no defined limit to the continuance of the mortgage, during which the lien is to continue. In support of this position counsel cite several cases from Iowa and one from Nebraska. The leading case in Iowa is *Pennington v. Jones*, 57 Iowa, 37. The mortgage covered sundry acres of grain of different kinds, "to be sown and raised on the land leased of Barber McDowell and now occupied by said W. A. McDowell (the mortgagor), lying and being in section 17," et cetera. The court held the mortgage invalid, because it did not state "that all the crops to be grown for any specified number of years were mortgaged," saying that "before a mortgage on crops to be sown or planted can be regarded as valid, as against third persons, the year or term the crops are to be grown must be stated."

In *Muir v. Blake*, 57 Iowa, 662, the mortgage said, "all the crops raised by me in any part of Jones county for the term of three years." The court held that this was a "roving description, with nothing in the way of identification to suggest inquiry where the crops may be found, except the body of the county."

In *Eggert v. White*, 59 Iowa, 464, "all and the entire crop of flax and wheat and other grain or produce raised on the east half of" Held invalid, "because the year the same was to be grown is not stated."

⁵⁰⁴ In *Cole v. Kerr*, 19 Neb. 553, "seventy-five acres of corn to be planted, fifty acres of broom corn to be planted, tended and delivered in June," et cetera. Held that "to be planted" would apply to all corn "which might thereafter be found in Adams county."

In all of these cases there are elements of uncertainty, either in the place or time of the planting. In the present case the description of the premises is specific. The alleged element of uncertainty is the term "during the continuance of the mortgage." The appellants contend that the provision in the mortgage, that it is intended to secure any future advances which mortgagee may make to mortgagor, introduces an element of uncertainty in this, that by such advances the mortgage may be kept alive indefinitely beyond the statutory time of the note.

There is, however, under our decisions, a limit to the continuance of a mortgage as against subsequent purchasers or en-

cumbrancers. In a line of cases in this court, beginning with *Lord v. Morris*, 18 Cal. 482, it has been well settled that subsequent purchasers of encumbrancers may rely upon the apparent expiration of the mortgage, and will hold against a prior mortgage in spite of an extension or renewal of the debt beyond its statutory life.

By the same reasoning subsequent advances, although contracted for by the mortgagor, cannot extend the apparent maturity of the mortgage against subsequent purchasers. This rule, in reference to future advances, as laid down in the cases, is a limit to the life of a mortgage. It is said in *Tapia v. Demartini*, 77 Cal. 387, 11 Am. St. Rep. 288, that where a mortgage is given to secure future advances the mortgagee cannot safely make such advances where he has actual notice of a sale or encumbrance made by the mortgagor. And in *Jones on Chattel Mortgages*, third edition, section 97, it is said: "The general rule is, that a prior mortgagee is affected only by actual notice of a subsequent encumbrance, and not by constructive notice, but there are numerous authorities which hold that if the mortgagee has the option to make the advances or not, as he chooses, the mortgage, as to each advance made upon it, is to be regarded as a fresh mortgage, and is subject to the lien of any encumbrance which has been duly recorded at the time ⁵⁰⁵ the advance is made, whether the mortgagee has actual notice of it or not."

In view of these authorities, the term "during the continuance of this mortgage" has a defined meaning. It cannot be said, as claimed by the appellants, that the mortgage could be continued ad infinitum.

In any event the mortgage is good to the extent of the crops planted during the life of the note. The uncertainty of description insisted upon by appellants is in the doubtful period beyond the life of the note. There can be no question that the mortgage may be good to the extent of what is certain and definite, even if it be bad for the rest. In one of the cases cited by the appellants (*Luce v. Moorehead*, 73 Iowa, 499, 5 Am. St. Rep. 695), it was said: "An instrument may be valid as to the property sufficiently described, and void for the uncertainty of the description of other property." This view of the present case is sufficient to sustain the ruling of the court below, which extends only to the crops of the first two years.

Another contention of the appellants is, that the proceedings in insolvency having been instituted in 1895, there was then no

lien upon the crops of 1896 which were then unplanted, and the debt being discharged by the insolvency, there was no debt to sustain any lien to arise thereafter when the crop began to have an existence. They cite the case of *Mayer v. Taylor*, 69 Ala. 403, 44 Am. Rep. 522, to the effect that the lien actually attaches only when the property comes into existence. But the case recognizes the equitable lien attaching to the potential existence, by virtue of which the mortgage of an unplanted crop is valid. The case holds that this equitable mortgage was superior to a subsequent mortgage made after the crop was planted. And our case of *Arques v. Wasson*, 51 Cal. 620, 21 Am. Rep. 718, rests upon the same ground—that there is in such cases a potential existence which sustains the lien of the mortgage. After this lien is created insolvency proceedings cannot affect the debt to the impairing of the lien. In *Arques v. Wasson*, 51 Cal. 620, 21 Am. Rep. 718, this lien prevailed against an attachment and execution. In *Mayer v. Taylor*, 69 Ala. 403, 44 Am. Rep. 522, it prevailed against a mortgage made after the crop was planted. Certainly, proceedings in insolvency have no stronger legal or equitable force than purchasers for valuable consideration.

506 But, say the appellants, this is a contract for continuing personal services. And they cite the case of *Mooney v. Detrick*, 85 Cal. 549, which holds that the debt due by one who engages the time and services of another is discharged by the insolvency. Conceding, without deciding, that the converse of this is sound—that a covenantor is released from his contract for service by insolvency, yet the personal services in this case are not the debt or of the essence of the debt. The covenant of this mortgage, that the mortgagor should tend, protect, and take care of the crop and deliver it to the mortgagee, is merely collateral to the real indebtedness and for the better enforcement of the lien. By virtue of the debt and the lien the mortgagee is entitled to hold all the crops grown and tended by the mortgagor; and the mortgagor covenants to tend and protect the crops and deliver them to the mortgagee. That his services in that respect are not the debt which the mortgage secures, nor of the essence of the debt, is made clear by the fact that provision is made in the mortgage that in case of his breach of this covenant the mortgagee might enter upon the premises and take all measures necessary for the protection of the crops and products, and expressly appointing the mortgagee the attorney of the mortgagor for that purpose. The covenants in that respect are very sig-

nificant. "And the party of the first part does hereby covenant and agree to and with the said party of the second part, its successors and assigns, that he and they will carefully tend, take care of," et cetera. "That in default of any or either of the above acts to be done by the said party of the first part, the party of the second part, his successors or assigns, may enter into or upon the said premises and take all measures necessary for the protection of said crops or products or his interest therein, et cetera. . . . And the said party of the first part does for the purpose aforesaid make, constitute, and appoint the said party of the second part, or his successors or assigns, his true and lawful attorney irrevocable, with full power to enter upon said premises and take possession of said crops, and take care of, protect, thresh, clean, and sack or bale the same in case of any default on the part of the covenants herein contained." It would be unreasonable to hold that a release of the mortgagor from these subsidiary services would destroy the lien which is so carefully guarded against any injury to arise from the absence of the subsidiary services.

507 And the case is stronger if possible against an insolvent who himself institutes proceedings to disqualify himself.

3. Substantially the same argument is urged by appellants in reference to the declaration of homestead made after the mortgage and before the crop of 1896 was planted. But the argument has no greater force in favor of a homestead right than in favor of a sale for value, or proceeding in insolvency. Establish the fact that there is sufficient potential existence in the coming crops to sustain a legal or equitable lien upon them, and the lien must prevail against subsequent purchasers of every kind; otherwise it is no lien at all.

The objection made in all the cases to the descriptions is that they are not sufficient to impart notice. In one of the cases cited by appellants the certainty of description required is said to be "sufficient, if it be such as to enable third parties by inquiries, which the instrument itself indicates and directs, to identify the property covered by it": *Muir v. Blake*, 57 Iowa, 665. As the alleged element of uncertainty in this case was the continuance of the mortgage, the fact that it was in force in 1895 and 1896 was within the knowledge of one homestead claimant and easily ascertained by the other.

Appellants insist that there is error in not making a specific finding that L. B. Glass is the wife of A. W. Glass. But her rights were protected; she was a party to the action; she an-

swered as the wife, declaring herself to be his wife; it is found that she made a declaration of homestead upon his property; and she set up in her answer the homestead which she had declared upon the land of her husband. Under these circumstances, the absence of a special finding has done her no harm.

Criticism is made of the form of the decree, the point of objection being that it contains the usual clause that the defendants and those claiming under them are barred and foreclosed of all equity of redemption in or claim to "the mortgaged property," but that no sale of property is ordered. The operative words of the decree are that the moneys which have come into the hands of the receivers from the sales of the crops of 1895 and 1896 be applied toward the payment of the ascertained debt. These sales appear to have been made by the receivers under orders of court presumably correct, as no objection to them appears in the records. The clause by which the defendants are ~~are~~ barred and foreclosed of ~~any~~ right of redemption "in the mortgaged property" cannot be appropriately applied to any future crops not sold or ordered to be sold, but may properly be referred to what have been sold by the receivers, and the proceeds of which are ordered to be applied toward the payment of the debt. The respondent in his points and authorities declares that he "is satisfied with the decree"; and, as there is nothing in the decree reserving any right to further proceedings in the action, the jurisdiction is exhausted, and the clause in question, if error, is not prejudicial.

I advise that the judgment be affirmed.

For the reasons given in the foregoing opinion the judgment is affirmed. Garoutte, J., Harrison, J., Van Dyke, J.

CHATTEL MORTGAGE—UNPLANTED CROP.—A mortgage of unplanted crops is valid and creates an equitable lien which attaches as soon as the crops come into existence, and may then be enforced: *Donovan v. St. Anthony etc. Elevator Co.*, 7 N. Dak. 518; 66 Am. St. Rep. 674. Chattel mortgage on unplanted crop is void as against subsequent purchasers or attaching creditors: *Long v. Hines*, 40 Kan. 220; 10 Am. St. Rep. 192. As to what is sufficient description in a chattel mortgage, see monographic note to *Barrett v. Fisch*, 14 Am. St. Rep. 239; *Davis v. Pitcher*, 97 Iowa, 13; 59 Am. St. Rep. 392.

INSOLVENCY WILL NOT AVAIL AS A DEFENSE, nor bar a recovery of money promised in an action at law, when the consideration is an act to be performed subsequent to the insolvency: *Smith v. Busby*, 15 Mo. 887; 57 Am. Dec. 207.

HOMESTEAD.—Subsequent adoption of real estate as homestead cannot affect the validity of the owner's undertaking to sell and convey it, or release him from his obligation entered into before it

was made a homestead: *Yost v. Devault*, 3 Iowa, 345; 66 Am. Dec. 92. Same rule applied to judgment lien: *Bunn v. Lindsay*, 95 Mo. 250; 6 Am. St. Rep. 48.

APPELLATE PROCEDURE—HARMLESS ERROR.—Error without prejudice is no ground for a reversal of judgment: *Farwell Co. v. Wolf*, 96 Wis. 10; 65 Am. St. Rep. 22; *Osborne v. Francia*, 38 W. Va. 312; 45 Am. St. Rep. 859. Refusal of trial judge to find upon material issues is error: *Farmers' etc. Co. v. New York etc. Ry. Co.*, 150 N.Y. 410; 55 Am. St. Rep. 689. But a judgment fully sustained by findings of fact and conclusions of law cannot be disturbed on appeal on the ground that a referee has failed to find on all the issues raised by the pleadings: *Adams etc. Co. v. Deyette*, 5 S. Dak. 418; 49 Am. St. Rep. 887. When a failure to find on a material issue is not reversible error: *Hague v. Nephi Irr. Co.*, 16 Utah, 421; 67 Am. St. Rep. 634; *Maynard v. Locomotive Engineers' etc. Assn.*, 16 Utah, 145; 67 Am. St. Rep. 602.

AGAR v. WINSLOW.

[123 CALIFORNIA, 487.]

ELECTION BETWEEN INCONSISTENT REMEDIES.—A party cannot be held to have made an election between two inconsistent remedies, when it does not appear that he was entitled to pursue both. Hence, one who commences an action of ejectment against his tenant is not thereby precluded from maintaining an action of unlawful detainer against the same tenant, though the action of ejectment has not been dismissed, if it does not appear that such action could have been maintained.

LANDLORD AND TENANT—EVICTION.—The commencement of an action of ejectment by a landlord against his tenant is not an eviction, if the subtenants continue in undisturbed possession, and, by the advice and consent of the landlord, pay to their immediate lessor all rents accruing by the terms of their leases, though their lessor is a sublessee of the original lessor, and does not pay to the latter his rents, he taking no proceeding for their collection.

William H. Chapman and Edward P. Cole, for the appellant.

Freeman & Bates, for the respondent.

588 GRAY, C. This is an unlawful detainer case. The defendant Winslow appeals from a judgment against him for the possession of the property and for one thousand dollars' rents unpaid, so far as said judgment awards to plaintiffs said sum of one thousand dollars, and from an order denying said defendant's motion for a new trial.

Joseph Macdonough, being the owner of the premises in controversy, made a will in which he appointed the plaintiffs herein as his executors and trustees; thereafter, in 1895, he died, and

plaintiff John G. Agar was appointed by the court as sole executor ⁵⁸⁹ of his said will, and on October 15, 1895, he alone, both as trustee and executor, leased said premises to Winslow for the term of five years from October 15, 1895, at the monthly rent of two hundred and fifty dollars, payable in advance. This rent was paid by Winslow to Agar for all the time up to and including July 15, 1896, since which time no rent has been paid to plaintiffs.

The plaintiffs herein began this suit on October 20, 1896, and, after stating in their complaint the foregoing undisputed facts, say that the said premises were by the superior court distributed to the plaintiffs on May 12, 1896, to be by them held in trust according to the terms of the will; that since the date of such distribution they have been entitled to receive the rent due for such premises; that on October 9, 1896, plaintiffs served a notice on defendants informing them of the decree of distribution, and that because of such decree Winslow thereafter had held said premises as tenant, holding over from month to month under said lease, that there was then due under said lease seven hundred and fifty dollars, and that they pay that sum within three days or quit and surrender possession of the property; and that defendants having done neither of these things, plaintiffs demand restitution of the premises and judgment for the seven hundred and fifty dollars, together with two hundred and fifty dollars for each month thereafter that defendants shall withhold possession of said premises. The defendant Winslow in his answer denies that he is a tenant holding over after the expiration of the lease, or that the lease terminated with the entry of the decree of distribution, but, on the contrary, says that the said lease is in full force and effect for the term of five years from July 25, 1895. The answer then alleges an eviction from the premises of defendant by plaintiffs on the thirteenth day of July, 1896; that Winslow had subleased to one George Sesnon, and that Sesnon had again subleased to the other defendants; that plaintiffs on the said thirteenth day of July, 1896, wrongfully brought an action against defendants in ejectment to recover rent and the possession of the said premises on the ground that the said lease had expired; that by said action defendant's rights of possession had been slandered, and he had been unable to collect any rents since the said thirteenth day ⁵⁹⁰ of July, 1896, and that he had been harassed and disturbed in his possession thereby. A trial was had and the court found all the allegations of the complaint to be true, and that there

had been no eviction by plaintiffs, but that plaintiffs did sue defendants in ejectment on July 13, 1896.

The defendant, to support his answer, put in evidence the pleadings and papers on file in the case of *Agar v. Winslow et al.*, begun in the superior court, July 13, 1896. The complaint in that case shows that it was an action to recover possession of the same premises involved in this suit, and for the value of the rents, issues, and profits, on the ground that the lease, which is the same lease mentioned in this case, was void, and that the defendants were trespassers. It appeared on the trial that this ejectment suit was still pending, and that Sesnon, to whom Winslow leased the premises, was a party defendant in the ejectment suit, but is not a party to this suit. It further appeared at the trial that on the advice of plaintiffs the tenants in possession paid to their lessor, Sesnon, all rents due from them, and that Sesnon had refused to pay Winslow because, as he alleged, of the possibility of the lease from Agar to Winslow being declared void or forfeited, but Winslow had, however, taken no legal proceedings for the collection of the rent from Sesnon, and that Sesnon was away on the high seas at the time of the trial. On this condition of the case the appellant contends: "1. That the remedies of ejectment and unlawful detainer are inconsistent, and that, having chosen their option to bring ejectment, plaintiffs' election is final, and they cannot pursue the other remedy of unlawful detainer."

The rule contended for by appellant is stated by the court of appeals of New York in *Rodermund v. Clark*, 46 N. Y. 354, as follows: "Where there exists an election between inconsistent remedies the party is confined to the remedy which he first prefers and adopts." Before one can exercise an option or preference between two things, both those things must have an actual existence. The defendant, therefore, cannot defend in this action of unlawful detainer on the theory that plaintiff, in beginning the suit in ejectment, exercised his right of election between two remedies, unless he makes it appear that both these remedies were open to plaintiff. If plaintiff was mistaken and ⁵⁹¹ undertook to avail himself of a remedy that he was never entitled to, this does not prevent him from subsequently availing himself of a remedy that he is entitled to under the facts of the case: *Bunch v. Grave*, 111 Ind. 351. The defendant should have shown by the allegations of his answer and his evidence that the remedy of ejectment was available to plaintiffs: *Mackubin v. Whetcroft*, 4 Har. & McH. 135. On the contrary,

the facts appearing in defendants' answer, as well as in the evidence at the trial, tend to negative the idea that plaintiff had any right to institute the ejectment suit. The action of ejectment is always based on the theory that the defendant is wrongfully in possession and a trespasser on the premises sought to be recovered. It appears in this case that Winslow went into possession of the premises under a lease from plaintiff, and that his rent was paid in advance to a time subsequent to the date of the commencement of the ejectment suit. The defendant in his answer alleges that this lease is in full force and effect; if that be true, then the defendant was rightfully in possession, and certainly the action of ejectment would not lie; but even ignoring this affirmative statement of the answer, and treating the lease as having been terminated by the decree of distribution, the defendant has nevertheless remained in possession, paying rent to plaintiff entitling him to hold the possession as against plaintiff to a date after the commencement of the ejectment suit, and creating a tenancy from month to month at the rent reserved in the lease: Civ. Code, sec. 1945. There was no notice given to terminate this lease until long after the beginning of the ejectment suit, nor is there any fact alleged or proved to show that the relation of landlord and tenant ever ceased to exist between plaintiffs and defendant up to the giving of the notice to pay rent or quit just before the commencement of the present action. I have examined all the cases cited in appellant's brief to show that where a party elects between inconsistent remedies he is limited to the one he first seeks to avail himself of, and find in all those cases where they refer to that doctrine at all, it appeared that the first remedy sought was a real remedy available to the plaintiff. *Holt Mfg. Co. v. Ewing*, 109 Cal. 356, is a case of that kind, and is in consonance with all the other cases cited on the subject. No case has been ⁵⁹² called to my attention, nor do I believe that any can be found, which holds that a person is estopped from pursuing a remedy that he is entitled to, because he has endeavored to avail himself of another remedy that he never was entitled to. If this were the rule, then a mere mistake of judgment would result in depriving one of valuable rights. In the language of respondents' brief, "as we understand it, where an election is claimed the facts must be such that the rights of the parties may be mutual. In other words, the circumstances must be such that each may be bound by the election, and if one of them is not bound the other cannot be. Plaintiffs cannot be

bound to treat defendant as a trespasser while defendant retains the right to compel them to treat him as a lessee." It would, therefore, seem that the ground for a reversal of the judgment, based on the principle that where a party is entitled to two inconsistent remedies his election between them is irrevocable, is not well taken in this case because it does not appear that plaintiffs were entitled to the first remedy sought for by them.

The next and only remaining ground of reversal contended for by defendant is stated by him as follows: "2. That the acts of plaintiffs were such as to evict defendant, and that the rent was suspended, and hence they could not maintain this action while the eviction continued."

Appellant's principal contention as to this eviction is that the ejectment suit had the effect to prevent his subtenants from paying their rent. The finding of the court on this subject, which is fully sustained by the evidence, reads as follows: "That, notwithstanding the commencement and pendency of the action hereinbefore described, the defendants Siebe, Waltz, Christensen, and Jorgensen have continued in the full and entire possession and enjoyment of all the premises described in the plaintiffs' complaint, and have, with the consent and upon the advice of plaintiffs, paid to their lessor, George H. Sesnon, all rents accruing and due from them to him, according to the terms of their lease from him; and the plaintiff has not in any way interfered with the collection of the rents from any tenant or subtenant of the defendants, but, on the contrary, has at all times advised such payments to be made, and the rents have been paid, as above set forth, to the said George H. Sesnon, who ⁵⁹⁸ has received monthly the rents accruing to him from his said tenants, Siebe, Waltz, Christensen, and Jorgensen, but he has not paid the same, or any part there, to said Winslow, nor has said Winslow taken any proceedings whatever for the collection of the same." It also appears from the evidence in the case that Winslow has a bond or contract from Sesnon in the sum of two thousand five hundred dollars, executed by three sureties for the payment of the rent by Sesnon.

I fully agree with the learned counsel for appellant that it is not necessary that there should be an actual ouster to constitute an eviction, but that any act of the lessor which results in depriving his lessees of the beneficial enjoyment of the premises constitutes an eviction. To this effect is the case of *Levitzky v. Canning*, 33 Cal. 299, and some other cases cited by appellants. But it appears that Winslow has not been deprived

of the beneficial use of the premises, at least by any act of plaintiffs, as they have advised the payment of the rent, and the rent in full has actually been paid by the subtenants to Winslow's lessee, and though Winslow has not received it from Session, his lessee, he has a right of action against both him and his sureties for it, and whatever may be the result in the case at bar he can collect his rent if his lessee and sureties are able to respond to a judgment. It will be seen by an examination of the case of *Levitzky v. Canning*, 33 Cal. 299, that the acts complained of as amounting to an eviction had the effect to make the tenants of the lessee quit the premises, leaving them vacant. Another case cited by appellant is *Leadbetter v. Roth*, 25 Ill. 587. In that case the subtenant was forbidden to pay any more rent to his lessor, and thereafter the first lessee had nothing more to do with the premises and the subtenant paid the rent directly to the landlord. The case of *Skaggs v. Emerson*, 50 Cal. 3, decided simply that while a landlord in violation of his lease withheld part of the premises from the possession of his tenant he could have no remedy in the courts against him. In the other cases cited by appellant the interference relied on as constituting an eviction was in every instance of such a character as to interfere with the lessee's enjoyment of the premises by depriving him of his right to collect rent or in some way rendering it inequitable for the landlord to collect rents from his lessee, and in none of them is ⁵⁹⁴ the lessee freed from his obligation to his landlord where he remains in possession and enjoyment of the premises, either personally or through his subtenants, with the power to collect rent from them. It will be unnecessary to consider respondents' point that the appeal should be dismissed.

For the foregoing reasons we advise that the judgment be affirmed.

Haynes, C., Britt, C., and Pringle, C., concurred.

For the reasons given in the foregoing opinion the judgment is affirmed. Garoutte, J., Harrison, J., Van Dyke, J.

ELECTION BETWEEN INCONSISTENT REMEDIES.—If a party mistakes his remedy he may sue again in proper form: See note to *Fowler v. Bowery Sav. Bank*, 10 Am. St. Rep. 489. Election to sue on a contract to purchase realty will not preclude the plaintiff from suing for damages for waste committed on the same property by the defendant while a lessee thereof, if the plaintiff had no cause of action, and failed in the first suit because the defendant had never elected to purchase the property. There can

be no election unless concurrent remedies exist between which the plaintiff had the right to elect: *Powell v. Dayton etc. R. R. Co.*, 16 Or. 33; 8 Am. St. Rep. 251. As to when an election is made, see *Field v. Great Western Elevator Co.*, 6 N. Dak. 424; 66 Am. St. Rep. 611; *Johnson-Brinkman etc. Co. v. Railway Co.*, 126 Mo. 344; 47 Am. St. Rep. 675.

LANDLORD AND TENANT—EVICTION.—As to what acts are sufficient to constitute an eviction, see *Barrett v. Boddie*, 158 Ill. 479; 49 Am. St. Rep. 172, and note.

WHYTE v. ROSENCRANTZ

[128 CALIFORNIA, 634.]

AN ACTION FOR MONEY HAD AND RECEIVED may be sustained where the defendant has received money under a contract which is for any reason void, as where a minor obtains money by virtue of a contract which is void because of his minority and his refusal to affirm the contract on arriving at his majority.

MINORS—ACTIONS AGAINST FOR MONEY HAD AND RECEIVED.—If a minor, more than eighteen years of age, receives money under a contract which is void because of the statute of frauds, or which cannot be enforced against him because he refuses to affirm it on reaching his majority, an action may be maintained against him to recover such money, though he does not retain the identical money in his hands, if the statute of the state provides that if a contract is made by a minor more than eighteen years of age, it may be disaffirmed upon restoring the consideration to the party from whom it was received, or paying its equivalent.

ACCEPTANCE OF A PROMISSORY NOTE—WHAT IS NOT.—If one offers a promissory note to another in consideration of pre-existing indebtedness, which the latter refuses to accept, and the note is left in his custody and is indorsed by him to his attorney for the purpose of being surrendered to the maker, such note does not become operative, and there is no necessity for the person named as payee of rescinding the note before bringing an action based upon such pre-existing indebtedness.

APPELLATE PROCEDURE.—A GENERAL OBJECTION that each and every ruling of the trial court which was made the object of objection and exception was erroneous is not a proper or sufficient mode of presenting errors to the consideration of the appellate court, and may be ignored by it.

I. Rosencrantz and Henry E. Highton, for the appellant.

Charles S. Peery, William T. Baggett, and J. T. Fleming, for the respondent.

635 **CHIPMAN, C.** Action for money had and received. Plaintiff is assignee of Adele Hesser, from whom it is alleged that defendant received the sum of five thousand dollars, under a verbal agreement, "upon the express condition that the defendant would immediately, upon meeting his majority, make,

execute, and deliver to said Adele Hesser, as security for the payment of said sum, an assignment of all the right, title, and interest in and to" certain property situated in the city of San Francisco, of which defendant was the owner of an undivided one-eighth interest; it is alleged that at this time defendant was over the age of eighteen years; that prior to the commencement of the action defendant came of age and said Adele Hesser demanded that defendant execute said assignment, but he failed and refused to do so and wholly failed to secure said sum; on or about January 20, 1895, defendant signed a promissory note for said sum, with interest at seven per cent, payable eleven months after date, "and attempted to deliver the same to said Adele Hesser, and left the same with said Adele Hesser at her residence, but said Adele Hesser then and there refused to accept the said note unless said defendant would secure ~~the~~ payment of the same by said assignment of said interest on said real property as aforesaid, and said note was not in fact delivered"; said Mrs. Hesser, prior to the commencement of the action, offered to return said note to defendant, but he refused to accept the same and refused to return said sum of five thousand dollars or any part thereof, and no part of said sum has been paid, but the whole thereof is due; plaintiff is now willing and ready to return said note to defendant and "brings the same into court for said defendant." The complaint is verified. Defendant denies the alleged or any agreement or conditions as attaching to the receipt of the money; admits making the five thousand dollar note; denies that it was not accepted by Mrs. Hesser, and alleges that it was received by her in payment of said sum; denies the offer to return the note, and denies the alleged assignment to plaintiff; alleges that about September 20, 1894, he borrowed of Mrs. Hesser two thousand dollars and gave his note therefor to her, payable one day after date, at seven per cent interest; that on December 26, 1894, he borrowed from her three thousand dollars and gave his note to her for that amount, payable one day after date, at seven per cent interest; that at these times defendant was over eighteen years old and under twenty-one years, and on January 6, 1895, defendant came of age, and about January 20, 1895, executed and delivered to Mrs. Hesser his note for five thousand dollars, payable eleven months after date, at seven per cent interest, which she accepted to secure the payment of said sum; alleges that Mrs. Hesser surrendered to defendant said two notes first given (when they were surrendered is not alleged); and, when

the five thousand dollar note was given Mrs. Hesser and defendant agreed that it should be received in payment of the first two notes, that it was so received by her, and that said last note was not due when this suit was commenced.

The cause was tried without a jury, and the court found that defendant received the five thousand dollars under the verbal agreement as alleged in the complaint; it was paid as follows: two thousand dollars about September 26, 1894, and three thousand dollars about December 2, 1894, and that defendant gave his two notes for these amounts bearing date as alleged in the answer, but that they were not accepted "as absolute or conditional ^{est} payment, but were intended by and between the parties, and it was so agreed and understood, that said notes should be taken merely as evidence of the said indebtedness until said defendant should arrive at his majority and would make, execute and deliver the said conveyance of said real estate as security for said indebtedness as hereinbefore set forth, and were the only written evidence said Adele Hesser had of said indebtedness"; about January 1, 1895, defendant obtained possession of said two last-mentioned notes from Mrs. Hesser upon the promise of defendant "to thereafter immediately deliver to her said conveyance of said real estate as aforesaid, and the said notes were, while in the possession of said defendant, marked paid by him and retained by him, but the said Adele Hesser did not deliver the said notes up to be canceled, nor were the same then paid or the indebtedness evidenced then thereby released or discharged"; that about January 20, 1895, defendant signed a promissory note for five thousand dollars (the note as above referred to) and offered to deliver the same to Mrs. Hesser, "and showed the same to her and left the said note upon a table in the presence of said Adele Hesser at her residence, but said Adele Hesser then and there refused to accept said note in settlement or payment of the said indebtedness, and refused to accept the same in any manner without the security for the payment of the same which she claims the defendant had promised her, and the said defendant then said: 'You can have the said note or nothing.' Thereupon the said Adele Hesser demanded the said conveyance and the said real property as security for the said sum of five thousand dollars, and at the same time offered to return the said note to defendant, and insisted that he should take the same and make the said conveyance; but defendant refused to take the said note away, and refused to make the said conveyance, and refused to return to the said

Adele Hesser the said sum of five thousand dollars or any part thereof; that said Adele Hesser was inexperienced in business, and, although she retained the said note in her possession thereafter, she had no intention at any time of accepting the said note as a conditional or absolute payment of said indebtedness"; that Mrs. Hesser did not sell this note, but assigned it for the purpose of producing the note at the trial to be canceled, and the same was delivered to ⁶³⁸ the clerk of the court for that purpose; that Mrs. Hesser mortgaged her property to obtain the money loaned to defendant, and he agreed to pay the interest thereon, and that the interest money alleged by defendant to have been paid by him was in fact paid to the mortgagee and not to Mrs. Hesser on said notes first executed by defendant; the court also found that defendant owned the interest in certain property as alleged in the complaint; that defendant came of age January 5, 1895, and that Mrs. Hesser frequently thereafter demanded that he execute said conveyance, but on said January 20, 1895, he refused and ever since has refused to make said conveyance or secure said loan, and thereby disaffirmed said contract and agreement entered into by him when he received said money.

Judgment passed for plaintiff, from which and from the order denying his motion for a new trial defendant appeals.

1. Appellant claims that the complaint does not state facts sufficient to constitute a cause of action, but "does state facts which effectually dispel the legal theory upon which it is framed."

The basis of the action is that defendant has received money which, under the circumstances, it would be inequitable for him to retain. The complaint alleged that defendant obtained from Mrs. Hesser five thousand dollars upon a promise to give a certain security therefor at a certain time. The condition was not complied with, and, being void, it could not be enforced. This void feature of the transaction does not preclude recovery. An action on quantum meruit or quantum valebat will lie where money is paid or services performed under a contract void by the statute of frauds, and we see no difference in principle where the action is for money had and received and the contract is void for other reasons. In *Buck v. Eureka*, 109 Cal. 504, where the action was on a void contract, this court held that an action would lie for services rendered on quantum meruit. Upon the proposition see, also, *Day v. New York Cent. Ry. Co.*, 51 N. Y. 583; 89 N. Y. 616; *Cook v. Doggett*, 2 Allen, 439; *Jarboe v.*

Severin, 85 Ind. 496; Reynolds v. Harris, 9 Cal. 340. But it is further said that, although the complaint averred nondelivery of the note and refusal to accept it by Mrs. Hesser, it is alleged that an offer was made to return it, which shows delivery, ⁶⁸⁰ else how could there be an offer to return? We think the explanation made of the circumstances attending the attempted delivery, and the reasons for retaining the note and offering to return it, relieve the pleading from the charge of inconsistency or of being *felo de se*.

2. Appellant's next five points may be summarized and treated together. Defendant's agreement to secure the money was void; if he made it he had the right to and did disaffirm, and under the provisions of section 35 of the Civil Code, he was not bound to restore the money unless he had the identical money he had received, the burden of proving which was on plaintiff; that the five thousand dollar note was a substitution for the first two notes and changed the time of payment, and was acquiesced in by Mrs. Hesser, and hence it became a new contract on conditional payment, and operated at least to postpone payment and as full performance of defendant's agreement; that Mrs. Hesser could not hold the note and at the same time demand payment of the money, and she did not rescind or attempt to rescind.

The evidence tended to show that defendant obtained the money as alleged and as found by the court, and upon the agreement as found by the court. A few days before defendant came of age he got from Mrs. Hesser the two notes first given for the purpose, as he said, to use them in settling with his guardian "and to give her a transfer of his property." He came of age January 5th, and the next day he came to Mrs. Hesser, as she testified, and said to her: "I will be up in the evening and I can bring you the deed to my property and you can sell it and make me paid." He said: "You are my mother and that he would treat me as a mother." These notes were never paid and were not returned to Mrs. Hesser, but were marked paid by defendant. She did not see him again until about the 20th of January, "when," as she testified, "he rang the bell and came in in a passion." I said, "Hilly, what is the matter with you?" He said, "Here!" and he flung that five thousand dollar note on the table, and he said, "If you don't take this, madam, you will never get a cent." I said, "What is the matter, Hilly?" He said, "I will make myself execution proof, like my brother, Isidor Rosencrantz, and you will get nothing." There was evi-

dence ⁶⁴⁰ corroborative of this meeting. She testified that she did not accept the note, and the evidence tends to show that she tried to get him to take back the note and insisted on having the deed to his property, but that he threw the note on a table and left the house and she saw him no more. In February Mrs. Hesser handed the note to plaintiff, with the right to sue, and she put the matter in the hands of her attorney, Mr. Fleming, and he took the note and she indorsed it in his presence, and he has had it ever since. It appears that defendant paid some interest directly to Mrs. Hesser and some to the bank on her mortgage given to secure the money she borrowed to loan to defendant; but Mrs. Hesser testified that she understood it to be interest money to apply on her mortgage, as defendant had promised to furnish the money for that purpose. It appears, however, that she did receive some interest money on the five thousand dollar note, as to which her attorney in March informed defendant it was without the attorney's knowledge, and an offer was made to return it and a new demand made for the deed. The evidence is conflicting, but I think there is some evidence tending to support the findings.

It is conceded that the verbal agreement to convey the property was void, and, being void by the statute of frauds and not because of defendant's minority, it may not have been necessary for him to disaffirm, and possibly his disaffirmance or non-disaffirmance would not affect the case. He did, however, disaffirm the agreement to convey. The action is not upon this void agreement; it arises out of the relations of the parties, and rests upon the rule that, while the law will not give the action on the agreement, it regards it as morally binding, and for that reason will not give relief against a party not in default nor in favor of a party who is in default in his performance of the agreement; and where a party, who has received money under such an agreement, has refused to perform it, the law, to do justice to the other party, will imply an assumpsit. This being the rule between parties ordinarily, does it apply to a minor over the age of eighteen years under our Civil Code? There are certain obligations, not here involved, which the minor may not disaffirm: Civ. Code, secs. 36, 37. In all other cases the contract of the minor, "if made whilst he is under the ⁶⁴¹ age of eighteen, may be disaffirmed," et cetera; but, "if the contract be made by the minor whilst he is over the age of eighteen, it may be disaffirmed in like manner upon restoring the consideration to the party from whom it was received or paying its equiva-

lent": Civ. Code, sec. 35. Appellant relies upon *Craig v. Van Bebb*, 100 Mo. 584, 18 Am. St. Rep. 571, for the proposition that this section applies only when, upon his majority, the minor has the money.

It may be true, as appellant claims, that the law elsewhere is that no restitution is required "unless the appellant had the identical money he had received." But, whatever may be the law under other statutes, we think our code is too plain to admit of any such interpretation, and was so made to obviate perplexities existing where the statutes had not made the law clear: See Code Commissioners' note to Civ. Code, sec. 35. The consideration here was the five thousand dollars received by defendant. Conceding, but by no means admitting, that the duty of the minor only goes to the extent of returning the identical money received, if he have it, as seems to be held under some statutes, our code adds the words "or paying its equivalent," which clearly implies that if he cannot restore the identical consideration received he must pay its equivalent. In this case defendant received money, and that or other money is its only equivalent: See note, *supra*, to *Craig v. Van Bebb*, 18 Am. St. Rep. 694; *Combs v. Hawes* (Cal. Nov. 19, 1885), 8 Pac. Rep. 597.

The claim that the five thousand dollar note was a substitution and a new contract in place of the first two notes is not borne out by the evidence, and the finding is to the contrary. It seems that defendant obtained possession of these latter notes under pretense that he wanted them for a particular purpose and not to be canceled, which he assumed to do after getting possession of them. They were one-day notes, and were not received as payment, but mere evidences of the debt until Mrs. Hesser could get the deed promised her. The five thousand dollar note was thrust upon Mrs. Hesser under circumstances justifying the finding of the court that she did not retain it with any intention of accepting it as conditional or absolute payment of the indebtedness evidenced thereby. That she received ⁶⁴² some interest was some evidence of acceptance, but it was not conclusive. Nor can appellant claim that payment was postponed because this note was made payable eleven months after date, for Mrs. Hesser did not accept the note. I do not think that her retention of the note, under the circumstances, and turning it over to her attorney, is at all conclusive of her acceptance of it as a new contract substituted for the earlier notes; it was evidence of the fact merely, but open to ex-

planation. As defendant got possession of the earlier notes apparently under a false pretense and still retained them, the burden was on him to make clear the proof of delivery and acceptance of the new note. The evidence on the point was conflicting, of which there was sufficient to justify the finding against defendant's contention. Upon the point that Mrs. Hesser failed to rescind or offer to rescind, the obvious answer is that there was nothing for her to rescind, as she did not receive and accept the note as conditional or absolute payment of the indebtedness. Besides, the offer to surrender the note and bringing it into court at the time to be canceled was sufficient. Defendant was thus fully protected against any other action on that note: *Coghill v. Boring*, 15 Cal. 213; Civ. Code, sec. 1691, subd. 2.

There was no offer to return the interest money paid by defendant, but this was voluntarily paid by him to apply to Mrs. Hesser's mortgage according to agreement, and, furthermore, was but the reasonable compensation for the use of the money, to the return of which defendant was not entitled: *Wilson v. Moriarty*, 77 Cal. 596.

3. Appellant makes an omnibus objection that "each and every ruling of the court below, which was made the object of objection and exception, was erroneous," citing many folios of the transcript but not pointing out why error is claimed as to any one of these numerous assignments. This method of presenting errors would, under the practice of this court, justify ignoring them altogether. We have, however, looked through the transcript in obedience to the learned counsel's request, but can discover no error prejudicial to defendant.

We are of the opinion that the judgment and order should be affirmed, and so advise.

443 Britt, C., and Haynes, C., concurred.

For the reasons given in the foregoing the judgment and order are affirmed. Henshaw, J., Temple, J., McFarland, J.

MINOR'S CONTRACTS—RESTORING CONSIDERATION—MONEY HAD AND RECEIVED.—If an infant, upon reaching majority, retains what he received by virtue of his contract, or any substantial portion thereof, or the proceeds thereof, he cannot disaffirm or repudiate his contract without restoring or abandoning to the use of the other party that which remains in his possession of the consideration received: *American Freehold etc. Co. v. Dykes*, 111 Ala. 178; 56 Am. St. Rep. 38. If an infant conveys his real estate for cash paid to his father, who buys a piano for the infant

with the money, and the infant, on coming of age, though still having the piano, chooses to disaffirm the deed, he may do so, without either surrendering the piano or repaying the money: *Englebert v. Troxell*, 40 Neb. 195; 42 Am. St. Rep. 665. Infant's liability for money had and received: See note to *Craig v. Van Bebber*, 18 Am. St. Rep. 606, 658. For a comprehensive discussion of infants' liability, see monographic note to *Craig v. Van Bebber*, 18 Am. St. Rep. 578-724.

DELIVERY AND ACCEPTANCE OF PROMISSORY NOTE.—As a general rule, a negotiable promissory note, like any other written instrument, has no legal inception or valid existence as such until it has been delivered in accordance with the purpose and intention of the parties: *McCormick etc. Machine Co. v. Faulkner*, 7 S. Dak. 363; 58 Am. St. Rep. 839. See, also, *School Dist. v. Sheldley*, 138 Mo. 672; 60 Am. St. Rep. 576.

APPELLATE PROCEDURE.—An appellate court will decline to consider an uncertain and indefinite assignment of error. An assignment of error should specify the particular error complained of: *Kimberly's Appeal*, 68 Conn. 428; 57 Am. St. Rep. 101.

CASES
IN THE
SUPREME COURT
OF
DELAWARE.

NATIONAL BANK v. FURTICK.

[3 MARVEL (DEL.), 85.]

CORPORATIONS—GARNISHEE.—SERVICE OF PROCESS upon a corporation summoned as garnishee must be made upon one of the officers designated in the statute relating to attachments, to wit, upon the president, treasurer, cashier, or paying clerk of the corporation.

CORPORATIONS—SERVICE OF PROCESS ON LOCAL AGENT.—Under a statute authorizing garnishment of a foreign corporation by service on certain of its officers, service of process on its local agent, who is not one of the designated officers, does not confer jurisdiction.

GARNISHMENT—SITUS OF DEBT.—A FOREIGN CORPORATION cannot be summoned as garnishee in one state, to reach a debt payable by it in another state.

Plaintiff is a corporation, organized under the laws of the United States, located, and having its principal place of business, in Wilmington, Delaware. The defendant is a citizen of the state of South Carolina. The Liverpool, London, and Globe Insurance Company is a foreign corporation, with agencies in Delaware and South Carolina. F. L. Gilpin is its agent in Delaware. Before the commencement of this attachment suit the defendant, Furtick, secured insurance in such corporation upon a store building and stock of merchandise located in South Carolina, through the agency of such corporation in that state. On December 6, 1894, the insured property was burned, and part of the insurance money is admittedly due. On December 15, 1894, a writ of foreign attachment was issued in this case, and the sheriff summoned such foreign insurance com-

pany as garnishee by serving such writ upon F. L. Gilpin, agent of such corporation, personally. On June 7, 1895, judgment by default was taken against the defendant, Furtick, and on June 17, 1895, Gilpin appeared and pleaded nulla bona to the writ. On November 26, 1895, a rule of court was granted upon the plaintiff to show cause why the attachment and garnishment should not be vacated. The question reserved for consideration by the supreme court is whether, under the facts, the attachment should be vacated.

J. Biggs, for the plaintiff.

W. S. Hilles, for the defendants.

⁴⁸ MARVEL, J. It was contended by counsel for the garnishee in this case that the attachment should be vacated for two reasons: 1. Because of want of service upon the statutory officer; 2. Because the debt under the facts was not the subject of attachment in the state of Delaware.

We will first consider whether there was such a service upon the garnishee as to give the court jurisdiction. The garnishee is a foreign corporation, and it is unquestioned law that the service must be in accordance with the provisions of the statutes of this state. The sufficiency of the service, therefore, depends upon the requirements of the statutes. What these requirements are, as applicable to the case before us, depends upon which statute controls—the general insurance law regulating the transaction of business in this state by foreign fire insurance companies, or the attachment statute providing for the summoning of corporations as garnishees.

The insurance law passed March 24, 1879 (16 Del. Laws, c. 347, sec. 7), and amended for the last time March 17, 1881 (16 Del. Laws, c. 140), provides: "That before insurance companies shall be permitted to transact business in this state, they shall file with the insurance commissioner a certificate of the name and residence of some person, or agent, within this state, upon whom service of process may be made, and all processes against said company issued out of the courts of this state may then and thereafter be served upon such person or agent so ⁴⁹ designated." At the time of the passage of this law and the last amendment thereto, the act relating to attachments authorized the summoning of corporations as garnishees in attachment proceedings only in the case of "corporations chartered by act of the general assembly" of this state: 14 Del. Laws, c. 90. It

was not until April 25, 1894, that the legislature amended this statute, generally known as the attachment act, and subjected all corporations "doing business in this state to the provisions of the laws in relation to garnishees" (18 Del. Laws, c. 681), and this statute provided that "service of the summons upon the president, treasurer, cashier, or paying clerk, as provided in other attachment cases, shall be sufficient to render said officers and the corporation subject to all the liabilities provided by the said law."

Thus it is seen, that prior to March 31, 1871, corporations were not subject to the attachment laws of this state, and that by the act of that date only certain corporations, "chartered by the act of the general assembly of the state, were made liable to be summoned as garnishees in attachment proceedings. Foreign corporations were not included.

The insurance law of March 17, 1881, did not extend the attachment law nor authorize the issuing of attachment process against foreign corporations, but only provided that, before foreign insurance companies should be permitted to do business in this state, they must appoint an agent upon whom all processes against them issued out of the courts of the state might be served. It provides only for service of process already authorized by law, and attachment against foreign corporations was not then expressly recognized as such a process. It was not until eight years after the passage of this act that the attachment laws were amended and for the first time "made foreign corporations doing business in this state," subject to be summoned as garnishees in attachment proceedings, and under this act process could be served only on the "president, treasurer, cashier, or paying clerk of such corporation."

⁵⁰ It is true, as contended by the counsel for the plaintiff, that the attachment statute is a remedial statute, and that, as a general rule, when the object of a statute is remedial, it is to be construed liberally. But it is equally true that when the remedy is sought to be obtained by summary proceeding and under a statute which is in derogation of the common law, a statute is to be strictly construed and must be exactly followed by those who act under or in pursuance of it. "A proceeding in attachment, as authorized by the statutes of the several states, is always viewed as a violent proceeding wherein the plaintiff, at the inception of his suit, seizes the property of the defendant without waiting to establish his claim before the judicial tribunals of the land, and the statute authorizing it has

invariably received a strict construction": Black on Construction of Laws, 315. This rule of construction has become so general in this country that in some of the states statutes have been enacted directing that the attachment laws shall be liberally construed. As before stated, the attachment statutes of this state expressly provide upon whom service must be made, to give the court power to appropriate to the satisfaction of the plaintiff's demand the effects or credits of the debtor in the hands of the garnishee, for it is by the service of the writ that the court gets control of the property. To acquire jurisdiction and secure such control the terms of the statute must be strictly followed. The power originates with the statute, and exists only to the extent plainly granted. This has been recognized to be the law in this state. In *Pennsylvania Steel Co. v. New Jersey etc. R. R. Co.*, 4 *Houst.* 572, and in *Frankel v. Satterfield*, 9 *Houst.* 209, the court (per Grubb, J.) said: "In this state, the institution of a suit by foreign attachment process is a statutory proceeding, which must be pursued conformably with the provisions authorizing it."

We are therefore of the opinion that service of process upon corporations, when such corporations are to be summoned as garnishees, must be made upon one of the officers designated in the statute relating to attachments.

Ferdinand L. Gilpin, under the facts of this case, was not such ⁵¹ an officer, being neither the president, treasurer, cashier, nor paying clerk, and the attempt to serve the writ upon the Liverpool, London, and Globe Insurance Company through him was ineffectual to bind the corporation, and it should be discharged. If the garnishee should be discharged, no other property being attached, there was nothing to give the court jurisdiction, and the attachment should be vacated.

The second reason assigned why the attachment should be vacated was, that even if it could be granted that service was had upon the statutory officer, the debt, under the facts of this case, was not the subject of attachment.

To reach a satisfactory solution of this proposition will require an examination into the nature of attachments and garnishment and the law fixing the situs of the res when that res is a debt or other chose in action. In doing this we will confine ourselves to the consideration of the attachment and garnishment proceedings against nonresidents alone.

In *Wells v. Shreve*, 2 *Houst.* 370, Houston, J., said: "In this state, a suit by foreign attachment is, in its original char-

acter, in the nature of an *ex parte* proceeding in rem to judgment of condemnation against the property bound by the foreign attachment; for, while it continues such, there is no appearance of the defendant, no defense whatever pleaded, no issue joined, and no trial had." This was followed in *Frankel v. Satterfield*, 9 Houst. 201, where the court, per Grubb, J., said: "Under the statutory provisions, it is plain that if no property has been attached by writ, there can be no attachment to dissolve, no security given, no appearance by the defendant, no action in personam, and, consequently, from want of jurisdiction, no judgment in personam. Nor can there be a judgment in rem for like reasons."

These views are not new. They have been frequently expressed, with more or less distinctness, in opinions of eminent judges, and have been carried into adjudications in numerous cases. The supreme court of the United States, in *Cooper v. Reynolds*, 10 Wall. 318, in the case of absence of personal service on the defendant ⁵² within the jurisdiction, said: "The court, in such a suit, cannot proceed unless the officer finds some property of the defendant on which to levy the writ of attachment. A return that none can be found is the end of the case and deprives the court of further jurisdiction, though the publication may have been duly made and shown in court. Now, in this class of cases, on what does the jurisdiction of the court depend? It seems to us that the seizure of the property, or that which, in this case, is the same in effect, the levy of the writ of attachment on it, is the one essential requisite to jurisdiction, as it unquestionably is in proceedings purely in rem. Without this the court can proceed no further. With it the court can proceed to subject the property to the demand of the plaintiff. If the writ of attachment is the lawful writ of the court, issued in proper form, under the seal of the court, and if it is by the proper officer served upon property liable to the attachment, when such writ is returned into the court the power of the court over the res is established, and in the subsequent and well-considered case of *Pennoyer v. Neff*, 95 U.S. 723, Mr. Justice Field said: "It is in virtue of the state's jurisdiction over the property of the nonresident situate within its limits that its tribunals can inquire into that nonresident's obligations to its citizens, and the inquiry can then be carried only to the extent necessary to control the disposition of the property. If the nonresident has no property in the state, there is nothing upon which the tribunals can adjudicate": *Hart v.*

Sansom, 110 U. S. 151; Arndt v. Grigg, 134 U. S. 316; Grover Mach. Co. v. Radcliff, 137 U. S. 287; Wilson v. Seligman, 144 U. S. 44; Scott v. McNeal, 154 U. S. 34; Goldey v. Morning News, 156 U. S. 518; Rorer on Interstate Law, 174; Drake on Attachment, secs. 52, 54, 453, 478; Waples on Attachment, 227, 244, 249; Story on Conflict of Laws, secs. 532, 592 a.

Garnishment, as in this case, is a form of attachment. It is an attachment by means of which money or property of a debtor in the hands of third parties, which cannot be levied upon, may be subjected to the payment of the debtor's claim. To subject the ⁵³ property or credit to attachment and thus confer jurisdiction it must be within the jurisdiction, so that the court may obtain legal control of the res, otherwise it could make no legal disposition of it, because it is an axiomatic principle of law that the courts cannot change rights of property situate without the state: American Cent. Ins. Co. v. Hettler, 37 Neb. 849; 40 Am. St. Rep. 522.

These principles governing attachment and garnishment proceedings against nonresidents are founded upon reason, and established by the adjudicated cases of the highest courts and recognized by nearly all text-writers. It being essential, then, that in the absence of personal service within the jurisdiction, an actual seizure of or levy on property of the absent defendant within the jurisdiction should be had, and until this is done the jurisdiction is not established, the question of the situs of the property or res is one of paramount importance. This inquiry could present no difficulty in respect to real estate, and little or none in regard to tangible personal property, having an actual situs. But for the purpose of jurisdiction, the situs of a debt or chose in action is a question upon which there has been some diversity of opinion. There is, of course, no actual or visible, but only constructive, situs. Does the debt follow the creditor and his domicile, or the debtor and his domicile? The legal title and right are clearly in the creditor, and, by analogy to the principle that constructive possession is with the rightful owner, we should expect that the chose in action, particularly a debt, follows the person of the creditor for the purpose of attachment, as well as for many other purposes. And such seems to us to be the law, especially where there is no stipulation to the contrary: Central Trust Co. v. Chattanooga etc. Ry. Co., 68 Fed. Rep. 685; Douglass v. Phenix Ins. Co., 138 N. Y. 209; 34 Am. St. Rep. 448; Everett v. Connecticut Mut. Life Ins. Co., 4 Colo. App. 509; Atchison etc. R. R. Co. v. Mag-

gard, 6 Colo. App. 85; State Tax on Foreign Held Bonds, 15 Wall. 300; Missouri Pac. Ry. Co. v. Sheritt, 43 Kan. 375; 19 Am. St. Rep. 143; Renier v. Hurlbut, 81 Wis. 24; 29 Am. St. Rep. 850; Cole v. Cunningham, 133 U. S. 107.

This was laid down in the case of State Tax on Foreign Held ⁵⁴ Bonds, 15 Wall. 300, where Mr. Justice Field says: "Debts owing by corporations, like debts owing by individuals, are not property of the debtors in any sense. They are obligations of the debtors, and only possess value in the hands of the creditors. With them they are property, and in their hands they may be taxed. To call debts property of the debtor is simply to misuse terms. All the property there can be, in the nature of things, in debts of corporations belongs to the creditors to whom they are payable, and follows their domicile, wherever they may be. Their debts can have no locality separate from the parties to whom they are due. The same rule has been held to apply for discharge under insolvent laws: Reno on Nonresidents, sec. 271; Main v. Messner, 17 Or. 78.

The principle seems well established in cases of attachment for the purpose of giving jurisdiction, especially when the debt is payable at the domicile of the creditor. In Douglass v. Phoenix Ins. Co., 138 N. Y. 209, 34 Am. St. Rep. 448, the facts were that the insurance company, a corporation formed under the laws of the state of New York, was indebted to Douglass, a citizen of New York, the insured, on account of a loss. The insurance company had an agent in Massachusetts appointed under the laws of that state upon whom process might be served and was engaged in carrying on business in that state. Alley and other creditors of Douglass brought suit in Massachusetts, jointly, against the insurance company and Douglass, and the attachment or trustee process was served on the legal agent and levied on the debt. This was set off as a defense to the suit on the policy by the insurance company, and the question was, whether the Massachusetts court (that suit having been first instituted) had jurisdiction, and it was held that it had not.

The court (Andrews, J.) said: "We are of the opinion that in the attempt to execute an attachment in Massachusetts upon the agent of the corporation there, and without having acquired jurisdiction, the plaintiff must fail, for the reason that the debtor, the insurance company, was in no just or ⁵⁵ legal sense, a resident of Massachusetts, and had no domicile therein, and was not the agent of the plaintiff, and that, in contemplation of law, the company and the debt were, at the time of the issu-

ing of the attachment, in the state of New York, and not in the state of Massachusetts.

In *Everett v. Connecticut Mut. Life Ins. Co.*, 4 Colo. App. 509, the facts were: Everett was a citizen of Colorado. Mrs. Walker was a nonresident, though formerly a resident of Colorado, and was indebted to Everett on a promissory note executed by her jointly with her husband. The insurance company was a Connecticut corporation, and had, under a written designation of authority, appointed the superintendent of insurance of the state of Colorado for the purposes of the service of process as a condition precedent to its right to do business in the state. The insurance company admitted an indebtedness to Mrs. Walker on account of the death of her husband, and forwarded to her the money through their agent in Denver. So far as it is disclosed by the record, there was no other tangible property in the state capable of seizure. Everett commenced suit, but was unable to obtain service on the principal defendant. In aid of his suit, he procured a writ of attachment to issue, and attempted to effectuate it by the service of the process of garnishment on the superintendent of insurance as the agent of the company. Judgment was entered so that upon the record it would appear there had been a recovery against the principal defendant. The insurance company asked to be discharged on the invalidity of the judgment, and that they were not legally charged by the service of garnishment on the superintendent of insurance.

The court (per Bissell, presiding judge) said: "We do not find any satisfactory authority which holds that where both the debtor and creditor are outside of the state, a suit may be commenced by attachment, and the debt seized. To escape the doctrine of *Pennoyer v. Neff*, 95 U. S. 723, and obtain a judgment against one without the limits of the sovereignty, an attachment must issue and be levied on the property of the nonresident person. To the extent ⁵⁶ of the property seized judgment may go against the absent person, and he will be held to have had notice through the seizure of the res, and be bound by the judgment. The cases go this far. It is not easy to perceive how a case is brought within the scope of this exception when the only levy is that made by the service of the garnishment process upon the agent of the nonresident debtor. Nothing is seized, nothing is taken, nothing is within the jurisdiction of the court, and a person out of the state is sought to be brought into court, where the service of a writ is upon another,

who is likewise absent. The circle never ends. . . . It is as impossible by judicial construction, as by legislative enactment, to declare a property out of the state, having a domicile with the creditor or the debtor, is within the limits of a sovereignty for the purposes of a levy."

In case of *Central Trust Co. v. Chattanooga etc. Ry. Co.*, 68 Fed. Rep. 685, in the United States circuit of Tennessee the facts in brief were: A citizen of Tennessee sought to attach by garnishment proceedings the wages of employes of the railroad company, which was incorporated and organized under the laws of Georgia, with its line of railway extending a short distance into the state of Tennessee. The laborers whose wages were sought to be attached were employed and paid in the state of Georgia. The garnishment was served upon the receiver, who was a citizen of Georgia, but who was appointed by the courts both in Georgia and in Tennessee with power to operate the railroad, and he answered, showing wages due the nonresident. No personal service was had on the nonresident defendant. The court said: "Where both garnishee and the principal debtor are nonresidents of this state, and the debt, such as wages due, is payable in the state of their residence, there is no property within the state, and the courts of the state and of the United States are without jurisdiction to proceed by attachment, and a judgment based on such an attachment is an absolute nullity. And this rule applies fully to the case of wages due by a corporation of another state to its employes, a resident of such other state, under contract of employment ⁵⁷ there made, and is not affected by the fact that a foreign railway corporation, without being incorporated in this state, extends its railroads into the state, and is subject to process on its local agents."

In *Atchison etc. Ry. Co. v. Maggard*, 6 Colo. App. 85, the plaintiff was a resident of Colorado. The defendant was a resident of Kansas and an employe of the garnishee railroad company, a corporation created by the state of Kansas, but was operating a part of its line in Colorado when the wages of his employe for work performed in Kansas, and payable, there, was attached. The court (per Reed, J.) said: "As between the plaintiff and defendant, the debt, beyond question, followed the domicile of the plaintiff. That was its situs. But the indebtedness of the garnishee to the defendant did not follow the plaintiff. Its situs was by contract fixed where the services were performed and the payment to be made, and if such claim or indebtedness is property in contemplation of the statute, the

situs of such property was in Kansas and not in Colorado. Care must be taken not to confound the indebtedness due from the defendant to the plaintiff with that due the defendant from the garnishee. They have no relation whatever."

The court in this case review the federal and state decisions, and show that a large majority of the states have followed the principle that, for purposes of jurisdiction in attachment proceedings, the situs of a debt is the domicile of a creditor, unless otherwise stipulated.

An exception to this rule appears to be where the garnishee is a resident of the state where the proceedings are instituted, and is under the exclusive jurisdiction of that state, and, as a consequence, under its power to determine for itself the rights and obligations arising from his contracts, and the mode of enforcing them; and possibly another exception is where a foreign corporation is doing business in a state and the debt arose in respect to such business, and where the corporation submits or subjects itself to the law of the state in the same manner and to the same extent in respect to such business as it would be bound to were it a corporation ⁵⁸ created by the state. We avoid expressing an opinion upon these cases. The proceeding here is not based upon any cause of action that originated in this state, nor to enforce any contract or agreement entered into with any of its citizens, or in reference to any subject matter within the state. It is a case of a nonresident defendant and a nonresident garnishee. True, the garnishee is a corporation doing business in this state, but the debt due the defendant arose from its contract for insurance made through its agency in South Carolina with the defendant, a citizen of that state, and concerning property situate there, and was payable there under the custom of the company; and was payable there in accordance with the principle of law, that in the absence of a place fixed in the contract a debt is payable at the domicile of the creditor (*Central Trust Co. v. Chattanooga etc R. R. Co.*, 68 Fed. Rep. 685), and is not such a credit or property within this state as will confer jurisdiction in this proceeding, even if service had been made upon the statutory officer. To take any other view would be to hold that it existed, had its situs, and was liable to attachment in every state in this Union where the defendant happened to have an officer, upon whom process could be served, as a condition precedent to its being permitted to do business in such state. That this is true is shown by the fact that an attempt was made to attach this very same debt by a creditor in

the state of New York. Upon motion, the court there vacated the attachment upon the grounds we have just stated. We believe this view to be based upon reason and supported by authority, and to be the only doctrine consistent with proper protection to citizens of other states.

If it is not the situs of the defendant that gives jurisdiction, as is held in *National Fire Ins. Co. v. Chambers*, 53 N. J. Eq. 468, and if it could be granted that service was had upon the statutory officer, we would still hold that the attachment in the case should be dissolved.

The statute provides that before foreign insurance companies shall be permitted to do business in this state, they must appoint an agent upon whom process may be served. The condition has⁵⁹ relation to the permission given. The presumption is, that only such jurisdiction is claimed as is necessary to deal with litigation arising out of the business that is done under this permission. "Statutes by which the jurisdiction is assumed should be construed strictly, and should not, unless their language is explicit, be held to confer jurisdiction beyond that which is required to enable the courts to take cognizance of matters arising out of the business done within the state, or else to protect and enforce the rights of the residents of their own state against foreign corporations."

Judge Wheeler, in a case decided in Vermont in 1874 (*Sawyer v. North American Life Ins. Co.*, 46 Vt. 697), expressed very strongly the opinion that a statute providing for the appointment of an agent on whom a process might be served ought not to be construed as intended to permit a nonresident to sue a foreign corporation for a cause of action arising outside of the state. He said that, even assuming that the agent in that case had been appointed in obedience to the statute, the question still remained, what cases the statute was intended to reach. A statute is to be construed with reference to the old law, the mischief, and the remedy. When this statute was passed, the old law permitted the agents of any insurance company, foreign as well as domestic, to make contracts of insurance within the state under which causes of action would accrue to our own people within the jurisdiction of the state courts. The mischief was, that the jurisdiction of the state courts over these causes of action would be unavailing; except upon voluntary appearance, for want of power in the courts to compel appearance. The remedy provided was the requiring of any foreign

insurance company making such contract to keep an agent in this state on whom service could be made.

This would be a full remedy for all that mischief without requiring such companies to keep an agent here on whom any process for any purpose could be served. There could be no advantage obtained for the people of the state by providing means to give the courts of the state jurisdiction over causes of action that occurred out of the state in favor of persons not citizens of the state against a ⁶⁰ corporation existing out of the state; and it is not to be presumed that the legislature intended to accomplish that purpose unless that is the necessary result of the enactment. It is more reasonable to suppose that the intention was to provide a method for obtaining jurisdiction over a defendant to a cause of action the courts had jurisdiction of before, than that it was to provide means for obtaining jurisdiction of a cause of action where none was had before, and of the parties also by the compulsory appointment of an agent: 12 Harvard Law Rev., vol. 1.

The statute is not so explicit as to be clearly intended to require a foreign insurance company to submit to suits in this state, having no relation to the business done within the state nor with one of her citizens, or to suits brought by persons that are citizens of the state where the corporation was organized or of some other foreign state. For this reason the attachment would have to be dismissed in this case.

The contention of the plaintiff's attorney that no hardship could follow by permitting the judgment, as a foreign jurisdiction would be bound to give full faith and credit to it, does not seem to be in accordance with the rulings of the adjudicated cases. We find that judgments rendered upon such facts as in the present case have been in many jurisdictions held void and no bar to a suit to recover the same debt in the courts of another state having unquestioned jurisdiction over it: *Renier v. Hurlbut*, 81 Wis. 24; 29 Am. St. Rep. 850; *Missouri Pac. Ry. Co. v. Sharitt*, 43 Kan. 375; 19 Am. St. Rep. 143. And by courts assuming jurisdiction in similar cases, parties have been made to pay the same debt twice through no fault or negligence of their own: *Alabama etc. R. R. Co. v. Chumley*, 92 Ala. 317; *Green v. Farmers' etc. Bank*, 25 Conn. 452; *Smith v. Boston etc. R. R. Co.*, 33 N. H. 337; *Pierce v. Chicago etc. Ry. Co.*, 36 Wis. 283; *Terre Haute etc. R. R. Co. v. Baker*, 122 Ind. 433; *McCarty v. New Bedford*, 4 Fed. Rep. 818; *Cole v. Cunningham*, 133 U. S. 107.

The rulings of the courts in these cases were based upon the reason that the previous judgments were rendered without the courts having jurisdiction of the person or subject matter, and ⁶¹ upon the now well-settled principle of law that when the courts are without jurisdiction, the proceedings are an illegitimate assumption of power, and no faith and credit or force and effect will be given them in any other jurisdiction. Such judgments cannot be sustained under the provisions of the constitution requiring that "full faith and credit shall be given in each state to the public acts, records, and judicial proceeding of other states," and the act of Congress providing for the mode of authenticating such acts, records, and proceedings, and declaring that, when thus authenticated, "they shall have such faith and credit given to them in every court within the United States, as they have by law, or usage in the courts of the states from which they are, or shall be taken."

Said Justice Miller in *Pennoyer v. Neff*, 95 U. S. 723: "In the earlier cases it was supposed that the act gave to all judgments the same effect in other states which they have by law where they have in the state where rendered. But this view was afterward qualified so as to make the act applicable only where the court rendering the judgment had jurisdiction of the parties and of the subject matter, and not to preclude an inquiry into the jurisdiction of the court in which the judgment was rendered or the right of the state itself to exercise authority over the person or the subject matter": *McElmoyle v. Cohen*, 13 Pet. 312; *D'Arcy v. Ketchum*, 11 How. 165; *Lafayette Ins. Co. v. French*, 18 How. 404; *Thompson v. Whiteman*, 18 Wall. 457; *Frankel v. Satterfield*, 9 Houst. 201.

"Such judgment can be taken advantage of at any time, and in any court where it is offered as a conclusive adjudication between the parties, and, when collaterally attacked, may be disregarded and treated as a nullity, and need not be adjudged to be such by a formal and direct proceeding for its vacation or reversal": *Frankel v. Satterfield*, 9 Houst. 201.

The contention that the garnishee cannot thus attack the judgment is not supported by any well-considered case. In a suit by attachment, the court must acquire jurisdiction and proceed to ⁶² enter a judgment before it can pronounce any judgment against a party summoned as garnishee. If the previous proceedings are unauthorized and void, there is no sufficient basis to support the judgment against the garnishee. By it no rights would be divested, and the garnishee would not be

protected in the payment of a judgment under such circumstances. It would be regarded as shown by the authorities above cited, as a voluntary and not a compulsory payment, and the defendant might compel him to pay a second time: Black on Judgments, sec. 260.

In attachment proceedings, therefore, like the one we are now considering, it is the duty of the garnishee, and a duty he must perform at his peril, to see that the court has jurisdiction: Drake on Attachment, secs. 691, 693; Shinn on Attachment, secs. 660, 707, 708.

It is therefore considered by the court that, upon the facts of this case as set forth in the record filed with the statement of the question reserved, the attachment should be vacated; and it is ordered that the opinion of this court be certified to the court below and the record remanded.

Cullen, J., dissented, but delivered no opinion.

IN THE CASE of *Associated Press v. United Press*, 104 Ga. 51, it was held that a foreign corporation cannot maintain in a Georgia court, against another foreign corporation, an action begun by suing out an attachment which is never levied upon property of the defendant, and which the plaintiff has not sought to make effectual otherwise than by causing a summons in garnishment to be served upon a person not himself indebted to the defendant, but who is an agent of a third foreign corporation, a debtor of the defendant, not having an office or transacting any business in the state. In this case, Mr. Justice Lumpkin said: "A foreign corporation being casually within the state, by the presence of an officer, cannot be made to submit to the service of process of garnishment. The court acquires no jurisdiction in such cases. The process of garnishment against a foreign corporation must issue where such corporation usually does business and has a resident officer or agent on whom service may be made; for in such instances only can a valid service be made: 2 Shinn on Attachment and Garnishment, sec. 493. 'Furthermore, the fact that a foreign corporation has members or officers residing within the jurisdiction of the court, and that its books and records are kept there, will not render it liable as a garnishee. It must have goods, effects, or credits within the state or its indebtedness be payable within the state, for, according to the jurisdictional rule, the court will not otherwise acquire jurisdiction of the thing to be appropriated': 2 Shinn on Attachment and Garnishment, sec. 494. And in this connection see, also, Rood on Garnishment, secs. 239-241. What is said by these authors is well supported by the many authorities to which they refer: See, also, *Good Hope Co. v. Railway Barb Fencing Co.*, 22 Fed. Rep. 635; *Golden v. Morning News*, 42 Fed. Rep. 112. In the case last cited, the circuit court of the United States for the east-

ern district of New York held that: 'In an action by a resident of New York against a foreign corporation, which does not do business, or have office, agent, or property within the state of New York, service of process upon an officer of such corporation, while temporarily within the state, does not confer jurisdiction upon the state court from which process issued.' This ruling was afterward affirmed by the supreme court of the United States: 156 U. S. 518. The same principle was laid down in Louisville etc. R. R. Co. v. Dooley, 78 Ala. 524. See opinion delivered by Chief Justice Stone and authorities therein cited. The decision of this court in Schmidlapp v. La Confiance Ins. Co., 71 Ga. 246, directly sustains the ruling now made; and see, also, Bates v. Forsyth, 69 Ga. 365; Tim v. Franklin, 87 Ga. 95; Saffold v. Scottish American Co., 98 Ga. 787, 788."

Of the Situs of Debts for Purposes of Garnishment, and of Property in Transit in the Hands of Common Carriers.*

As to tangible property, such as lands and chattels, the question of its situs for the purpose of seizure under ordinary attachment process can present little difficulty. The situs of such property, except in a few instances, is an ordinary reality as to which hair-splitting arguments and distinctions can have little bearing. The situs of real property is fixed, and conclusive as to jurisdiction: Smith v. Yargo, 28 Ill. App. 594. Nonresidence of both debtor and creditor will not affect an attachment levied upon land within the jurisdiction of the court issuing it: Ward v. McKenzie, 83 Tex. 297; 7 Am. Rep. 261. Real property, however, of all forms of property, has the maximum of tangibility. At the other extreme we find forms of property, myriad almost in number and variety, the intangibility of which makes their situs at times extremely difficult to determine. Lying between these extremes are other forms of property, and evidences of property, and it seems that the farther one gets from the ideal tangibility of realty, the more does he become distracted by the lack of harmony among courts which have been called upon to discuss the subject of our note. The question presented must often be arbitrarily determined. For this reason the judicial discord is not to be wondered at. *Mobilia non habent situm* was the maxim of the common law. Personal property was deemed to be attached to, and to follow, the person of its owner, and to be able to reach the owner and bring him within the jurisdiction of a court was to get jurisdiction of his personal property.

Attachment proceedings, embracing garnishment and foreign attachment, are not purely in rem nor in personam, but partake of the qualities both of actions in rem and of actions in personam: Neufelder v. German-American Ins. Co., 6 Wash. 336; 36 Am. St. Rep. 166; Hornthal v. Burwell, 109 N. C. 10; 26 Am. St. Rep. 556; Smith v. Blatchford, 2 Ind. 184; 52 Am. Dec. 504. For the purposes of attachment personal property may have a situs distinct

*Garnishment of a debt in a state where the creditor does not reside: 19 Ga. 145-150.

and apart from the domicile of the owner: Wyeth Hardware etc. Co. v. Lang, 127 Mo. 242; 48 Am. St. Rep. 626. It is generally stated that in attachment suits the property must be within the jurisdiction of the court issuing the process, in order to confer jurisdiction: Douglass v. Phenix Ins. Co., 138 N. Y. 209; 34 Am. St. Rep. 448; since property outside the state cannot be garnished: Bowen v. Pope, 125 Ill. 28; 8 Am. St. Rep. 330; Bates v. Chicago etc. Ry. Co., 60 Wis. 296; 50 Am. Rep. 369. See, also, Neufelder v. German-American Ins. Co., 6 Wash. 336; 36 Am. St. Rep. 166. Property not within the jurisdiction issuing the process can only be regarded outside the jurisdiction as unaffected by the process: Owen v. Miller, 10 Ohio St. 186; 75 Am. Dec. 502. Attachment may reach personal property within the jurisdiction, but belonging to a nonresident debtor: Peterson v. Polgnard, 8 B. Mon. 570; Carington v. Didier, 8 Gratt. 260; and while attachment execution served on a garnishee in Pennsylvania cannot bind defendant's goods in the hands of the garnishee in another state, it will, if the goods have been sold, bind the proceeds in the garnishee's possession: Merchants' etc. Nat. Bank v. Baeder Glue Co., 164 Pa. St. 1.

Situs of Debts.—The main interest in our inquiry, however, is centered in an intangible property interest. "In the case of movables," says Andrews, C. J., in Douglass v. Phenix Ins. Co., 138 N. Y. 209, 34 Am. St. Rep. 448, "their seizure under attachment shows that their actual situs is within the jurisdiction. But in respect to intangible interests, debts, choses in action, bonds, notes, accounts, interests in corporate stocks, and things of a similar nature, the question whether the res is within the jurisdiction of the sovereignty where the process is issued, is not so readily determined." Starting with the hypothesis that debts are property and must have an ascertainable situs, we are confronted by the self-evident fact that debts can in no sense be the property of the debtors. They only possess value in the hands of the creditors. In this connection we quote the language of Mr. Justice Field in State Tax on Foreign Held Bonds, 15 Wall. 300: "To call debts property of the debtors is simply to misuse terms. All the property there can be, in the nature of things, in debts of corporations belongs to the creditors, to whom they are payable, and follows their domicile, wherever that may be. Their debts can have no locality separate from the parties to whom they are due." It would seem proper, therefore, that the situs of a debt for the purpose of garnishment should be considered as at the domicile of the creditor, but the proposition may not be disposed of in such a clear-cut conclusion. Such a conclusion would be in harmony with the rule that a chose in action has its situs at the domicile of the owner thereof, which, although sometimes disregarded as a fiction, is the primary or general rule, and should govern unless good reason exists for adopting some other guide: Mason v. Beebee, 44 Fed. Rep. 556. See monographic note to Buck v. Miller, 62 Am. St. Rep. 455. The situs of property for the purpose of jurisdiction is one thing, and its situs for the purpose of determining the right of parties thereto is another, and the two are not necessa-

ally the same: *Mason v. Beebee*, 44 Fed. Rep. 556; *Singer Mfg. Co. v. Fleming*, 39 Neb. 679; 42 Am. St. Rep. 618. Here we have to do with the situs of debts for the purpose of jurisdiction, for to attach a debt by process of garnishment, jurisdiction should be had of the debt.

Does the Place Where Debt is Payable, or may be Sued Upon, Fix Its Situs?—It is held by some courts that the situs of a debt for the purpose of garnishment is within the jurisdiction where it is due and payable, and that it is subject to garnishment nowhere else: *Louisville etc. R. R. Co. v. Dooley*, 78 Ala. 524; *Missouri Pac. Ry. Co. v. Maltby*, 84 Kan. 125; *Illinois Cent. R. R. Co. v. Smith*, 70 Miss. 344; 35 Am. St. Rep. 651; *American Cent. Ins. Co. v. Hettler*, 37 Neb. 849; 40 Am. St. Rep. 522; *Owen v. Miller*, 10 Ohio St. 136; 75 Am. Dec. 502; *Smith v. Taber*, Tex. Civ. App., Apr., 1897. Where a debt is due a nonresident and payable in another state, it is not subject to garnishment: *Keating v. American Refrigerator Co.*, 32 Mo. App. 293; *Todd v. Missouri Pac. Ry. Co.*, 33 Mo. App. 110; *Walker v. Fairbanks*, 55 Mo. App. 478, where it is said: "It became incumbent on the plaintiff to disprove the fact that the debt was payable in Denver, Colorado, and to prove that it was payable here, since the place where the debt is payable is its situs in this class of cases, for the purpose of determining the jurisdiction of the court over it." In that case plaintiff sought to garnish in the hands of Fairbanks & Co. wages due the respondent, Henderson. It appeared that Henderson was a resident of Denver, Colorado, and that it was the custom of the garnishee to pay Henderson by mailing to him checks or drafts payable in New York. Judgment in favor of the garnishee was affirmed, the court saying: "It will be thus seen that, outside of the garnishee's answer, there was ample evidence to support the judgment of the court, because if the checks or drafts were payment in themselves, then the situs of the debt was in Denver, and if the place where the checks or drafts were payable determined the situs of the debt, then such situs was New York city, in the state of New York. In neither event was the situs of the debt in this state": See *Hamilton v. Rogers*, 67 Mich. 135. It is held in Nebraska that garnishment of a debt in one state which is due and payable in another is void: *American Cent. Ins. Co. v. Hettler*, 37 Neb. 849; 40 Am. St. Rep. 522.

By many other cases it is stated that the situs of a debt for the purpose of garnishment is at the place where the creditor might sue the debtor upon it and recover a personal judgment against him: *Harvey v. Great Northern Ry. Co.*, 50 Minn. 405; *Wyeth Hardware etc. Co. v. Lang*, 127 Mo. 242; 48 Am. St. Rep. 626; *Lancashire Ins. Co. v. Corbetts*, 165 Ill. 592; 56 Am. St. Rep. 275; *Hazard v. Jordan*, 12 Ala. 180; *Smith v. Taber*, Tex. Civ. App., Apr., 1897. It would seem that the question as to where the debt is due and payable is a secondary matter in fixing its situs for the purposes of garnishment, for courts maintain with the Minnesota court: "While, by fiction of law, a debt, like other personal property is for most purposes . . . deemed attached to the person of the owner, so as to have its situs at his domicile, yet this fiction always yields

to laws for attaching the property of nonresidents, because such laws necessarily assume that the property has a situs distinct from the owner's domicile. For such purpose, a debt has a situs wherever the debtor or his property can be found." Nor is it deemed material that the debt is payable elsewhere than at the place where the debtor may be found: *Harvey v. Great Northern Ry. Co.*, 50 Minn. 405. It is broadly stated that debts have no situs, but may be attached in any state other than that in which the debtor is resident: *Howland v. Chicago etc. Ry. Co.*, 134 Mo. 474; that wherever a debtor might be served with process in an action upon his debt, there he may be garnisheed by a creditor of his creditor: *Lancashire Ins. Co. v. Corbetts*, 165 Ill. 592; 56 Am. St. Rep. 275.

Between the two propositions—1. That the situs of a debt for the purpose of garnishment is at the place where it is due and payable; and 2. That such situs is wherever a suit might be maintained upon the debt—there is no necessary disagreement which will arise in all cases, and, indeed, we find them stated together frequently enough. But a debt need not necessarily be due and payable at every place where the debtor may be found and sued. Take, for example, a corporation, created under the laws of Pennsylvania, which has agencies and transacts business in a dozen other states, in each of which it is by statute subject to suit which may be instituted by the service of process upon its local agent. We shall later consider the many questions to which this common state of affairs gives rise, but this much here by way of illustration. Suppose that the corporation owes a debt to a resident of Pennsylvania, payable in Philadelphia at the creditor's place of business. The debt in question must be the property of the creditor. Can the corporation of its own motion, and without the creditor's consent, subject the latter's property in the debt to garnishment in each of the dozen states in which it is domiciled? There is an evident fallacy in the reasoning of the courts which answer this query in the affirmative, and base their holding upon the proposition that the situs of a debt is wherever the debtor might be sued upon it. It seems to us that such courts confound the situs of a debt for the purpose of jurisdiction of it in garnishment proceedings with its situs for the purpose of determining the rights of the parties thereto concerning it. They lose sight of the debt as an entity having but one situs, as the personal property of him to whom it is owing.

This important distinction was lately considered in *Swedish-American Nat. Bank v. Bleeker*, Sup. Ct. Minn., May, 1898, in which the facts were briefly these: The defendant, a resident of North Dakota, insured his house, situated in that state, in the Commercial Union Assurance Company, a London corporation, doing business both in North Dakota and Minnesota. A loss having occurred, the plaintiff, a resident of Minnesota, sought, by the service of garnishment process upon the local agent of the insurer, to subject the sum owing to the defendant to the payment of a debt owing from defendant to plaintiff. The indebtedness neither arose nor was payable in Minnesota. In reversing a judgment for the plain-

tiff, the court, per Cauty, J., said in part: "It is true that this defendant might have brought an action in this state against this insurance company to recover for this loss, and have obtained service by serving the summons on the insurance commissioner. But this does not prove that this debt has always had a situs in this state. In the first place, that action would be in personam, not in rem; and, for the purposes of such an action, it is immaterial where the situs of the debt is. In the next place, the creditor may, by his voluntary act, give the debt a situs also at some place other than that of his domicile. He may, so to speak, take the debt with him for the purpose of bringing suit upon it. But a third person claiming to be the creditor of such creditor cannot do this. Such a stranger has no power to change the situs of the debt, or give it a situs at a place where it would not otherwise have it." From the logic of this conclusion there is no escape.

Residence of Creditor as Fixing the Situs of a Debt.—By the great weight of reason and authority debts are considered as the property of the persons to whom they are due, and their situs to be at the domicile of the creditor for the purpose of garnishment, as for all other purposes: Louisville etc. R. R. Co. v. Dooley, 78 Ala. 524; Alabama etc. R. R. Co. v. Chumley, 92 Ala. 317; Louisville etc. R. R. Co. v. Nash, Ala. Sup. Ct., June, 1898; Consolidated Tank Line Co. v. Collier, 148 Ill. 259; 39 Am. St. Rep. 181; Cooper v. Beers, 143 Ill. 25; Holbrook v. Ford, 153 Ill. 633; 46 Am. St. Rep. 917; Lancashire Ins. Co. v. Corbetts, 165 Ill. 592; 56 Am. St. Rep. 275; Douglass v. Phenix Ins. Co., 138 N. Y. 209; 34 Am. St. Rep. 448; Williams v. Ingersoll, 89 N. Y. 508; Green v. Farmers' etc. Bank, 25 Conn. 452; Reimers v. Seatco Mfg. Co., 70 Fed. Rep. 573, 37 U. S. App. 426; Root v. Davis, 51 Ohio St. 29; Swedish-American Nat. Bank v. Bleecker, Minn. Sup. Ct., May, 1898; Commercial Nat. Bank v. Chicago etc. Ry. Co., 45 Wis. 172; Renier v. Hurlbut, 81 Wis. 24; 29 Am. St. Rep. 850; Illinois Cent. R. R. Co. v. Smith, 70 Miss. 344; 35 Am. St. Rep. 651; Missouri Pac. Ry. Co. v. Sharitt, 43 Kan. 375; 19 Am. St. Rep. 143. In Central Trust Co. v. Chattanooga, 68 Fed. Rep. 685, in discussing this matter, it was said: "This inquiry could present no difficulty in respect to real estate, and little or none in regard to tangible personal property having an actual situs. But, for the purpose of jurisdiction, the situs of a debt or other chose in action, is a question upon which there is a diversity of judicial opinion. There is, of course, no actual, visible, and only a legal or constructive, situs. Does the debt follow the creditor and his domicile or the debtor and his domicile? The legal title and right are clearly in the creditor, and, by analogy to the principle that constructive possession is with the rightful owner, we should expect that the chose in action, particularly a debt, follows the person of the creditor. And such is the established rule."

Could this simple general rule be adhered to, much of the confusion into which courts have involved themselves might be remedied. But the remedy of foreign attachment in this country is of statutory origin and regulation, having its earliest prototype in the

custom of London, which allowed the situs of a debt to be considered in some cases as at the domicile of the debtor instead of at that of the creditor. The important limitations which have been placed upon the rule have arisen generally where a resident creditor of a nonresident has endeavored to attach, in the hands of another resident, a debt owing from the latter to such nonresident. The questions arising from such a state of facts are various and important. If the debt, being property of the creditor, has its situs beyond the jurisdiction in which the plaintiff sues, by what methods, upon what reasoning, can it be subjected to the plaintiff's demands? If legislation is necessary to enable plaintiffs similarly situated to gain the relief sought, what limits are placed upon the power of legislatures to control property of nonresidents and subject it to the claims of residents? "The notion that the situs of the debt determines the jurisdiction of the court in garnishment," says the court, in *Lancashire Ins. Co. v. Corbetts*, 165 Ill. 592, 56 Am. St. Rep. 275, "has led to the creation of the fiction that, for the purposes of garnishment, the situs of the debt is changed and becomes the place where the garnishee lives, and not the domicile of his creditor. . . . To hold that the situs of the debt determines the question of jurisdiction is practically to hold that a debt cannot be garnished at all in foreign attachments, for the very ground of a foreign attachment is the nonresidence of the principal defendant, who, in cases of garnishment, is the creditor of the garnishee, and if the debt which the garnishee owes to his creditor can be reached only by proceedings had where such creditor resides—that is, where the debt has its situs—it cannot be reached in foreign attachment at all. . . . Thus it is seen that in garnishment proceedings the place of residence of the garnishee is of far more importance than the place of residence of the creditor, in obtaining jurisdiction to render a judgment against a garnishee." See to the same effect the able opinion of Pitney, V. C., in *National Fire Ins. Co. v. Chambers*, 53 N. J. Eq. 468.

Power of States Over Debts Owed to Nonresidents.—In states whose courts recognize the authority of the general rule that the situs of a debt is at the domicile of the creditor it is sometimes admitted that "this fiction always yields to laws for attaching the property of a nonresident, because such laws necessarily assume that the property has a situs distinct from the owner's domicile": *Wyeth Hardware etc. Co. v. Lang*, 54 Mo. App. 147; affirmed in 127 Mo. 242; 48 Am. St. Rep. 626. Statutes and the custom of London may, and often do, for the purposes of attachment or garnishment at the suit of a third person, give the debt a situs at the domicile of the debtor: *Swedish-American Nat. Bank v. Bleecker*, Minn. Sup. Ct., May, 1898; *Williams v. Ingersoll*, 89 N. Y. 508; *Douglass v. Phenix Ins. Co.*, 138 N. Y. 209; 84 Am. St. Rep. 448; *Lancashire Ins. Co. v. Corbetts*, 165 Ill. 592; 56 Am. St. Rep. 275. Compare *Root v. Davis*, 51 Ohio St. 29. "We conceive it to be well settled by authority," said the court in *Reimers v. Seatco Mfg. Co.*, 70 Fed. Rep. 523, 37 U. S. App. 426, "that while, generally speaking, the situs of

a debt is constructively with the creditor to whom it belongs, it is within the competence of the sovereign of the residence of the debtor by reason of its control over its own residents to pass laws subjecting the debt to seizure within its territorial sovereignty": See *Pomeroy v. Rand*, 157 Ill. 176; *Bragg v. Gaynor*, 85 Wis. 468; *Newland v. Circuit Judge*, 85 Mich. 151.

When it is desired to garnish a debt due a nonresident, it is necessary, of course, that he have notice of the proceedings, and, since personal service of process in such a case is generally impracticable, jurisdiction of the nonresident is obtained by publication of process. This may be upon the theory that by such means jurisdiction of the res, the debt, is acquired, which theory is based upon the proposition that the situs of a debt is with the creditor. Or if it be considered that, for purposes of garnishment, a debt has its situs with the garnishee, the debt is looked upon as the property of a nonresident, which cannot be taken from him without due process of law. Under the ruling in the great case of *Pennoyer v. Neff*, 95 U. S. 714, it would appear that in order, by the publication of process, to subject to garnishment a debt owing from a resident to a nonresident, the debt must be considered as having its situs within the jurisdiction of the state by whose laws such process is authorized. Without going at length into the large question here opened up, we quote from a recent decision of Alabama: "This decision—in *Pennoyer v. Neff*, 95 U. S. 714—involving as it did a construction of the fourteenth amendment of the federal constitution, and its effect on judgments rendered against nonresidents without personal service or voluntary appearance, and without a preliminary seizure of property of the defendant within the state of suit, is binding upon, and must be followed by, the courts of the several states. It necessarily results from the principles declared therein that if the situs of a debt for the purpose of garnishment be at the domicile of the creditor, and the debt be not property within the garnishee state, any judgment rendered against the creditor, as well as any judgment the effect of which is, on its face, to discharge the debt due to the nonresident by requiring the debtor, the garnishee, to pay it to the nonresident's creditor, is without due process of law, and void, unless there was personal service on the defendant within the state or a voluntary appearance by him": *Louisville etc. R. R. Co. v. Nash*, Ala. Sup. Ct., June, 1898.

The garnishment of debts owing from residents to nonresidents is a matter of very common practice, jurisdiction of the nonresident creditor being obtained by publication of process, unless personal service within the jurisdiction is possible or the defendant makes a voluntary appearance. To justify such practice it must be admitted that the general and very reasonable rule of law that the situs of a debt for purposes of garnishment, as well as for all other purposes, is at the domicile of the creditor, is defective. In its place must be adopted the fiction of law that for purposes of garnishment the situs of a debt is at the domicile of the garnishee.

It is impossible to reconcile the cases upon this question, and herein it is only our purpose to set forth the opposing holdings, and, if possible, to clarify, to some extent at least, a subject which is in very great confusion. Illustrating this line of reasoning we quote from the decision in *Cross v. Brown*, 19 R. I. 226: "In order to make a valid seizure, then, by process of attachment, whether of tangible or intangible property or interest, the res must be within the territorial jurisdiction; that is, if the res consists of visible and tangible property, it must be found and seized within the state, and if it consists of a mere chose in action, then its situs must be there. Now it is evident that a chose in action, being an intangible chattel, cannot, strictly speaking, have a physical location. Its locus or situs is, therefore, a legal fiction and, being so, it may have a different situs for different purposes; that is, a conventional situs. . . . It is undoubtedly true that the jurisdiction of the state for purposes of taxation cannot be held to extend to the property which a nonresident has in a debt which he holds against a resident. . . . But, conceding that the state has no power to tax a mere chose in action belonging to a nonresident, does it therefore follow that it cannot authorize an attachment thereof by process of garnishment. Or, in other words, may not the debt, which is an intangible thing, have a situs at the domicile of the creditor for the purpose of taxation, and also at the domicile of the debtor for the purpose of attachment. We see no reason why it may not, and the authorities above cited, together with many others which might be added, fully support the view that it may. Moreover, for us to hold that a debt due a nonresident is not attachable by trustee process here would be both to render our statutes relating to foreign attachment largely null and void, and also to overrule the settled practice of the court from time immemorial."

Where Garnishee is a Foreign Corporation and the Debt is Owed to a Nonresident.—Much more might be said concerning the garnishment of debts owing from residents to nonresidents generally, but, instead thereof, we shall turn our attention to another matter of a special nature, the proper consideration of which will supply whatever may be wanting in what has been said upon the general question. Our different state governments, in addition to providing for the creation of corporations within their respective limits, generally allow corporations created under the laws of sister states to qualify under the local laws and transact business upon much the same footing held by resident corporations. The laws of a state usually provide in this regard that each of such foreign corporations shall have a general agent within the state upon whom process may be served in actions brought against the corporation. Whether, under such general laws, a corporation, by acquiring such a special domicile in a state, brings within the jurisdiction, for the purpose of garnishment, all debts which it may owe to nonresidents, is a question upon which courts differ. In denying a motion for reargument in the case of *Swedish-American Nat. Bank v. Bleecker*, Minn. Sup. Ct., May, 1898, which case we have already noticed at length, the

court, maintaining the negative of the proposition just stated, said: "The garnishee in this case is an English corporation, which may be doing business in every state in the Union, and also in England, Ireland, Scotland, Canada, India, Australia, and a score of other countries. If respondent's position is correct, the debt here in question has at one and the same time a situs in all of those states and countries in which the corporation is doing business, and may be seized by attachment or garnishment in any of them." However, such an argument did not deter the Illinois supreme court from upholding the affirmative even to the limits of the possibility mentioned by the learned Minnesota justice. In *Lancashire Ins. Co. v. Corbetts*, 165 Ill. 592, 56 Am. St. Rep. 275, under facts similar in essential respects to those in the Minnesota case, it was held that a debtor may at the same time be subject to garnishment in two or more states, irrespective of the state of residence or the citizenship of the creditor, if, at such time, actual service of process in different actions may be made upon such debtor in the different states, as where the debtor is a corporation doing business in all the states, and having officers in each upon whom process against it may be served.

An examination of the statutes under which these two cases were decided reveals no difference that would account for the diametrically opposite conclusions reached by the two courts. Each court believes its holding to be in accordance with the weight of reason and authority. It seems to us that the Minnesota decision was correct in principle and is upheld by authority. It is impossible to deny the general rule that a debt has its situs at the domicile of the creditor. Exceptions to general rules are common enough, but the exception claimed in this instance has little to commend itself to sound judgment. It is founded upon a fiction the adoption of which would be fraught with grave results. Assuming that substantial facts and their effects are changed by the misuse of terms, or by mere declaration, is not an uncommon error in argument. "If a debt is property belonging to and with the creditor only, it cannot be made property in the possession of the debtor by misuse of terms, or by declaring it to be so": Per Clark, D. J., in *Central Trust Co. v. Chattanooga etc. R. R. Co.*, 68 Fed. Rep. 685. It being assumed, however, that a debt may by legislation be given a situs at the domicile of the debtor for the purposes of attachment, we would still have no ground upon which to base the proposition that a corporation created by, and having its domicile in, one state, may, by transacting business in another state, qualifying under the laws of the latter, and establishing within its limits an agent authorized to accept service of process in actions against the corporation, transfer to such state the situs of every debt which the corporation may owe to nonresidents thereof. The second proposition is by no means a corollary of the first. A corporation cannot have two domiciles: *Thompson on Corporations*, sec. 688. Having completed the process just outlined, a corporation does not change its domicile or origin of its residence, but remains as before a resident

of the state where it was incorporated: *Douglass v. Phenix Ins. Co.*, 138 N. Y. 209; 34 Am. St. Rep. 448; *Plimpton v. Bigelow*, 93 N. Y. 592; *Central Trust Co. v. Chattanooga etc. R. R. Co.*, 68 Fed. Rep. 685; *Reimers v. Seateco Mfg. Co.*, 70 Fed. Rep. 573, 37 U. S. App. 426. In the words of the Colorado court of appeals in *Everett v. Connecticut Mut. Life Ins. Co.*, 4 Colo. App. 509: "It is as impossible by judicial construction as by legislative enactment to declare that property out of the state, having a domicile with the debtor or creditor, is within the limits of the sovereignty for the purposes of a levy." Furthermore, the law of a state cannot make a debtor a resident of that state by so declaring, contrary to the fact and the rule of general law, so as to bind another jurisdiction by the declaration; nor can any state authorize an attachment of a credit when neither the debtor nor the creditor is within its jurisdiction: *Douglass v. Phenix Ins. Co.*, 138 N. Y. 209; 34 Am. St. Rep. 448.

To sum up and conclude the foregoing, we believe it to be a rule of law, sound in principle, and amply supported by the appended authorities, that corporations are properly subject to garnishment only in the states either of their domiciles or of the residence of their creditors, and that a corporation, by going into another state, qualifying under its laws, transacting business there, and establishing an agent upon whom process may be served in suits against the corporation, does not thereby transfer to such other state the situs of debts which it owes to nonresidents thereof, nor subject such debts to seizure in such state under process of garnishment: *Reimers v. Seateco Mfg. Co.*, 37 U. S. App. 426; 70 Fed. Rep. 573; *Central Trust Co. v. Chattanooga etc. R. R. Co.*, 68 Fed. Rep. 685; *Louisville etc. R. R. Co. v. Nash*, Ala. Sup. Ct., June, 1898; *Louisville etc. R. R. Co. v. Dooley*, 78 Ala. 524; *Alabama etc. R. R. Co. v. Chumley*, 92 Ala. 817; *Everett v. Connecticut Mut. Ins. Co.*, 4 Colo. App. 509; *National Bank v. Furtick*, 2 Marv. (Del.) 35; ante, p. 99; *Associated Press v. United Press*, 104 Ga. 51; *Swedish-American Nat. Bank v. Bleecker*, Minn. Sup. Ct., May, 1898; *Illinois Cent. R. R. Co. v. Smith*, 70 Miss. 844; 35 Am. St. Rep. 651; *American Central Ins. Co. v. Hettler*, 37 Neb. 849; 40 Am. St. Rep. 522; *Douglass v. Phenix Ins. Co.*, 138 N. Y. 209; 34 Am. St. Rep. 448; *Towle v. Wilder*, 57 Vt. 622; *Morawetz v. Sun Ins. Office*, 96 Wis. 175; 65 Am. St. Rep. 43. Compare *Mason v. Beebee*, 44 Fed. Rep. 556. Opposed to this view are: *Lancashire Ins. Co. v. Corbetts*, 165 Ill. 592; 56 Am. St. Rep. 275; *German Bank v. American Fire Ins. Co.*, 83 Iowa, 491; 32 Am. St. Rep. 316; *National Fire Ins. Co. v. Chambers*, 53 N. J. Eq. 468; *Hannibal etc. R. R. Co. v. Crane*, 102 Ill. 249; 40 Am. Rep. 581; *Burlington etc. R. R. Co. v. Thompson*, 31 Kan. 180; 47 Am. Rep. 497; *Fithian v. New York etc. R. R. Co.*, 31 Pa. St. 114; *Railroad v. Barnhill*, 91 Tenn. 395; 80 Am. St. Rep. 889; *National Fire Ins. Co. v. Chambers*, 53 N. J. Eq. 468; *Mooney v. Buford etc. Mfg. Co.*, 72 Fed. Rep. 32. Compare, also, *Neufelder v. German-American Ins. Co.*, 6 Wash. 336; 36 Am. St. Rep. 166; *Mahany v. Kephart*, 15 W. Va. 609; *Cross v. Brown*, 19 R. I. 220; *Wyeth Hardware etc. Co. v. Lang*, 127 Mo. 242; 48 Am. St. Rep. 626.

While the cases cited in opposition to our views seem formidable in number, an examination of them reveals the fact that in few of them was the question discussed with any show of thoroughness. In some of them the ground is taken that a foreign corporation, by coming into a state, doing business there, and subjecting itself to local laws, subjects itself to all the liabilities of resident corporations, and should be treated as such, and therefore held amenable to garnishment process. This view, it is plain, leaves out of consideration the interest which nonresident creditors have in debts owing to them from such a corporation, which interest is more important than the coexisting interest of the debtor. It is based upon a palpable misapprehension of the questions involved, and, in its outworking, tends not so much to burden the debtor corporation, as it does to confiscate the property of nonresident creditors without due process of law. In *Mooney v. Buford etc. Mfg. Co.*, 72 Fed. Rep. 82, another ground is taken. That was a suit in garnishment by a resident of Indiana against a nonresident debtor, in which it was sought to hold, as garnishee, a foreign corporation doing business in Indiana and there amenable to service of process, which was also indebted to the defendant. The relief sought was granted, and in adverting to the general proposition to which we have cited the cases pro and con, Woods, C. J., said: "That proposition we consider unsound. The decisions cited to sustain it proceed upon the assumption—which we think clearly erroneous—that jurisdiction in garnishment against a debtor of the principal defendant, who cannot be personally served with process, depends, when tangible property has not been attached, upon the situs of the debt. The assumption makes garnishment impossible in cases of foreign attachment whether the debtor sought to be reached is a resident or a nonresident. Escape is sought from this result by saying, as in *Donglass v. Phenix Ins. Co.*, 138 N. Y. 209, 34 Am. St. Rep. 448, that 'the laws of a state, for the purpose of attachment proceedings, may fix the situs of a debt at the domicile of the debtor.' That is a sheer fiction, which, if resorted to at all, may just as well be enlarged so as to include foreign corporations wherever they are doing business, under agreement that process may be served upon their agents as if on themselves. But, manifestly, the essentials of jurisdiction cannot rest upon a fiction, and if, in this class of cases, the situs of a debt or chose in action is essential, it must be the real situs. It is not in the power of the legislature of a state to affect the rights of nonresidents, against their consent, by declaring that, of two things which are not identical, one shall be deemed the equivalent of the other—certainly not by declaring that something out of the state shall be deemed within it. No such fiction, however, is necessary, because the jurisdiction in such a case does not depend upon the situs of the debt, but upon control over the debtor, obtained by means of process duly served." The same ground of dissent is excellently presented also in *National Fire Ins. Co. v. Chambers*, 53 N. J. Eq. 468.

It is thus seen from the extended notice we have given to this phase of our subject, that it is one upon which courts are by no

means agreed. Among those courts which deny the proposition which we have stated, the grounds of dissent are various and conflicting. As to the ground taken by Judge Wood and Vice-Chancellor Pitney in the cases just cited, it seems to us the most logical of all those given by the dissenting courts, and would be quite conclusive but for one thing. Debts have a recognized and fixed situs for all other purposes but attachment, for taxation, administration, distribution, and in matters of insolvency. Why should not the same rule apply for purposes of attachment? Moreover, in attachment proceedings the situs of property to be attached is a matter of great importance, and, where jurisdiction of the principal defendant cannot be had, it is generally sufficient to seize the res within the jurisdiction of the court. In view of these established rules it would be only for the weightiest reasons that we should accept the proposition that, for the sole purpose of garnishment, debts are to be considered as having no situs, or that in garnishment proceedings the matter of the situs of property sought to be reached is material in all cases excepting one, namely, when the property sought to be reached is a debt. If such reasons have been advanced, we have failed to see them, or, seeing, have failed in our appreciation of their weight.

As to the Garnishment of Debts Due from Residents to Nonresidents, Generally, the discussion follows the lines of reasoning exhibited in our foregoing discussion of the special phase of the question which is presented when the person sought to be held as garnishee is an artificial person, a corporation, created under the laws of a sister state, but domiciled for a special purpose in the state where garnishment proceedings are instituted. The conflicting views as to the situs of debts are encountered, and it would serve no purpose to repeat what we have already included herein. There are marked differences between natural persons and corporations which are material to this inquiry. A natural person has not that quality of omnipresence which enables a corporation to be at the same time a quasi resident of an indefinite number of jurisdictions. This fact removes one of the complexities which render difficult a consideration such as we have just concluded. When the person sought to be held as garnishee of a debt owing to a nonresident is a natural person, the question becomes a clear one of theory as to what is the situs of a debt. In such a case we are not compelled to choose between unpleasant alternatives. It is not a question of either, on the one hand, abandoning the well-settled and reasonable rule of law that the situs of a debt for all purposes is at the domicile of the creditor, to whom, and to no one else, it is a thing of value, or of, on the other hand ignoring the necessity, under which we are placed by the multiplying of corporations, of accommodating the rules of law to the proper and just regulation of this growing and important class of artificial persons. So, without going into this matter at length, we feel the more confirmed in our adherence to the views already expressed herein. That tangible property in the hands of a resident and belonging to a nonresident is attachable by a resident creditor of the owner is a proposition

elementary and unquestioned. Where, however, the property sought to be reached is a debt, the proceedings must fail through want of jurisdiction, unless the defendant be within the reach of the process of the court or voluntarily submits himself thereto.

Property in Transit.—Upon the matter of garnishment of property of a defendant in the hands of a common carrier, the authorities are meager and conflicting. The property sought to be reached may be in actual transit, in which case it may be either within or beyond the jurisdiction of the court from which garnishment process issues, or it may be that the transit has not yet begun or else that it is completed, and the property is held by the carrier either at the place of shipment or at that of delivery. In *Adams v. Scott*, 104 Mass. 164, the action was against a resident of Connecticut, who appeared and answered. Trustee process was served upon an express company to whom a package containing money had been consigned in Massachusetts, which package was in transit and deliverable to the defendant in Connecticut. Under the Massachusetts statute the company was chargeable as trustee unless exonerated by the fact that the money was in their hands as common carriers, in transit. In that case the voluntary appearance of the defendant in the principal suit is a material and noteworthy fact. In holding the carrier liable as trustee, Morton, J., speaking for the court, said: "There is no reason why a common carrier should not be liable to the trustee process, in the same manner as other bailees are, unless the nature of his contract is such that a judgment charging him as trustee would not protect him against a claim of the defendant for a nondelivery of the goods at their place of destination. But we are of opinion that such judgment would be a sufficient excuse to the trustee for a failure to deliver according to his contract. The doctrine of the common law that a carrier is responsible for all losses excepting those occurring by the act of God or a public enemy has no application to a case like the present. There has been no loss, but the defendant's property has been sequestered by the law to be applied to his use and benefit. Every man holds his property subject to be attached, and whenever property is attached in a suit against the owner, and taken into the custody of the law, it excuses the person having possession of it from performing his promise, express or implied, to deliver it to the owner. The law substitutes the delivery to its officers for a performance of his contract.

The weight of authority, however, holds that property in the charge of a carrier and in actual transit is not subject to garnishment by the service of process upon the carrier or his agent. This direct proposition was before the Wisconsin supreme court in the form of a query in *Bates v. Chicago etc. Ry. Co.*, 60 Wis. 296; 50 Am. Rep. 369. In the course of an opinion upholding the proposition, it was said in that case: "We think that public policy and the proper discharge of the duties imposed upon common carriers of personal chattels placed in their possession for carriage, require that this question should be answered in the negative; and we think so, notwithstanding the very broad language of the statute

above quoted. That railroad corporations, as well as individuals and other corporations, are subject to garnishee process must be admitted, and that in proper cases they must be held to respond as individuals. This court has so held as to debts due from the railroad company to the principal debtor in the action. The nature of the possession and control which the railroad company has of and over personal property in actual transit; the interruption of business and the general inconvenience which must necessarily result from holding such property, the subject of the garnishee process, it appears to us are amply sufficient to justify us in making such property an exception to the general rule, in the absence of any positive declaration of the legislature subjecting such property to the process." In *Western R. R. Co. v. Thornton*, 60 Ga. 300, it was attempted by the service of garnishment process upon a local agent of the railroad company at Columbus, Georgia, to reach a trunk belonging to the defendant, which was at the time in transit over the company's road in Alabama. After discussing the query, Is the baggage of a railway passenger subject to garnishment? and adverting with some tenderness to the intimate relation existing between a passenger and his baggage, the court held that as the trunk was not in reach of process issued in Georgia at the time of its service, the fact that it was later brought into Georgia by the company, in due performance of its contract with the passenger, would not render the garnishment effective.

Garnishment will not lie against personal property in transit and outside the state, but in the custody of a common carrier whose residence is within the state. In such case, the situs of the property does not follow the residence of the garnishee: *Montrose Pickle Co. v. Dodson etc. Mfg. Co.*, 76 Iowa, 172; 14 Am. St. Rep. 213. The service of an attachment upon a railway company creates no lien upon property not within the county at the time it is served: *Sutherland v. Second Nat. Bank*, 78 Ky. 250. In Pennsylvania it has been provided by statute that when goods, wares, and merchandise are in transitu at the time of service of process, beyond the limits of the commonwealth, without default, collusion, or fraud on the part of the company or transporter, they shall not be liable to proceedings in attachment issued in the state: *Pennsylvania R. R. Co. v. Pennock*, 51 Pa. St. 244. It is held that a railroad company is not liable to garnishment for cars received of a connecting line, under running arrangements existing between them such as are usually adopted by connecting lines throughout the country, whereby, instead of unloading and transferring their freight from the cars of one company to the cars of the other at the points of connection, each received from the other the cars loaded with freight and hauled them to the place of destination on its own line of road, and, after discharging the freight, returned the cars as soon as possible in the due course of business. This upon the principle that the duties of a railroad company, so far as it performs the functions of a common carrier, are public; that as a public servant it is bound to transport and deliver freight with reasonable dispatch, nothing, in the absence of express contract,

can excuse it for nondelivery at the point of destination, except the act of God or the public enemy: *Michigan Cent. R. R. Co. v. Chicago etc. R. R. Co.*, 1 Ill. App. 399. A carrier receiving goods cannot hold them to answer attachment at the suit of a creditor of the shipper previously served upon him; nor is he liable for them if attached while he is in the faithful performance of his contract as a common carrier: *Bingham v. Lamping*, 26 Pa. St. 340; 67 Am. Dec. 418.

Property in the hands of a common carrier in transit to a place outside of the state is not subject to garnishment, although it is yet within the state at the time of the service of the garnishee summons: *Stevenot v. Eastern Ry. Co.*, 61 Minn. 104. A very important case upon this question is that of *Illinois Cent. R. R. Co. v. Cobb*, 48 Ill. 402, in which the question presented was whether or not a railway company can be held liable to judgment on garnishment process merely on the ground that it may have had property in transit on its route consigned to one who may be a debtor at the time of issuing and serving the writ. Said the court: "No case has been cited by appellees in which such a proceeding has been sustained, and, in the absence of precedent, we should be strongly inclined to hold that companies were not so liable; certainly not, out of the county where the property delivered to them for transportation is situated. Any other rule would make railway companies collecting agents of creditors, and that, too, at the risk of these companies. . . . It is not their business, nor is it their interest, to know to whom the various articles belong, nor should it be required of them that conflicting claims to the property intrusted to them should be adjusted through controversies, the burden, annoyance, and expense of which they must bear. When the goods are in the depot of a railway company, in the county in which the attachment proceedings are instituted, there could, perhaps, be no objection to such process, but on this point we express no definite opinion. When the property has left the county and is in transit to a distant point, though on the same line of railway, it would be unreasonable to subject the company to the costs, vexation, and trouble of such a process, merely because it had received to be carried that which the law compelled them to receive and carry."

The question of jurisdiction of the property sought is easily seen to be at the foundation of the decisions in this class of cases, which is to say that the question as to the situs of the property is one of controlling importance. Thus, where property is in the possession of a common carrier, and its transportation is not yet begun, it is subject to garnishment if within the jurisdiction of the court issuing the writ: *Landa v. Holck*, 129 Mo. 663; 50 Am. St. Rep. 459; *Stiles v. Davis*, 1 Black (U. S.), 101. Similarly, it is held that a railway company, after the termination of the transportation of property, and while it is holding the same only as a warehouseman, is liable to garnishment in respect to such property: *Cooley v. Minnesota etc. Ry. Co.*, 53 Minn. 827; 29 Am. St. Rep. 609.

CASES
IN THE
SUPREME COURT
OF
GEORGIA.

PAULK v. MAYOR.

[104 GEORGIA, 24.]

INJUNCTIONS AGAINST CRIMINAL PROSECUTIONS.—
An injunction cannot be granted to restrain a criminal prosecution.

INJUNCTIONS AGAINST CRIMINAL PROSECUTIONS.—
Equity cannot by injunction restrain quasi-criminal proceedings by the authorities of a municipality, for violations of an alleged invalid ordinance.

W. A. Hawkins and Thomson & Whipple, for the plaintiff.

J. H. Martin, for the defendant.

24 FISH, J. The plaintiff in error brought his petition to enjoin criminal proceedings against him and his employes, under the provisions of the charter of Sycamore, prohibiting and making penal the sale of intoxicating liquors within its incorporate limits, and to enjoin similar proceedings under a municipal ordinance, prohibiting, under penalty of fine or imprisonment, the keeping of such liquors in the city for the purpose of sale or barter. He alleges that the municipal ordinance in question is void and has been repealed; that if the corporate authorities are allowed to institute and carry on the threatened prosecutions, "it will not only harass and jeopardize his personal liberty, without any lawful authority, but it will also interfere ²⁵ with him in the enjoyment of his civil rights, break up his business, and cause him to sacrifice and lose his property and stock of goods, and damage him in a large amount, and all without authority and without adequate redress"; and that his damages will be irreparable.

In *Gault v. Wallis*, 53 Ga. 675, it was held that "courts of equity have no jurisdiction to interfere with the administration of the criminal laws of the state by injunction or otherwise." And in *Phillips v. Mayor etc.*, 61 Ga. 386, it was held: "No injunction, or order in the nature of an injunction, will be granted to restrain proceedings in a criminal matter." In *Garrison v. Atlanta*, 68 Ga. 64, where these decisions were followed, the principle is reaffirmed in the following language: "Injunction will not be granted to restrain a criminal proceeding." These decisions seem to be decisive of the questions raised in the present case; and but for a later decision of this court, which is invoked in behalf of the plaintiff in error, and which we shall presently consider, we should not deem it necessary or profitable, in this opinion, to do more than cite and follow these adjudications. The case in 61 Ga. 386 is especially in point, owing to its similarity to the case now under consideration. In that case, certain retail liquor dealers sought to enjoin prosecutions under a municipal ordinance which was passed after they had obtained their licenses to sell, on the ground that the ordinance was void and materially restricted their business. This court, speaking through Bleckley, J., who delivered the opinion, said: "Whatever may be the infirmities of the penal ordinances of Stone Mountain, an injunction in the present case was properly denied. If unlawful convictions take place before a municipal court, reversal can be had in the superior court, as a court of law, by certiorari. This is a plain and adequate remedy, and a court of equity need not and cannot interfere. Chancery takes no part in the administration of criminal law. It neither aids the criminal courts in the exercise of jurisdiction nor restrains or obstructs them." The principle upon which these decisions are founded has long been well settled by a great current of authority, both in this country and in England. In *In re Sawyer*, ²⁰ 124 U. S. 200, it was reaffirmed by the supreme court of the United States in the most emphatic terms. The first headnote in that case is: "A court of equity has no jurisdiction of a bill to stay criminal proceedings." And in the opinion of the court it is said: "The office and jurisdiction of a court of equity, unless enlarged by express statute, are limited to the protection of the rights of property. It has no jurisdiction over the prosecution, punishment, or pardon of crimes or misdemeanors, or over the appointment or removal of public officers. To assume such a jurisdiction, or to sustain a bill in equity to restrain or relieve against proceedings for the

punishment of offenses, or for the removal of public officers, is to invade the domain of courts of common law, or of the executive and administrative department of the government." Further on, in the same opinion, after stating that: "The modern decisions in England, by eminent equity judges, concur in holding that a court of chancery has no power to restrain criminal proceedings, unless they are instituted by a party to a suit already pending before it, and to try some right that is in issue there," and that "Mr. Justice Story, in his Commentaries on Equity Jurisprudence, affirms the same doctrine," it is said: "And in the American courts, so far as we are informed, it has been strictly and uniformly upheld, and has been applied alike whether the prosecutions or arrests sought to be restrained arose under statutes of the state, or under municipal ordinances": Citing *West v. Mayor etc.*, 10 Paige, 539; *Davis v. American Society etc.*, 75 N. Y. 362; *Tyler v. Hamersley*, 44 Conn. 419, 422; 26 Am. Rep. 479; *Stuart v. Board of Supervisors*, 83 Ill. 341; 25 Am. Rep. 397; *Devron v. First Municipality*, 4 La. Ann. 11; *Levy v. Shreveport*, 27 La. Ann. 620; *Moses v. Mayor etc.*, 52 Ala. 198; *Gault v. Wallis*, 53 Ga. 675; *Phillips v. Mayor etc.*, 61 Ga. 386; *Cohen v. Goldsboro Commrs.*, 77 N. C. 2; *Waters Peirce Oil Co. v. Little Rock*, 39 Ark. 412; *Spink v. Francis*, 19 Fed. Rep. 670; 20 Fed. Rep. 567; *Suess v. Noble*, 31 Fed. Rep. 855. To this formidable and strong array of authorities we might ourselves add a number of more recent decisions, to the same effect, by our American courts, but we do not deem it necessary to do so.

²⁷ Counsel representing the plaintiff in error, recognizing the fact that the three Georgia decisions that we have cited, particularly the one rendered in 61 Georgia, in the *Stone Mountain case*, are against their contentions, rely upon the ruling of this court in *Atlanta v. Gate City Gas Light Co.*, 71 Ga. 106; and considering the principle announced in the fifth headnote to that case simply as an abstract proposition, applicable to all cases in which some sort of a property right may be injuriously affected by a criminal prosecution, we can understand the confidence with which they invoke that decision in behalf of their client. But the principle there announced is to be considered and applied in the light of the extraordinary facts disclosed by the record and discussed in the opinion of the court in that case. There are wide differences between that case and the one at bar. In that case, the city of Atlanta, to use the language of the court, had "stood by and seen this company make an outlay of

one hundred and forty thousand dollars in the exercise of their rights under this charter, without intimating to them that objection would be made to their use of the streets for the purposes authorized, and without the use of which their enterprise would not have been undertaken and could not be prosecuted, and without which they would lose their entire outlay and be involved in irretrievable ruin." And then when the gaslight company was ready to begin the work of laying its mains, the municipal authorities sought to prevent it from exercising its valuable, vested corporate franchises, by first refusing to allow it permission to excavate or obstruct the streets of the city for the purpose of laying its pipes, and then threatening, under certain city ordinances, to prosecute and punish any of its agents or employes who, without such permission, should undertake to do so. The court, after demonstrating that "the permission of the city of Atlanta was not required to enable the complainant to exercise its franchises," says: "Upon every principle of equity this failure to notify the complainant of their intention until this heavy expenditure had been made would estop them. Such conduct is fraudulent in the eye of the law, and, where practiced upon an innocent party, who is seeking bona fide to carry out the provisions of its charter by availing itself of the powers and ²⁸ privileges thereby granted, would, if anything could, debar them from now being heard." The court seems also to have been of the opinion that the municipal ordinances making penal the excavation or obstruction of the streets of the city without permission of the municipal authorities were void in so far as they affected the vested rights of the gaslight company under its legislative charter. And the court, on page 126, strikes what it appears to us is the real keynote of the case, when it says: "Where it is manifest, as in this case, that a prosecution and arrest is threatened for an alleged violation of city ordinances, for the sole purpose of preventing the exercise of civil rights conferred directly by law, injunction is a proper remedy to prevent injury to the party thus menaced." It will be seen that the distinguishing feature of that case, and the one which was successfully employed in invoking the interposition of equity, was the patent fact that the threatened prosecutions under the municipal ordinances were being used, not for the legitimate purpose of preventing the streets of the city from being unlawfully injured or obstructed, but for the purpose of destroying the valuable, vested franchises of the Gate City Gas

Light Company. And equity, seeing the palpable fraud which was being perpetrated under color of what purported to be a simple police regulation, stretched forth its strong arm to prevent the irreparable damages which would ensue if it did not afford its protection to the rights which were thus imperiled. It was long ago decided that "an injunction will be granted to prevent the franchise of a corporation from being destroyed, as well as to restrain a party from violating it by attempting to participate in its exclusive privileges": *Osborn v. United States Bank*, 9 Wheat. 738.

We think, therefore, that the true principle which underlies the case that we have just been discussing, as we gather it from its peculiar facts and the opinion of the court, is, that when the damages would be irreparable if the threatened injury is not prevented, equity, if properly appealed to, will not permit valuable, vested corporate franchises, granted by the state, to be seriously impaired or practically destroyed by prosecutions instituted under color of municipal ordinances, which ²⁹ are wrested from their legitimate purposes and fraudulently used, in a matter to which they cannot apply, as a means with which to prevent the exercise of these franchises. A similar case to the one in 71 Georgia is that of *Port of Mobile v. Louisville etc. R. R. Co.*, 84 Ala. 115, 5 Am. St. Rep. 342, where the supreme court of Alabama held that: "Where a city attempts by an ordinance unlawfully to destroy the franchise of a railroad company, a court of equity will not refuse to interfere by injunction for the reason that the ordinance is quasi criminal in character." Somerville, J., delivering the opinion of the court, said: "It cannot be tolerated that a municipal corporation . . . should escape the grasp of a court of chancery, in a clear case of equitable cognizance, by the device of adding a penalty to an illegal and void ordinance." How different from such a case as the one in 71 Georgia is the one at bar. Here no question as to the destruction or invasion of civil rights which had become vested under a legislative charter is presented; and, so far as the record discloses, the municipal authorities of Sycamore are simply endeavoring, in good faith, to enforce the penal provisions of the charter and ordinance of the city, the enactment of each of which appears to have been a bona fide effort to exercise the police power, for the protection and preservation of the peace and good order of the community. The plaintiff in error, with full knowledge that the charter of the city contained a provision

prohibiting the sale of intoxicating liquors within its incorporated limits, and that one of its ordinances prohibited the keeping of such liquors for sale or barter therein, after seeking and taking legal advice, deliberately purchased a stock of whisky, beer, et cetera, procured state and federal licenses, opened a "store" in that city, and commenced selling his stock, in defiance of the law and the ordinance. Having voluntarily gotten himself into his predicament, he now invokes the aid of equity to extricate him therefrom, upon the plea that his business will be ruined, without authority of law, unless he is afforded this relief. He deliberately undertook to test the validity of both the local law and ordinance of Sycamore, by voluntarily and knowingly engaging in the business which they prohibited. He has ample opportunity to ^{so} make this test in the courts having jurisdiction over criminal matters, and a court of equity will not invade their domain in his behalf.

A case which is almost the exact counterpart of this one is that of *Burnett v. Craig*, 30 Ala. 135, 68 Am. Dec. 115, in which there was a bill for injunction which alleged that the town council of Cahaba had passed an ordinance fixing a license for retailing within its incorporate limits; that the complainant had obtained a state license, and, acting upon legal advice that the ordinance was illegal, had opened a store in that town and commenced retailing spirituous liquors; that he was thereupon arrested for violating the ordinance, and fined and imprisoned; that he had instituted a proceeding, which was still pending, to test the ordinance; and that the council still threatened to fine and imprison him as long as he persisted in carrying on his business. The prayer was, that the municipal authorities be enjoined until the validity of the ordinance was determined by the legal proceedings. The bill was dismissed in the court below, for want of equity, and the case was carried to the supreme court, where the judgment of the lower court was affirmed, the higher court holding that: "Chancery will not restrain quasi criminal proceedings by the authorities of a municipal corporation for repeated violations of an alleged invalid ordinance." This case was subsequently referred to in *Port of Mobile v. Louisville etc. R. R. Co.*, 84 Ala. 115, 5 Am. St. Rep. 342, as not being at all in conflict with the decision rendered in that case. The case made by the plaintiff in the court below falling within the general and well-established rule applicable to cases in which an injunction is sought to restrain criminal, or quasi-

criminal proceedings, the judge committed no error in refusing to grant a temporary injunction.

Judgment affirmed.

All concurring, except Cobb, J., absent.

INJUNCTIONS AGAINST CRIMINAL PROSECUTIONS.—An injunction will not issue to restrain criminal proceedings unless they are instituted by a party to a suit already pending before the court, and for the purpose of trying the same right that is in issue there: *Creighton v. Dahmer*, 70 Miss. 602; 35 Am. St. Rep. 666, and monographic note thereto.

INJUNCTIONS AGAINST CRIMINAL ACTS.—A bill in equity having for its sole purpose an injunction against crime does not lie; but equity may interfere if the alleged criminal act goes further and operates to the destruction or diminution of the value of property of the complainant: *Klein v. Livingston Club*, 177 Pa. St. 224; 55 Am. St. Rep. 717; *Vegetahn v. Guntner*, 167 Mass. 92; 57 Am. St. Rep. 448.

NEW YORK LIFE INSURANCE CO. v. BABCOCK.

[104 GEORGIA, 67.]

INSURANCE—CONTRACT FOR, WHEN COMPLETE.—A contract of insurance is consummated upon the unconditional written acceptance of the application for insurance by the insurer. Actual delivery of the policy to the insured is not essential to its validity, unless expressly made so by the terms of the contract.

INSURANCE—DELIVERY OF POLICY—ACTS OF AGENT. An unconditional delivery of a policy of insurance by the insurer to his agent for delivery to the insured, binds the insurer, and is tantamount to a delivery to the insured, although the agent never parts with possession of the policy, and its delivery to the insured is, by the policy, made essential to the validity of the contract of insurance.

AGENCY—NEGLIGENCE.—A principal cannot take advantage of the wrong of his agent by pleading his negligence as a defense.

INSURANCE—CONSTRUCTION OF CONTRACT.—Stipulations and conditions in policies of insurance are to be so construed, if possible, as to avoid forfeitures.

F. Colville, for the plaintiff in error.

Jones, Martin & Jones, and R. J. & J. McCamy, for the defendant in error.

68 LEWIS, J. This was a suit upon a policy of life insurance. The case was submitted to the court without a jury, upon an agreed statement of facts, the substance of which was as follows: On November 20, 1895, H. C. Babcock made application to J. D. Thomas, local agent at Dalton, Georgia, of the de-

fendant company, for insurance of five thousand dollars. On the same day Babcock paid the agent the first year's premium on said policy, to wit, one hundred and seventy-four dollars, and at the same time said local agent gave to said Babcock a receipt to the effect that this sum of one hundred and seventy-four dollars should be held for Babcock on the condition, "that if the officers at the home office of the New York Life Insurance Company approve an application made by him this day for an insurance of five thousand dollars, and a policy is issued and delivered to him while living and in good health, said sum shall be applied in payment of the first annual premium on said insurance, provided on or before such delivery he shall pay any balance of said premium." And, "that unless his application is approved, and a policy is issued and delivered to him while living and in good health, and until such first annual premium is paid in full, the New York Life Insurance Company incurs no liability except for the return of said sum on surrender of this receipt." The receipt further stipulated: "That no agent has power in behalf of said company to make any contract of insurance or to bind said company by making any promise or making or receiving any representation or information." The application made at the same time the receipt was given was at once forwarded by the agent to the home office of the company in New York. It was provided in the application: "That the company ^{or} shall incur no liability under this application until it has been received, approved, the policy issued thereon by the company at the home office, and the premium has actually been paid to and accepted by the company or its authorized agent during my lifetime and good health." This application was stamped: "Received November 25th, 1895. Home Office." In the application was this further provision: "That the foregoing application, together with the answers made to the medical examiner in continuation of and forming part of the application, shall be a consideration for and the basis of the contract of the New York Life Insurance Company, under any policy issued under this application." On the twenty-sixth day of November, 1895, a policy of insurance to the applicant was issued, in which was contained the exact provisions above quoted from the application; and on the face of this policy were the words: "In witness whereof, the New York Life Insurance Company has by its duly authorized officers signed and delivered this contract, this the 26th day of November, 1895." Signed by the president and secretary of the company.

The above policy was mailed to the local agent of the company at Dalton, Georgia. It reached Dalton and was delivered to the agent, Thomas, by the postmaster about 2 P. M. on November 30, 1895. Thomas made no effort to deliver the policy to the applicant Babcock, whose office was about three minutes' walk from the postoffice, but carried it home with him, his home being about one mile from the postoffice. The policy remained in this agent's possession until about 9 o'clock of the morning of December 2, 1895, at which time one Sherry McAuley, whom the agent knew to be an intimate friend of Babcock, called and asked for said policy, stating that he was authorized to receive it. The agent asked if Babcock was sick, and McAuley replied that he was not. After hesitating, the agent delivered the policy to McAuley. After McAuley had received the policy, he then informed Thomas that Babcock was dead; that he was found dead on the afternoon of the day before in his office with a pistol wound in his breast. This was the first knowledge the agent had of Babcock's death; and he at once demanded the return of the policy, but McAuley refused ⁷⁰ to give it up. The plaintiff, Adelaide A. Babcock, is the party named in the policy as beneficiary, and is the mother of the deceased applicant. Demand was duly made by plaintiff on defendant company for the payment of the policy after the same became due, which demand was refused. No offer to return the money paid by the applicant to the agent Thomas had ever been made to the legal representative of the estate of Babcock until the day of the trial. Babcock, the applicant, died on December 1, 1895, about 4 o'clock in the afternoon, and was in good health up to the time of his death.

After argument had upon the foregoing evidence, the court rendered a judgment for the plaintiff against the defendant for the principal sum sued for, five thousand dollars, besides interest and costs of suit. To this judgment defendant excepted upon the following grounds: 1. Because the court erred in holding the contract between the parties was consummated without the delivery of the policy, the parties having contracted, as defendant contends, that actual delivery of the policy should be made during life of applicant; 2. Because the court erred in holding there was a delivery of the policy under the contract; 3. Because the court erred in disregarding the conditional receipt as being a part of the contract, said receipt declaring the policy must be delivered during the lifetime of the applicant; 4. Because the court erred in holding the applicant had paid his

first premium, the conditional receipt showing, as defendant contends, that there was really no payment, and that there was no intention upon the part of the applicant to pay, or defendant to receive, said money as a premium.

The fundamental question to be determined in the legal construction of all contracts is, What was the real intention of the parties? Where one party makes a proposition to purchase a thing which is unconditionally accepted by the other, the contract of purchase becomes complete. There is no reason why the same rule should not be applied when a written application is made for an insurance policy. So long as the application is not acted upon by the insurance company, of course no contract has been consummated; and if the applicant should die before the acceptance of his application, the company has incurred no ⁷¹ liability. But when the application is accepted, and nothing remains for the applicant to do, the contract becomes complete. Actual delivery of the policy to the insured is not essential to the validity of such a contract, unless expressly made so by its terms. It is true that whether or not a policy has been delivered often becomes a material question; for this is usually the most effective way of proving the acceptance of the application made by the insured. But the contract may be otherwise proved, and when it is shown to be in writing, it is ordinarily binding upon the company, though there should be no delivery whatever, either actual or constructive, of the policy, and though it should remain in the hands of the company. This principle is settled by the provisions of our statute, which declares: "Such contract [fire insurance], to be binding, must be in writing; but delivery is not necessary if, in other respects, the contract is consummated": Civ. Code, sec. 2089. By section 2117 of the Civil Code the same principle is made applicable to life insurance: See Cooke on Life Insurance, 43; 1 Joyce on Insurance, sec. 91. See, also, opinion of Chief Justice Simmons in *Alston v. Greenwich Ins. Co.*, 100 Ga. 282.

We do not mean to say, however, that the insurer and the insured cannot by their contract make an actual delivery of the policy essential to its validity. We see no reason why an insurance company cannot stipulate in its agreement to insure that its risk shall not begin until some definite time in the future, or until some specified act has been done. It is insisted in this case by the plaintiff in error that the receipt given by the local agent to the applicant when the first annual premium was paid

constitutes a part of the contract of insurance, and that by virtue of the terms of this receipt it was expressly agreed between the parties that the insurance company should incur no liability until its policy had been actually delivered to the applicant. We think it very questionable whether the provision in this receipt in reference to a delivery of the policy forms any part of the contract sued on in this case. It was evidently given to protect the company against any liability in the event the application made to it should be rejected. The agent who gave the receipt had no authority to make any contract of insurance.⁷² When the application was passed upon by the duly authorized officers of the company, they could accept it upon such terms and conditions as they might stipulate. They could have embodied in the final contract the conditions appearing in the receipt, or have waived their right to do so by agreeing to insure the life of the applicant without prescribing the conditions named in the receipt. In the application that was passed upon and accepted by the company no such condition appears. The policy that was issued was evidence of the acceptance of this application. The one had direct reference to the other, and neither made any reference whatever to any stipulation contained in the receipt. The policy having referred to, and even quoted verbatim, the conditions named in the application, and having made no allusion whatever to any other paper, the position, to say the least, is plausible that it was the intention of the company not to make the receipt a part of its contract. But a decision of this question is not necessary, under the view we take of this case; for, under the facts in the record, we hold the condition in the receipt as to delivery of the policy was fulfilled. This case is treated just as if the policy never left the hands of the local agent; for the means by which he was induced to part with its possession after the death of the insured cannot strengthen the case of the defendant in error.

The sole defense of the plaintiff in error is based upon the contention that, under its contract, it was to incur no liability until there had been a delivery of the policy to the applicant. Assuming that this condition constitutes a part of the agreement between the parties, it then becomes a material question as to whether or not such delivery was effected before the death of the insured. This is also a question of intention, and must be determined from the facts and circumstances in this case. As a general rule, whenever one parts with the custody and control of anything with the intention at the time that it shall

pass into the possession of another, its delivery to such other person has, in contemplation of law, become complete. The mere manual possession of the thing intended to be delivered is a matter of little consequence. Such possession may exist without any legal delivery, and it may not exist when a legal ⁷³ delivery has been effected. For instance, where one has obtained possession of property fraudulently, or without the knowledge or consent of the owner, there is no delivery from the one to the other, the controlling element of intention being absent. On the other hand, where a person parts with dominion and control over a thing by transmitting it, for example, through the mails or otherwise, with the intention that it shall pass unconditionally into the hands of another, and in the course of transportation it has become lost, the delivery is, nevertheless, complete in law. The controlling question, then, on this subject of delivery is, not who has the actual possession, but who has the right of possession. Applying these principles to the facts before us, we think that the delivery of the policy in question to the applicant had, in contemplation of law, been effected before his death. When his application was accepted at the home office in New York, and a policy issued thereon was placed in the mails for the sole purpose of ultimately reaching his hands, the company parted with its possession and control of the paper. The intention to deliver was complete. The premium money which it had held up to that time upon a conditional trust then became its absolute property. It would have been guilty of no breach of trust in appropriating the fund to its own use. For this privilege it thus acquired there must have been a corresponding benefit accruing to the original owner of the fund; and what he acquired in lieu of his money was an insurance upon his life, and a right to the policy which evidenced the consummation of the contract. If the delivery was not complete when the policy was mailed, it certainly became so when it reached the hands of the local agent during the lifetime of the applicant, and while he was in good health. Construing this act of the company in transmitting the policy to the agent in the light of this contract, it necessarily follows, in the absence of any proof to the contrary, that the agent received the policy charged with no other duty except to hand it unconditionally to the applicant. If this be true, the possession of the agent was the possession of the applicant, and while in the hands of the agent the policy was simply held by him on deposit, or in trust for its real owner. ⁷⁴ This owner had a

right to demand possession of it. Upon refusal, he could have recovered it by an action of trover. Conceding this right, we cannot see how death can rob the beneficiary of her rights under the contract.

Upon a careful examination of the authorities cited for the plaintiff in error, as well as others bearing upon the subject, we find nothing in conflict with the above views. In the case of *Kohen v. Mutual etc. Life Assn.*, 28 Fed. Rep. 705, decided by Brewer, J., of the circuit court of Missouri, it was held: "Where the application for insurance provides that the policy shall not be in force until it is delivered to the applicant, the contract of insurance will not become binding upon the company until delivered." It will be seen from the facts in that case that, before the application was finally passed upon by the company in New York, it had received news of the death of the applicant. The company, in consequence, prepared no certificate of membership and issued no policy to the applicant. The question as to what would have constituted delivery had the policy issued did not arise in that case. In *Misselhorn v. Mutual etc. Life Assn.*, 30 Fed. Rep. 545, decided by the same court, it was held: "Where an application for life insurance, and the policy issued thereon, both provided that the policy should not be in force until 'signed by the officers of the association, and delivered to the applicant,' and the policy was made out after the applicant's death, and, in ignorance thereof, delivered at the place where he had resided, held, that it was void." The plaintiff sought to hold the company liable in that case on account of delay in passing upon the application. The company defended, on the ground that the proposition which the applicant made was for the policy to become operative when the instrument was executed and delivered, and the instrument being executed in ignorance of a material fact, the company was held not liable. The question of what would have constituted delivery had the applicant been in life when the policy issued was not discussed. In the case of *McCully v. Phoenix etc. Ins. Co.*, 18 W. Va. 782 (3), it is ruled: "A condition that the contract shall not take effect except upon the delivery of the policy must be performed⁷⁵ before the contract is complete." It will appear, however, from the facts in that case, that while the policy had left the home office and had been transmitted to the local agent, yet Patton, J., delivering the opinion, put his ruling upon the ground that the policy on its face showed that it was not sent to the agent to be delivered absolutely to McCully, but only

when countersigned by the agent. The case of *Steinle v. New York Life Ins. Co.*, 81 Fed. Rep. 489, was claimed by the plaintiff in error to be one in point, as it involved rights of the company growing out of a receipt just like the one in the case at bar. The two receipts are similar. But it appears from the facts in that case that the application was never in point of fact accepted; and it was simply held that if the applicant died before the acceptance of his application, the company was not liable. Counsel for plaintiff in error also cites 1 Joyce on Insurance, section 98, which lays down the same doctrine enunciated in the above cases, to the effect that where an agreement is made that the policy shall not be in force until actually delivered to the applicant, the contract is not consummated nor the company bound in the absence of such delivery. But in the same section the author says that this rule is subject to certain qualifications; and among the modifications given by him subsequently (section 102) is this: "As a rule, an unconditional delivery of the policy to the agent for delivery to the insured binds the company, and the agent may not refuse to deliver upon tender of the premium, although the insured may be seriously sick."

The above authorities we have selected are among the strongest relied upon by the plaintiff in error; and we merely call attention to them to show that they decide no principle in conflict with our ruling in this case. On the other hand, the principle upon which the third headnote is founded is abundantly sustained by authority, as well as reason. In *Machine Co. v. Insurance Co.*, 50 Ohio St. 549, it was held: "When the terms of an executed policy have been unconditionally accepted by the insured, and it has thereafter been treated as in force by the parties, its delivery will be regarded as complete, though it remain in the hands of the insurer's agent." ⁷⁶ In *Mutual Life Ins. Co. v. Thomson*, 94 Ky. 253, it was held that where a policy was forwarded by the company to its agent, and by the latter delivered to a broker, the premium having been paid, the company was liable, though the policy had not been delivered to the applicant, but to his widow after his death. The supreme court of Kentucky in that case based its ruling upon the ground that the applicant had a right to the possession of the policy. In *Commercial Ins. Co. v. Hallock*, 72 Am. Dec. 379, it was held: "Acceptance of proposition to insure completes contract of insurance, and the policy sent by mail to the agent for delivery cannot be rescinded without the consent of the insured." In

the case of *Yonge v. Equitable Life Assur. Soc.*, 30 Fed. Rep. 902, the applicant was taken sick the same day the agent received the policy from the home office. It was held that the policy was binding upon the company from the time it left the home office; if not then, when the agent received it. In 1 May on Insurance, third edition, section 55, it is declared that where a policy is made and forwarded to the agent to be delivered to applicant on payment of premium, he is not entitled to the policy without such payment. Such a case, however, says the author, is to be distinguished from those where the party claiming the policy has done everything which is required of him. In the one case the policy is held merely as a deposit, and for delivery; while in the other it is held for payment of the premium. Again, in section 56, the same author says: "The mere manual possession of the policy is of little consequence, whether it be in the hands of the insurers or the insured." In section 60 of the same work it is declared: "To constitute a delivery of the policy it is not necessary that there should be an actual manual transfer from one party to the other. The agreement upon all the terms, and the issue and transmission to the agent of a policy in accordance therewith, for delivery without conditions, is tantamount to a delivery to the insured. . . . Whether there is a delivery or not is often a question of intention." 1 Joyce on Insurance, section 95, declares that nondelivery by reason of the negligence of the company or its agents does not relieve the insurer of liability.

77 To the same effect are the decisions of this court upon the subject of what constitutes a valid delivery of a deed. The law makes such delivery essential to the conveyance of title to realty. What would constitute a sufficient delivery in law of a deed would be equally sufficient in the case of an insurance policy, even where the contract between the insurer and the insured stipulated that there should be no liability until delivery of its policy. In the one case the parties supply by contract what the law requires in the other: *Rushin v. Shields*, 11 Ga. 636 (5); 56 Am. Dec. 436; *Alexander v. Leith*, 39 Ga. 180; *O'Neal v. Brown*, 67 Ga. 707; *Ross v. Campbell*, 73 Ga. 309, 310. In any view, then, that we take of this case, whether the receipt given by the local agent to the applicant constitutes a part of the contract of insurance or not, the defendant company was liable. The insured had complied with every condition, and had done everything required of him in order to obtain insurance upon his life. The company had unconditionally accepted his appli-

cation and issued a policy to be unconditionally delivered to him. That policy was received by its local agent, who, through negligence or in disregard of his obligations both to his company and to the other contracting party, failed, without excuse and without authority, to hand the policy to its real owner. In consequence of this failure and negligence, the company contends it is not liable. It thus seeks to take advantage of the wrong of its own agent, by virtually pleading his negligence as a defense to this action. The law should be plain in its terms and unmistakable in its meaning before a court should hold that for such a cause an insurance policy was inoperative. As was held by this court in the case of *Clay v. Phoenix Ins. Co.*, 97 Ga. 44, "stipulations and conditions in policies of insurance, like those in all other contracts, are to have a reasonable intendment, and are to be so construed, if possible, as to avoid forfeitures and to advance the beneficial purposes intended to be accomplished."

Judgment affirmed.

All concurring, except Cobb, J., absent.

Insurance—Contract of when Complete.

Parol Agreement.—A contract of insurance is not complete until the minds of the parties have met and they have arrived at an understanding of the terms of the agreement, the proposals of one party being accepted by the other, and the risk does not attach until all conditions precedent have been fulfilled. Thus, an application for insurance is a mere proposal on the part of the applicant. When the insurer signifies his acceptance of it to the proposer, and not before, the minds of the parties meet and the contract is made. This acceptance must be signified by some act: *Heiman v. Phoenix Mut. Life Ins. Co.*, 17 Minn. 153; 10 Am. Rep. 154; *Schwartz v. Germania Life Ins. Co.*, 18 Minn. 448; *McCully v. Phoenix Mut. Life Ins. Co.*, 18 W. Va. 782; *Covenant Mut. Ben. Assn. v. Conway*, 10 Ill. App. 348; *Rowland v. Springfield etc. Ins. Co.*, 18 Ill. App. 601.

If all of the terms of the contract have been agreed upon and nothing remains to be done but to execute them, liability attaches on the part of the insurer with all the efficacy of a formal policy: *Home Ins. Co. v. Adler*, 77 Ala. 242; *Ganser v. Fireman's Ins. Co.*, 38 Minn. 74; *Michigan Pipe Co. v. Michigan Fire Ins. Co.*, 92 Mich. 482.

It is not essential to the validity of a contract of insurance that it should be evidenced by a written policy; a parol contract is sufficient: *Lingenfelter v. Phoenix Ins. Co.*, 19 Mo. App. 252; *Henning v. United States Ins. Co.*, 47 Mo. 432; 4 Am. Rep. 332; *Baile v. St. Joseph etc. Ins. Co.*, 78 Mo. 371; *Potter v. Phoenix Ins. Co.*, 63 Fed. Rep.

382; *Baker v. Commercial Union Assur. Co.*, 162 Mass. 358; *Flitton v. Fire Ins. Assn.*, 20 Fed. Rep. 766; *Humphry v. Hartford Fire Ins. Co.*, 15 Blatchf. 35; *Sanborn v. Fireman's Ins. Co.*, 16 Gray, 448; 77 Am. Dec. 419; *Relief Fire Ins. Co. v. Shaw*, 94 U. S. 574; *Trustees of First Baptist Church v. Brooklyn Fire Ins. Co.*, 19 N. Y. 305. The doctrine that an act done at one time may take effect as of a prior time by relation back to the principal contract is applicable to contracts of insurance, and a parol contract to insure being the principal act, the payment of the premium and the formal execution of the policy may be concurrent therewith or subsequent thereto: *Davenport v. Peoria etc. Ins. Co.*, 17 Iowa, 277.

If a parol contract of insurance is fairly entered into upon a good consideration, between parties capable of contracting, it is binding, although no written policy is executed: *Hartford Fire Ins. Co. v. Farrish*, 73 Ill. 166; *American Horse Ins. Co. v. Patterson*, 28 Ind. 17. A court of equity may compel the issuance and delivery of an insurance policy after a loss, as if made in advance, when there has been a valid parol agreement made for its issuance before the loss, although the charter of the insurer requires all policies to be in writing: *Franklin Fire Ins. Co. v. Taylor*, 52 Miss. 441; *Davenport v. Peoria etc. Ins. Co.*, 17 Iowa, 276. A parol acceptance of a written proposal for insurance is a binding contract for insurance: *Union Mut. Ins. Co. v. Commercial Mut. etc. Ins. Co.*, 2 Curt. 524. The rule that an agreement to insure, or to execute a policy may be validly made by parol, and that the reasons why the policy must be in writing do not apply to such an agreement (*Trustees of Baptist Church v. Brooklyn Fire Ins. Co.*, 18 Barb. 69), has never been denied, so far as we have been able to ascertain, except in one case, that of *Cockerill v. Cincinnati Mut. Ins. Co.*, 16 Ohio, 148, wherein it was held that a policy of insurance, or a verbal agreement therefor, to be valid, must be in writing.

The essential requisites to a valid parol contract to insure, in order to make it binding as a completed contract of insurance, are, that there must be a meeting of the minds of the respective parties at the same instant of time upon the subject matter of the insurance, the parties thereto, the amount of insurance, the limit of risk, including its duration in point of time, the extent of hazard assumed, the rate of premium, and generally upon all the circumstances which are peculiar to the contract, so that nothing remains to be done but to fill up and deliver the policy on the one hand, and pay the premium on the other: *People's Ins. Co. v. Padon*, 8 Ill. App. 447; *Trustees of Baptist Church v. Brooklyn Fire Ins. Co.*, 28 N. Y. 153; 23 How. Pr. 448; *Tyler v. New Amsterdam Fire Ins. Co.*, 4 Rob. 151. Thus, an oral agreement by an insurance agent to take a certain amount of insurance upon mill property is not a completed contract of assurance, if there was to be an apportionment between real and personal property, and none had been made at the time when the property was destroyed by fire: *Kimball v. Lion Ins. Co.*, 17 Fed. Rep. 625. The mutual as-

sent of the parties to all the elements and terms of the parol contract is essential to its existence and binding effect, and the mere delay of the insurer in accepting the offer or proposal and in returning the premium, for which demand has not been made, does not amount to an acceptance of the proposal, and convert it into a completed contract: *Alabama Gold Life Ins. Co. v. Mayes*, 61 Ala. 163.

The issuance of the policy is not necessary to a valid contract of insurance, and if a verbal contract to issue such policy is made with an authorized agent of the insurer, without mentioning any date for the insurance to take effect, the risk commences immediately: *Potter v. Phoenix Ins. Co.*, 63 Fed. Rep. 882.

Usually, a parol promise to issue a policy upon an application presented and accepted completes the contract of insurance, though no premium is paid, unless the premium is demanded as a condition precedent: *Fireman's Ins. Co. v. Kuessner*, 164 Ill. 275. A valid agreement to insure goods may be made verbally, and an action maintained for the breach thereof, on proof that the substantial conditions of the policy were agreed upon between the insured and the insurer's agent, prepayment of the premium being waived, and some of the details being left to the judgment of the agent filling out the policy, and that the parties separated under the supposition that the contract was complete; that a policy was subsequently issued, but after the loss, in which the details were filled out according to the understanding of the agent. Under such verbal agreement made in October to issue a policy for twelve months in the early part of November, a loss occurring on November 19th may be recovered: *Home Ins. Co. v. Adler*, 71 Ala. 516; 77 Ala. 242. And a parol agreement to insure certain property in a certain building for a certain term and a specified amount from date, although the rate of the premium is left uncertain and to be fixed by the insurer after inspection of the building, the contract being made by his agent, is a completed contract of insurance, and the insurer is bound for a loss occurring thereafter in the term and before the rate of the premium has been communicated to the assured: *Cooke v. Aetna Ins. Co.*, 7 Daly, 555.

If there is an oral contract for insurance to begin at once, the policy to be issued afterward, it is presumed that the form of policy stipulated for is that used by the insurer at the time; and in case of loss before issue of the policy, that form is considered as binding upon the parties: *Smith v. State Ins. Co.*, 64 Iowa, 716; *Salisbury v. Hekla Fire Ins. Co.*, 82 Minn. 458; *State Fire etc. Ins. Co. v. Porter*, 3 Grant Cas. 123; *Eureka Ins. Co. v. Robinson*, 56 Pa. St. 256; 94 Am. Dec. 65.

Generally, the local agent of an insurance company has authority to make oral contracts for insurance which will bind the company until a policy can be issued: *Baker v. Commercial Union Assur. Co.*, 162 Mass. 359. And, if such local agent agrees orally to place at once a certain amount at a certain rate upon the risk and to bind it, while the policy is not to issue until subsequently or until

the risk has been approved by another agent or the insurer, such verbal agreement completes the contract of insurance, and is within the apparent scope of the authority of the local agent, when he has authority in writing to receive proposals for insurance and is intrusted by his principal with blank policies, which he is accustomed to fill out and deliver without consultation with him, and has frequently, without the knowledge or consent of his principal, issued similar policies to those promised under such verbal agreement, without their previous approval. Under these and similar circumstances, the insurer is bound by the act of his local agent in making a verbal agreement for insurance, although the policy is not issued until some time subsequently, and does not, in fact, issue until after the loss has occurred: *Putnam v. Home Ins. Co.*, 123 Mass. 324; 25 Am. Rep. 93; *Sanborn v. Fireman's Ins. Co.*, 16 Gray, 448; 77 Am. Dec. 419; *Ellis v. Albany City Fire Ins. Co.*, 50 N. Y. 402; 10 Am. Rep. 495; *Franklin Fire Ins. Co. v. Hewitt*, 3 B. Mon. 231.

If an application for insurance on goods similar in all respects to others on which the insurer, through his local agent, has recently issued a policy to the same applicant is made on Saturday, and the parties then agree verbally upon all the terms of such insurance except the rate of premium, and the insurer, through his agent, promises to make out a policy and send it to the assured on the next Monday, these facts constitute a present contract of insurance at the former rate of premium, which authorizes a recovery for a loss happening on the intervening Sunday: *Audubon v. Excelsior Ins. Co.*, 27 N. Y. 216. If a proposition for insurance is made to an agent of the insurer, and he forwards it to the insurer, who, by letter to such agent, accepts the risk, and he thereupon makes a parol contract with the applicant for insurance for one year, the policy to be delivered when called for and the premium to be paid within five days, and before the expiration of that time or the payment of the premium the insured property becomes a total loss, whereupon the insured immediately tenders to the agent the amount of his premium and demands his policy, which is refused, the contract of insurance is rendered complete by the verbal agreement of the agent, and the insurer is liable thereunder: *New England etc. Ins. Co. v. Robison*, 25 Ind. 536.

Delivery and acceptance of the policy of insurance conclude the contract and exclude any parol promises for the future inconsistent with it: *Hartford Fire Ins. Co. v. Davenport*, 37 Mich. 608. Although actual manual delivery of the policy is not generally necessary in order to complete the contract of insurance, yet, when the application therefor provides that the policy shall not be in force until it is delivered to the applicant, the contract of insurance does not become binding upon the insurer until the policy is delivered: *Kohen v. Mutual Reserve Fund Life Assn.*, 28 Fed. Rep. 705. If a contract of insurance has been agreed upon, delivery of the policy is not essential to the validity or binding effect of the contract: *Michigan Pipe Co. v. Michigan Ins. Co.*, 92 Mich. 482, 491; *Davenport v. Peoria etc. Ins. Co.*, 17 Iowa, 276.

An actual manual delivery of the policy is not necessary unless made a condition precedent to the binding effect or completion of the contract, and if an agent of the insurer, under agreement with the insured holds the policy subject to the order and control of a third person whose mortgage interest is covered by it, this is a sufficient delivery to give validity to the contract, though such third person has not actually called for or received it at the time of the loss: *Home Ins. Co. v. Curtis*, 82 Mich. 402.

The formal delivery of the policy may be after the completion of the contract to insure, and, if done as of that date, it will relate back as having taken effect on that date: *Brownfield v. Phoenix Ins. Co.*, 35 Mo. App. 54. Whether or not an insurance policy has been delivered after its issuance so as to complete the contract and give it binding effect does not depend upon its manual possession by the insured, but rather upon the intention of the parties as manifested by their acts and agreement, and if the policy is executed and the agent of the company notifies the insured that it has been issued and is in his possession for him, and the premium is paid by the insured to the agent, there is a delivery of the policy and a completion of the contract so as to give it validity and binding effect: *Phoenix Ins. Co. v. McAuthur*, 116 Ala. 659; 67 Am. St. Rep. 154. In determining whether there has been a delivery of the policy, effect is to be given to the intention of the parties, and when the terms of an executed policy have been unconditionally accepted by the insured, and it has thereafter been treated as in force by the parties, its delivery must be regarded as complete and the contract consummated, though it remains in the hands of the insurer's agent: *Machine Co. v. Insurance Co.*, 50 Ohio St. 549. If an officer of the insurance company indorses an acceptance upon the application of the insured, and fills out the policy with intent to have it take immediate effect, and causes it to be mailed to the applicant as of force and effect at that time, the company cannot successfully claim that there was no delivery, although the policy did not reach its destination until after the death of the applicant: *Dalley v. Preferred Masonic Assn.*, 102 Mich. 289.

If an insurance agent, with general authority from the owner to keep his property insured, cancels one policy on order of the company issuing it, and immediately reinsures in another company, paying the premium, notifying the insured by mail of the transaction, and depositing the policy in his safe for the assured, this is a sufficient delivery of the second policy to complete the contract and bind the insurer in case of loss: *Dibble v. Northern Assur. Co.*, 70 Mich. 1; 14 Am. St. Rep. 470. A policy of insurance bearing date on the day the premium is paid, takes effect by relation from that day, although not delivered until several days subsequent thereto: *Lightbody v. North American Ins. Co.*, 23 Wend. 18.

If a life insurance policy is placed by an agent of the insurer in the hands of a broker through whom the application has been received, to be by him delivered to the insured, the contract must be regarded as completed, and binding on the parties, though the

applicant died before the policy was delivered to him: *Mutual Life Ins. Co. v. Thompson*, 94 Ky. 253. Acceptance of an application for insurance is the completion of the contract to insure, and if such application stipulates that the insurer's agent shall act for both parties, delivery of the policy to him consummates the insurance: *Alabama Gold Life Ins. Co. v. Herron*, 56 Miss. 643. If an insurance agent, who is authorized to issue policies, issues and delivers a policy and agrees with the applicant to deduct the premium out of money in his possession belonging to the applicant and to apply it on the payment of such premium, such an agreement is a receipt of the premium by the company, and if the policy is afterward delivered to the insured, but is returned to the agent, to be kept in his safe with other papers belonging to the insured, the delivery of the policy and consummation of the contract is complete, although the policy remains in such safe until after a loss: *Phoenix Ins. Co. v. Meier*, 28 Neb. 124. Delivery of a policy to an insurance agent authorized to deliver it to the insured and receive the premium, and such delivery by him and acceptance of a note for the premium, without paying it to his principal, completes and binds the contract of insurance, although the policy provides that such agent shall be deemed the agent of the insured and that the insurer shall not be liable until he receives the premium: *Carson v. Jersey City Fire Co.*, 43 N. J. L. 300; 39 Am. Rep. 584. An insurance agent being in the habit of issuing policies on blanks furnished by the company, and being about to leave home, and anticipating a request for a renewal of a policy issued by him which would expire before his return, signed a policy in blank and left it with his clerk to fill up and deliver to the insured if called for. On the day that the old policy expired an agent of the insured called at the insurance agent's office to secure a renewal of the policy, and was told by the clerk that it had been renewed and shown the entry thereof on the insurance register. Two days later, the insurance agent returned, and, in obedience to a letter from the general agent of the company, sent the policy to him for cancellation, but did not notify the insured until the morning after a loss had occurred, and seven days after the policy had been sent to such general agent. No premium was paid nor demanded, and it was held that a valid contract of insurance was completed, and that, though the new policy remained in the hands of the agent, it must be treated as delivered: *Lum v. United States Fire Ins. Co.*, 104 Mich. 397.

A condition that the contract shall not take effect except upon the delivery of the policy, contained in the application therefor, is valid and must be performed before the contract is complete: *McCully v. Phoenix Mutual Life Ins. Co.*, 18 W. Va. 782; and in Massachusetts it is uniformly held that there must be an actual, manual, and absolute delivery of the policy before the contract of insurance is consummated or binding on the parties: *Markey v. Mutual Ben. Life Ins. Co.*, 118 Mass. 178; 126 Mass. 158. Under the rulings in that state, if the policy is issued at one time after the acceptance of the application, but is not delivered, through no

fault of the insured, until a subsequent time, the contract is not completed and the insurance takes effect only from the time of the actual delivery of the policy: *Wanier v. Milford Mut. Fire Ins. Co.*, 153 Mass. 335. Some cases hold that a contract of insurance is not completed for want of delivery under peculiar conditions, and some of them seem to be in direct conflict with the great weight of authority. Thus, in *Nutting v. Minnesota Fire Ins. Co.*, 98 Wis. 26, it appeared that an insurance agent, on handing a policy to the broker who acted for the insured, remarked that he would like to keep it for a few days until he knew whether or not the insurer would carry the risk, and then took it away and kept it, without notifying the broker of the refusal of the insurer to carry the risk, and it was held, upon the happening of a loss, that there was no completed contract of insurance for the reason that the policy was never delivered. And where an insurance agent made out a policy to an applicant, and placed it in the hands of a third person, until he could learn whether the insurer would accept the risk, and the latter refused, it was held that there was no delivery of the policy and no consummation of the contract of insurance, although the insurance agent had received the premium: *Brown v. American Ins. Co.*, 70 Iowa, 390. In those cases where delivery of the policy is made a condition precedent to the completion of the contract, such condition must be complied with. Thus, where a policy issues under an application containing a condition that no liability shall arise unless the premium is paid and the policy delivered during the life of the assured, and such policy is delivered to an insurance agent, who delivers it to a third person with instructions not to deliver it until certain indorsements are made thereon, and the policy is not delivered until after the death of the insured, the contract is not complete or binding on the insurer: *Hawley v. Michigan Life Ins. Co.*, 92 Iowa, 593; *McClave v. Mutual Reserve Fund Assn.*, 55 N. J. L. 187. If an application contains a condition that there shall be no contract until a policy is issued and delivered while the applicant is living, there cannot be any completed contract of insurance if the applicant dies before the policy is issued: *Paine v. Pacific Mut. Life Ins. Co.*, 51 Fed. Rep. 689. If a policy is sent to an agent of the insurer without an application therefor, but with the expectation that the agent will tender it to the insured in renewal of another policy which has expired, and such policy reaches the agent on Sunday, and after the loss of the property on the previous day, and the agent who forwarded the policy telegraphs on that Sunday to the receiving agent not to deliver the policy, to which he answers, "All right, will return," and he communicates the facts to an agent of the insurer on the same day, who notifies the insurance agent to hold the policy, which is not done, and the agent of the insured, four or five days thereafter, demands the policy and tenders the premium, there is no completed contract of insurance, and the insurer is not liable for the loss: *New York Lumber etc. Co. v. People's Fire Ins. Co.*, 96 Mich. 20.

Payment of Premium.—A general agent of a life insurance company may waive the payment of the premium and deliver the policy, and thereby make it a valid and subsisting contract of insurance, notwithstanding a provision in the policy that it shall not take effect until the premium is paid while the insured is in good health: *Berlinger v. Travelers' Ins. Co.*, 121 Cal. 451. And if the insurer has issued and delivered a policy acknowledging the receipt of the premium therein, it is estopped to deny the payment of the premium for the purpose of showing the noncompletion of the contract of insurance and the nonexistence thereof. The contract is binding on the insurer for the length of time covered by the receipt, whether the premium is paid or not: *Dobyns v. Bay State Assn.*, 144 Mo. 95. An acceptance of a proposal to insure and receipt of the premium offered completes the negotiation for insurance, and if, on the same day, the insurer makes out and signs a policy, it thereby ratifies the application, and its consent is complete: *Keim v. Home Mut. Fire Ins. Co.*, 42 Mo. 38; 97 Am. Dec. 291. Receipt of the premium and delivery of the policy by the insurer complete the contract, and he cannot be heard thereafter to deny its existence: *Powell v. Factor's etc. Ins. Co.*, 28 La. Ann. 19.

A provision in a policy that the insurer shall not be liable thereon until the premium is actually paid is waived by an unconditional delivery of the policy to the assured as a completed contract under an express or implied agreement that credit shall be given: *Griffith v. New York Life Ins. Co.*, 101 Cal. 627; 40 Am. St. Rep. 96. A somewhat remarkable case is that of *Baldwin v. Chouteau Ins. Co.*, 56 Mo. 151; 17 Am. Rep. 671, where it appeared that an application for insurance was made, accepted, and the policy made out and executed. The insured not having the money with which to pay the premium, the policy remained in the hands of the insurer until two months thereafter, when the insured paid the premium and received the policy. In the mean time, the property was destroyed by fire, but the insured did not inform the insurer of this fact, and that upon the payment of the premium and the delivery of the policy the contract to insure related back to the date of the policy, and that the insurer was liable for the amount assured. And in *Hubbard v. Hartford Fire Ins. Co.*, 33 Iowa, 325, 11 Am. Rep. 125, it appeared that a person applied for a policy of insurance, which was made out for him on the eighteenth day of the month, but it was not delivered nor the premium paid until the twenty-second day of the same month; and it was held that the contract was completed and that the policy commenced on the eighteenth day of the month.

If the premium is tendered to the agent of the insurer, and he does not receive it, but says that he shall consider the payment as actually made, and authorizes the applicant to retain the money until the policy arrives, the contract is as complete and binding upon the insured as if the money had actually been paid to the agent: *Walker v. Metropolitan Ins. Co.*, 56 Me. 371-381. To the same effect is *Wooddy v. Old Dominion Ins. Co.*, 31 Gratt. 362; 31 Am. Rep. 732; *Phoenix Ins. Co. v. Meier*, 28 Neb. 124; *Carson v. Jersey City Fire Ins. Co.*, 43 N. J. L. 300; 39 Am. Rep. 584. If the amount of the

premium is paid to the insurer by its agent, who takes the risk, although such agent receives from the insured only part of the premium, and retains the policy in his hands until the time of the loss, the contract of insurance is completed and binding from the time of the issuance of the policy: *Wheeler v. Watertown Fire Ins. Co.*, 131 Mass. 1. If an insurer writes a policy founded on an accepted application and sends it to its agent, who offers it to the applicant for his inspection, but the premium is not paid nor the policy finally delivered, the contract of insurance is not consummated nor binding: *Markey v. Mutual Ben. Ins. Co.*, 126 Mass. 158. In *Marks v. Hope Mut. Ins. Co.*, 117 Mass. 528, it appeared that an insurance agent gave a receipt to an applicant for insurance, acknowledging the receipt of a certain sum, and agreeing, if the application was approved, to furnish a policy within thirty days, or, if the application was declined, to return the above amount to him or his order on demand and return of the receipt, no liability to be assumed by the insurer unless the risk was approved and a policy issued at the home office, and on an action on such receipt it was shown that the application was approved by the insurer and a policy sent to such agent within thirty days, which was not delivered before the death of the applicant, after which the policy was returned by the agent to the insurer; and it was held that the receipt did not operate as a present contract of insurance until the policy should be furnished, or for the thirty days mentioned therein. If such an application is rejected by the insurer, the receipt thus given is not binding on the company to issue a policy or at all, although it provides that it shall be binding on the insurance company until the policy is received: *Cotton States Ins. Co. v. Scurry*, 50 Ga. 48. If the premium is not paid, and the policy is not forwarded to the correct address of the applicant until after his death, the contract of insurance is inchoate and incomplete, and no liability attaches under it: *Rogers v. Charter Oak Ins. Co.*, 41 Conn. 97; *St. Louis Mut. Life Ins. Co. v. Kennedy*, 6 Bush, 450. If it is agreed between an applicant for insurance and an insurance agent that the application shall be sent to the insurer representing the premiums as paid in cash, when in fact the agent has accepted premium notes, and the policy is issued, and sent to such agent, who, distrusting the financial solvency of the applicant, enters into an agreement with him, whereby the note is surrendered and the policy returned to the insurer and canceled, such policy has never become a perfected contract, and its surrender and cancellation prevent any liability arising against the insurer if the insured has agreed that the policy shall not be enforced until the actual payment of the premium: *Griffith v. New York Life Ins. Co.*, 101 Cal. 627; 40 Am. St. Rep. 98.

Renewals.—If an insurance company accepts an application to renew a fire insurance policy, and issues such renewal without the payment of the premium, upon the representation of its agent that the insured is perfectly good, and forwards it to the agent holding the latter liable for the premium, this amounts to a contract to insure between the company and the assured: *Planters' Ins. Co. v.*

Ray, 52 Miss. 325. If an insurer makes an oral offer through his authorized agent to renew a policy of insurance upon certain terms and conditions, and the offer is accepted, this constitutes a contract binding on both of the parties. "There is in such case the assent of the parties *ad idem*. The insurers agree to issue the policy. The insured promises to pay the premium agreed upon," and this completes the contract of insurance: Walker v. Metropolitan Ins. Co., 56 Me. 371-381. An insurance company is liable upon a policy forwarded to it by its agent to be indorsed with its consent to a transfer or renewal of the policy, when an additional premium is demanded and paid to the agent, although the following day the property is destroyed by fire, before an indorsement by the insurer: Medearis v. Anchor Mut. etc. Ins. Co., 104 Iowa, 88; 65 Am. St. Rep. 428.

The Application.—As a general rule, the acceptance of an application and proposition to insure completes the contract between the insured and the insurer, without the issuance of a policy: Walker v. Metropolitan Ins. Co., 56 Me. 371-381; Commercial Ins. Co. v. Hallock, 27 N. J. L. 645; 72 Am. Dec. 379; McCulloch v. Eagle Ins. Co., 1 Pick. 278; Lightbody v. Insurance Co., 23 Wend. 18; Goodall v. New England Mut. Fire Ins. Co., 25 N. H. 169, and other cases cited in this note; but it has also been held that the fact that a policy has been issued and tendered to the assured pursuant to his application does not necessarily prove a completed contract of insurance: Hogben v. Metropolitan Life Ins. Co., 69 Conn. 503; 61 Am. St. Rep. 53. The application must, however, be approved before the contract becomes complete, and delay in making such approval by the insurer does not complete the contract: Home etc. Ben. Assn. v. Jones, 5 Oklahoma, 598; Equitable Life Ins. Soc. v. McElroy, 83 Fed. Rep. 631. And an acceptance of an offer or application to insure, if not communicated to the proposer, does not make a contract: Equitable Life Ins. Soc. v. McElroy, 83 Fed. Rep. 631. Some cases go to the extent of holding that though the application is accepted, there is a strong presumption, where no policy has been issued and no premium paid, that there was no contract and no intention to contract: Equitable Life Ins. Soc. v. McElroy, 83 Fed. Rep. 631. If an application made to an agent never reaches the insurer and no policy is issued, the contract is not complete and does not bind the insurer in the absence of a verbal contract by the agent to insure: Atkinson v. Hawkeye Ins. Co., 71 Iowa, 341; Walker v. Farmer's Ins. Co., 51 Iowa, 679; Covenant Mut. etc. Assn. v. Conway, 10 Ill. App. 348. If the application for insurance is made out on one of the regular blanks of the insurance company, which provides that no liability shall attach until the application has been approved by the home office, and the application and the premium is delivered to the insurance agent, and before the application has been approved by the home office, the property is destroyed, the contract is not complete, and the insurer is not liable: Pickett v. German Fire Ins. Co., 39 Kan. 697; Winneshiek Ins. Co. v. Holzgrafe, 53 Ill. 516; 5 Am. Rep. 64; Barr v. Insurance Co., 61 Ind. 488.

Correspondence.—If there is correspondence relating to fire insurance, the insurer making known the terms upon which he is willing

to insure by letter, the contract is complete when the insured places a letter in the postoffice accepting the offer and terms, and if the property is burned while the letter of acceptance is in transit by the mails, the insurer is liable: *Taylor v. Merchants' Fire Ins. Co.*, 9 How. 390; *Eames v. Home Ins. Co.*, 94 U. S. 621; *Northwestern Ins. Co. v. Elliott*, 7 Saw. 21; *Lungstrass v. German Ins. Co.*, 48 Mo. 201; *Schultz v. Phenix Ins. Co.*, 77 Fed. Rep. 375; *Thayer v. Middlesex Fire Ins. Co.*, 10 Pick. 325. An offer to contract insurance, communicated by post, must be considered as continually made until it reaches the other party, and if he accepts before knowledge of retraction of the offer, the contract is complete and binding: *Hamilton v. Lycoming Mut. Ins. Co.*, 5 Pa. St. 339. If a contract of insurance has been made with an agent, and the application with the premium note has been sent on to the office of the insurer from which the policy is to issue, the insurer is liable, although the loss occurs before the arrival of the letter containing the application: *Palm v. Medina etc. Ins. Co.*, 20 Ohio, 530. The same rules apply in life insurance. Thus, where the secretary of the insurer indorses an acceptance upon the application and fills out a policy, with intent to have it take immediate effect, and causes it to be mailed to the applicant as of force and effect at that time, the contract is complete, and the insurer cannot be heard to say that there was no delivery, though the policy did not reach its destination until after the death of the applicant: *Dalley v. Preferred Masonic etc. Assn.*, 102 Mich. 289; *Yonge v. Equitable Life Ins. Co.*, 30 Fed. Rep. 902. When the contract is made by correspondence through the mails, consummation occurs when an unqualified acceptance of the offer is mailed, the offer being deemed to continue a reasonable time after its receipt for acceptance, unless sooner withdrawn, and what is such reasonable time must be determined from all the circumstances in the case; but unless it is otherwise indicated it will not usually be considered as extending beyond the next mail, where ample time intervenes for acceptance: *Thayer v. Middlesex Mut. etc. Ins. Co.*, 10 Pick. 325; *Insurance Co. v. Johnson*, 23 Pa. St. 72. In one case, *McCulloch v. Eagle Ins. Co.*, 1 Pick. 278, it was held that when a party applies for insurance by letter, and receives a reply stating the terms upon which the insurance can be had, to which the applicant replies accepting the terms, the contract does not become binding until the letter of acceptance is received, or the fact of acceptance has in some way come to the knowledge of the insurer.

RAKESTRAW v. LANIER.

[104 GEORGIA, 188.]

CONTRACTS—RESTRAINT OF TRADE—CONSIDERATION.—A contract must be upheld if the restraint imposed thereby is not unreasonable, is founded upon a valuable consideration, and is reasonably necessary to protect the interest of the party in whose favor it is imposed, and does not unduly prejudice the interests of the public.

CONTRACTS—RESTRAINT OF TRADE—LIMITATIONS AS TO TIME.—A contract in restraint of trade unlimited as to time, the enforcement of which as made would needlessly oppress one of the parties without casting any corresponding benefit or protection on the other, is unreasonable and void.

CONTRACTS—RESTRAINT OF TRADE—LIMITATIONS. A contract in restraint of trade, reasonable and valid in other respects, may be rendered void for want of limitations as to time and territory.

CONTRACTS—RESTRAINT OF TRADE—LIMITATION AS TO TIME.—A distinction exists between a contract binding one to refrain from the practice of a learned profession, and one which binds a person who has sold out a mercantile business and the goodwill thereof not to again engage in such business. In the former case, there must be a reasonable limit as to time, while in the latter case a time limit is not essential to the validity of the contract.

CONTRACTS—RESTRAINT ON PRACTICE OF PROFESSION.—A contract which prohibits one party from at any time in the future practicing his profession as a physician at a given place, without regard to the fact that the other party shall not be engaged in such profession, or that the latter may have removed from the prohibited territory, or have been rendered unable from age or physical infirmity to continue his practice, is unreasonable, not necessary for the protection of the party in whose favor the restraint is imposed, oppressive to the party restrained, opposed to the interests of the public, and void.

The parties to this action formed a partnership for the practice of medicine, surgery, and obstetrics. The contract of co-partnership contained the following stipulations: "In consideration of the advantages and benefits that will flow to said Rakestraw by reason of the formation of said firm and partnership business, he hereby agrees that in the event said firm shall at any time hereafter be dissolved, he will not locate or engage in the practice of medicine, surgery, or obstetrics at said town of Oliver, or at any place within fifteen miles radius from the drugstore of said Lanier, unless he shall first have obtained the written consent of said Lanier. And in the event the said Rakestraw shall violate the terms of this article, the said Lanier shall be entitled to sue and recover, as his damages, the sum of one thousand dollars annually from said Rakestraw so long as he shall violate the terms of this article, said sum of one thou-

said dollars being agreed now between the parties hereto as damages and not as a penalty. This partnership shall continue for the space and term of twelve months from the date when signed by the parties hereto, unless sooner dissolved. This partnership may be dissolved by either member giving to the other in writing a notice of his intention to withdraw from the partnership; and at the expiration of thirty days from the service of such notice by either member on the other said firm shall be dissolved." On June 3, 1896, Lanier gave Rakestraw the required notice of an intention to dissolve the partnership, and in due course of time it was accordingly dissolved. Subsequently, Rakestraw continued to reside in the town of Oliver, and, in violation of the above contract, to practice medicine, surgery, and obstetrics. On September 18, 1897, Lanier demanded of Rakestraw the amount of damages agreed upon in the contract. The latter refused to comply with such demand, and, being insolvent, Lanier filed a petition in the superior court for an injunction restraining Rakestraw from carrying on the practice of his profession in violation of the terms of the contract set out above. The court ordered that a temporary injunction issue.

Denmark, Adams & Freeman, for the plaintiff in error.

Gignilliat & Stubbs and Oliver & Overstreet, for the defendant in error.

¹²¹ LITTLE, J. Counsel for plaintiff in error, both by his argument and brief, rests his case on the proposition that the petition on which the judge below granted an injunction, in default of bond, sets forth no cause for relief, because the contract ¹²² sought to be enforced is not a legal and binding instrument. Hence, this court is called upon to determine the question whether the contract which is set out in the foregoing report is void as contrary to public policy, or whether the same is valid and therefore to be enforced. This question is to be settled by the rules of law governing contracts made in restraint of trade; and, in seeking to make application of such rules, we find ourselves furnished with precedents which seem to be authority for all phases of the question, and rulings distressingly in conflict. The plaintiff in error submits that the terms of the contract render it invalid because it is harsh and unreasonable; it is against public policy; it is not a reasonable or proper contract within the meaning or the requirements of the law;

that it is without consideration to support it. If either one of these contentions is established, then, as we understand the law applicable to contracts of this character, the courts must refuse to enforce the contract relied upon, because agreements which are unlawful, without regard to the manner of execution, never in law become contracts, although frequently denominated and dealt with under the name of illegal contracts. We cannot, within reasonable limits, undertake to reconcile conflicting opinions in treating of contracts in restraint of trade, nor cite the authorities which bear upon the different constituent elements which render such contracts valid, or the want of which make them void, for the reason that the first are irreconcilable and the latter inharmonious. It must suffice that we shall in this case present the rules which we consider established by the most satisfactorily reasoned cases of other jurisdictions and the adjudications of our own court.

Mr. Clark, in his work on Contracts, says, on authority, that at one time in England it was considered that a contract was contrary to public policy if it placed any restraint at all on a man's right to exercise his trade or calling, but that gradually exceptions were recognized until at last the court, in a leading case, *Mitchell v. Reynolds*, 1 P. Wms. 181, established the rule that a contract in restraint of trade, upon consideration which shows it was reasonable for the parties to enter into it, is good; "that whenever a consideration appears to make it a proper and ¹⁰³ useful contract and such as cannot be set aside without injury to a fair contractor, it ought to be maintained," et cetera. By reference to that case, we find the conclusion of the court to be that: "In all restraints of trade, where nothing more appears, the law presumes them bad; but if the circumstances are set forth, that presumption is excluded, and the court is to judge of those circumstances and determine accordingly, and if upon them it appears to be a just and honest contract, it ought to be maintained." Some question has arisen as to the proper construction of our code, which declares that: "Contracts in general in restraint of trade are void" (Civ. Code, sec. 3668), and as to whether the proper interpretation of these words would have the effect to declare that contracts in general restraint of trade are void, or that contracts generally in restraint of trade are void. Speaking for myself, I interpret the language to mean that contracts generally in restraint of trade are void. The words of this section were not codified from any act of the general assembly, but the same language appeared in

our first code (1863), and ran without change through successive editions and revisions up to and including the Civil Code of 1895; from which I infer that if the words were not intended to be accepted as written, subsequent codifiers, if not subsequent legislatures, would, by change or amendment, more clearly have expressed a different meaning. But I take it that the words, "contracts in general in restraint of trade are void," meaning that, generally, contracts in restraint of trade are void, were incorporated into the codification of laws in force in this state as expressing a recognized legal principle sanctioned by the highest authority.

In *Ross v. Sadgbeer*, 21 Wend. 168, Mr. Justice Bronson says: "The law starts out with the presumption that a contract in restraint of trade is void." The same rule is stated in *Pollock on Contracts*, side page 311; is recognized in the leading case of *Mitchell v. Reynolds*, 1 P. Wms. 181, and the principle laid down in *Clark on Contracts*, 447. Besides, such a construction seems to be in harmony with the policy of the law in this state. To one class of persons at least—corporations—contracts of this character are forbidden when they tend to lessen competition in their respective ¹⁹⁴ businesses (Const. 1877; Civ. Code, sec. 5800); and various acts of the legislature seem to indicate such a policy to exist. However this may be, it is certain that contracts in unreasonable restraint of trade are contrary to public policy and void, because they tend to injure the parties making them, diminish their means of procuring livelihoods and a competency for their families; tempt improvident persons, for the sake of present gain, to deprive themselves of the power to make future acquisitions, and expose them to imposition and oppression; tend to deprive the public of the services of men in the employments and capacities in which they may be most useful to the community as well as to themselves; discourage industry and enterprise, and diminish the products of ingenuity and skill; prevent competition and enhance prices, and expose the public to all the evils of monopoly: *Clark on Contracts*, 446. Against evils like these, wise laws protect individuals and the public by declaring all such contracts void: *Alger v. Thacker*, 19 Pick. 51; 31 Am. Dec. 119. Since the early legislative history both of England and this country, statutes have been of force looking to the prevention of monopoly and the interdiction of restraints upon the exercise of business, trades, or professions, and in no instance has a contract which imposed an unreasonable restraint upon the same, in the eye of the judiciary,

cannot, undertake to measure. There is nothing in the record of the case which shows such gross inadequacy of consideration as to shock the conscience and amount in itself to evidence of fraud: See Metcalf on Contracts, 271.

The remaining objections urged against the validity of the contract may all be passed upon in considering the other question ¹⁹⁷ upon which the validity of the contract depends, namely, Is the restraint which it imposes reasonable? While public policy forbids any agreement which unreasonably restrains a person from exercising his trade or business, it is equally true that public policy also requires that the freedom of persons to enter into contracts shall not be lightly interfered with: Clark on Contracts, 447. The contract under consideration imposed a restraint unlimited as to time but limited as to space. We are aware that it has been repeatedly held that where the restraint is otherwise reasonable, the circumstance that it is indefinite as to time will not affect its validity: 1 Wharton on Contracts, sec. 432; Metcalf on Contracts, 232; Benjamin on Sales, sec. 525; Hitchcock v. Coker, 6 Ad. & E. 438; Pemberton v. Vaughan, 10 Q. B. 87; Catt v. Tourle, L. R. 4 Ch. 654; Cook v. Johnson, 47 Conn. 175; 36 Am. Rep. 64; Bowser v. Bliss, 7 Blackf. 344; 43 Am. Dec. 93; and that our court in more than one case, which will be presently referred to, held the same doctrine. Nevertheless, if the test of the validity of the contract is, as we have shown it to be, that it must be founded on a valuable consideration, and that the restraint imposed must be reasonable and such as is reasonably necessary to protect the interest of the party in whose favor it is imposed and at the same time not unduly prejudice the interest of the public, it seems to us that the question of time in the restriction imposed cannot be arbitrarily said to have no effect on the validity of a contract which, being reasonable in all other respects except in point of time, is, from the circumstances, unreasonable and oppressive as to the latter: See Mandeville v. Harman, 42 N. J. Eq. 185; Keeler v. Taylor, 53 Pa. St. 467; 91 Am. Dec. 221. In the case of Hitchcock v. Coker, 2 Ad. & E. 438, Lord Denman, construing a contract which imposed a restraint on one who, having entered the service of the plaintiff who was a druggist, agreed that he would not, at any time after leaving such service, engage in the business of a druggist in that town, said: "It is not limited to such time as the plaintiff should carry on business in Taunton, nor to any given number of years, nor even to the life of the plaintiff, but it attaches to the de-

fendant as long as he lives, although the plaintiff may have left Taunton, or parted with his business, or be dead"; ¹⁹⁸ and he accordingly held the restraint to be unreasonable and oppressive. That case was reversed on writ of error, but the point of reversal was that a restriction so extensive in point of time was necessary for the protection of the promisee in the enjoyment of the goodwill of his trade; and, as we understand the principle ruled in that case, a restriction so extensive is reasonable and not oppressive when it prevents the destruction of a property right, or interest, or the goodwill of a trade or business: See review of the case in Clark on Contracts, 455, 456. The contrary of this doctrine, however, is directly held in French v. Parker, 16 R. I. 219; 27 Am. St. Rep. 733.

With conflicting authorities as to the application of the rules for testing the validity of contracts in partial restraint of trade, upon which all agree, we think a clear distinction must be taken between the class of cases binding one who has sold out a mercantile or other kind of business, and the goodwill therewith connected, not to again engage in that business within a given territory, and that class of cases binding one to desist from the practice of a learned profession. I can readily perceive that a successor of a merchant, broker, or shopkeeper might reasonably expect to retain the former patronage of the place of business, but fully concur with the views expressed by the court, in the case of Mandeville v. Harman, 42 N. J. Eq. 185, that professional skill, experience, and reputation are things which cannot be bought or sold. They constitute part of the individuality of the particular person, and die with him. In that case the court said: "There can be no doubt, I think, that if the complainant was the most distinguished physician of the city of Newark, and had by far the most lucrative practice in that city, and he should be so unfortunate as to die next month or next year, it would be impossible for his personal representative to sell his goodwill or practice, as a thing of property distinct from the office which he had occupied prior to his death, for any price; and I think it is equally obvious that, if it were sold in connection with his office, the only possible value which could be ascribed to it would be the slight possibility that some of the persons who had been his patients might, when they needed the services of a physician, go or send there ¹⁹⁹ for the next occupant of the office. The practice of a physician is a thing so purely personal, depending so absolutely on the confidence reposed in his personal skill and ability, that when he

ceases to exist, it necessarily ceases also, and after his death can have neither an intrinsic, nor a market value. And if the complainant should make sale of his practice in his lifetime, it is manifest all the purchaser could possibly get would be immunity from competition with him, and, perhaps, his implied approval that the purchaser was fit to be his successor; but it would be impossible for him to transfer his professional skill and ability to his successor, or to induce anybody to believe that he had."

So far as we have been able to examine, the cases which have ruled that if the restraint is reasonably limited as to space, the fact that it is unlimited as to time will not render the agreement void, were cases in which some business or property, or property right, either of goods or goodwill, had been sold, and the restriction as to unlimited time was not considered unreasonable, because it affected property rights. Our own court has considered a number of cases involving contracts in restraint of trade, and in some of them held that restraints unlimited in point of time did not render the contracts void; but in every one of such cases, as far as we have examined, a property interest was involved. The first is that of *Holmes v. Martin*, 10 Ga. 503. In that case Holmes conveyed to Arnold a house and lot in the town of Lawrenceville, with this restriction in the deed: "That the said house and lot shall not be kept by the said Arnold or his assigns as a public tavern or hotel, which right is reserved in said property by said Holmes." In that case the court held this contract to be good, and that contracts in partial restraint of trade only may be supported, provided the restraint be reasonable, and the contract founded on a consideration. In the case of *Mell v. Moony*, 30 Ga. 413, no question arose which called for a ruling of the validity of contracts in restraint of trade, the points in the case relating alone to pleading. In the case of *Jenkins v. Temples*, 39 Ga. 655, 99 Am. Dec. 482, it appeared that Jenkins had bought of Temples an entire stock of groceries and confectioneries at very high ²⁰⁰ prices; and Temples had agreed that he would use all of his influence for Jenkins with his former customers, and bound himself not to deal in any of said articles at Spring Place until January, 1869. Temples violated the agreement. The court below held the contract to be void, and this court ruled, reversing the judge below, that a party might legally bind himself for a valuable consideration not to conduct a particular trade or business in a particular place for a reasonable and definite period of time. In the case of *Spier v. Lambdin*, 45 Ga. 319, Lambdin sold to Spier an un-

expired lease of the Barnesville Academy, with the consent of the trustees, for the consideration of four hundred and seventy-five dollars, representing that he wished to abandon school teaching, and would use his influence for Spier's benefit. The contract was held to be good and enforceable. In the case of *Ellis v. Jones*, 56 Ga. 504, Ellis & Palmer had purchased a stock of merchandise, consisting of dry-goods, groceries, et cetera, from Jones & Co., and the storehouse containing the same, together with their customers and goodwill. Jones & Co. having recommenced business in the same place, Ellis & Palmer filed a bill to enjoin such action. The injunction was refused. It does not satisfactorily appear in the case that Jones & Co. covenanted not to engage in the same business.

In the case of *Goodman v. Henderson*, 58 Ga. 567, the suit was upon a written agreement, whereby Goodman, in consideration of one hundred dollars a month for two years, and a further money consideration, agreed to retire from the business of purchasing green hides, sheepskins, et cetera, in the Savannah market forever, and that he would use his influence in favor of the purchaser, and sold to him the goodwill of the business. This court held in that case, that the limit as to time made no difference if the contract was limited as to space. In the case of *Brewer v. Lamar*, 69 Ga. 656, 47 Am. Rep. 766, there was an agreement to sell a certain proprietary medicine, and the seller agreed never to use or permit his name to be used on any preparation for the same class of complaints for which this medicine was made, and agreed also to surrender his trademark and give to the purchasers the exclusive right to sell and manufacture the ²⁰¹ same under the old name. The consideration of the purchase was two hundred and seventy-five dollars. The court held that the contract was in partial restraint of trade and could be enforced. In the case of *Newman v. Wolfson*, 69 Ga. 764, Newman sold to Wolfson a stock of goods, et cetera, together with the goodwill of the business, for fourteen hundred and sixty-six dollars, and covenanted not to engage in a like business in that city for a period of five years. The court in this case held that the contract was not unreasonable. In the case of *Swanson v. Kirby*, 98 Ga. 586, this court held, where one had sold out a given business and contracted not to again carry on the same in a particular locality, that, though unlimited as to time, such a contract, being reasonable and proper when limited as to place and in other respects, was valid. In this case the consideration paid was fifteen hundred dollars, and the property purchased

was a membership in the American Ticket Brokers' Association, a burglar-proof safe, desk, typewriter, and other office fixtures. The covenant was not to open a ticket office in the city of Atlanta without the consent of Kirby. In that case the court held that, while contracts in total restraint of trade were void, where the restraint was partial, reasonable, and founded upon a good consideration, the contract would be enforced. It has never been decided in this state that a covenant between professional men (where no property rights were involved in the contract which imposed the restriction), so extensive in duration as that under consideration in the present case, is valid. As was said by the court in the case of *Mandeville v. Harman*, 42 N. J. Eq. 185: "It is one of the natural rights of every citizen of this state to use his skill and labor in any useful employment, not only to get food, raiment, and shelter, but to acquire property; and I think it may be regarded as very certain that the courts will never deprive anyone of this right, or even abridge it, except in obedience to the sternest demands of justice."

We test this contract by the rules before referred to, and find it supported by a legal consideration. Being limited as to space, although unlimited as to time, we find that it may properly be classed among contracts in partial restraint of trade. When we seek its terms to ascertain whether it is ²⁰² reasonable, made to protect the promisee, and not oppressive on the promisor, we find that no money was paid by the promisee and no property sold by the promisor; we find that the promisor, by the nature of the contract, must have rendered service for all the benefits he received; we find that under the terms of this contract, if the promisee, the defendant in error, should remove from the town of Oliver, from the state of Georgia—if he should become permanently incapacitated, by disease, from continuing the practice of medicine—if he should die, the promisor in any event would not be at liberty to practice his profession in Oliver, nor within fifteen miles' radius of that town. No matter what the changed conditions might be, it was so nominated in the bond that he should not exercise his calling within the territory prescribed. It must be clear, therefore, that the restrictions imposed upon the promisor in this contract were larger than were necessary for the protection of the promisee. Full protection would have been afforded to the latter if the time in which the restraint should apply had been limited to the life of the defendant in error, or to the time in which he was engaged in the practice of his profession in the county of Screven. Had this

contract been so limited, it is obvious, from the view which we take of the law, that it could be upheld and would be enforced. But when the terms of the contract prohibit one party from at any time in the future practicing his profession at a given place, without regard to the fact that the other party should not be engaged in the competitive business; without regard to the fact that he may have removed from the county and state in which such territory was located; without regard to the fact of the inability of the party, from age or physical infirmity, to continue his practice, it would seem to be unreasonable, not necessary for the protection of the party in whose favor the restraint was imposed, oppressive to the party restrained, and opposed to the interests of the public; and such being the case, the contract cannot be enforced. If it be said that it would be the right of the plaintiff in error, under any of the circumstances we have mentioned, to pray for a modification or rescission of such contract, the reply is that we are not dealing ²⁰³ with such question. We are to construe it as it is written; and so construing it, we hold it to be void and of no binding force and effect.

The judgment of the court below must be reversed.

All the justices concurring, except Cobb, J., absent.

CONTRACTS IN RESTRAINT OF TRADE—CONSIDERATION. A contract in restraint of trade is not void where there is a consideration for it, and good reason for entering into it, and where it imposes no restraint not beneficial to the other party to the contract or injurious to the public: *California Steam Nav. Co. v. Wright*, 6 Cal. 259; 65 Am. Dec. 511.

CONTRACTS—RESTRAINT OF TRADE—LIMITATIONS AS TO TIME.—Contracts in restraint of trade are not necessarily void by reason of universality of time or of place. Their validity depends upon the reasonableness of the restrictions under the conditions of each case, and the test of reasonableness in contracts of this kind is the test of validity: *Oakdale Mfg. Co. v. Garst*, 18 R. I. 484; 49 Am. St. Rep. 784. Usually, however, agreements in general restraint of trade are unreasonable against public policy, and void: *Lufkin Rule Co. v. Fringeli*, 57 Ohio St. 596; 63 Am. St. Rep. 736; *Bagby etc. Co. v. Rivers*, 87 Md. 400; 67 Am. St. Rep. 357. See extended monographic note to *Angier v. Webber*, 92 Am. Dec. 751-765.

CONTRACTS—RESTRAINT OF TRADE—PROFESSIONS.—For the difference, in contracts in restraint of trade, of a limitation as to time as applied to professions and as applied to ordinary mercantile business, see the note to *Tardy v. Creasy*, 59 Am. Rep. 686-689. This distinction, apparently, is not recognized in Connecticut: *Cook v. Johnson*, 47 Conn. 175; 36 Am. Rep. 64.

SOUTHERN RAILWAY CO. v. BARLOW.

[104 GEORGIA, 218.]

RAILROADS—EXCURSION TICKETS—IDENTIFICATION.

A railway excursion ticket, signed by the purchaser, stipulating that it shall not be valid for the return trip unless signed by the purchaser in the presence of a designated agent, and also witnessed and officially executed by such agent for the return trip, and also containing another stipulation by which the purchaser agreed to sign his name and otherwise identify himself as the purchaser of the ticket whenever called upon to do so by an agent or conductor of the roads named on the ticket, makes it incumbent on the purchaser to use all reasonable means of identifying himself as such to the validating agent, and, if required, to identify himself to such agent otherwise than by simply signing his name.

RAILROADS—EXCURSION TICKETS—EXPULSION FROM TRAIN—DAMAGES.—One holding the return portion of a railway excursion ticket required to be validated by a designated agent for such return is entitled to ride thereon, although the ticket is not properly validated, if the failure to validate is due to the fault of the railway company. Such holder has a right in good faith to board a train belonging to the company, although he may know that the ticket will not be accepted for passage, and if, under such circumstances, he is unlawfully ejected from the train, he may recover all damages which he may show by the evidence he has suffered; but if he boards the train with no bona fide intention of returning, and simply to have himself ejected, and thus lay the foundation for an action, he is entitled to recover nominal damages only.

DAMAGES—EVIDENCE.—In an action by a married woman against a railway company to recover for a wrongful expulsion from a train, it is error to allow her counsel to comment to the jury on evidence tending to show that the company's agent, in her absence, had used insulting and offensive language to her husband when he went to such agent to have her ticket validated for passage.

Dorsey, Brewster & Howell, and S. McDaniel, for the plaintiff in error.

W. R. Hammond and L. P. Skeen, for the defendants in error.

214 FISH, J. On September 20, 1895, Joseph E. Barlow purchased from the Pennsylvania Railroad Company at Pittsburg, Pennsylvania, two tickets, one for himself, and one for his wife, for passage over connecting lines of railway from Pittsburg to Atlanta, Georgia, and return, one of the lines being the Southern Railway between Atlanta and Chattanooga. Upon each of these tickets was a printed contract containing certain stipulations. Barlow signed his name to the contract on one of the tickets and the name of his wife to the contract upon the other. The third item in each of the contracts was as follows: "This ticket will not be valid for the returning trip, unless signed by me in the presence of the authorized joint agent at

Atlanta, Georgia, also witnessed and officially executed by said agent for the returning trip." The eighth item in each contract was as follows: "I hereby agree to sign my name and otherwise identify myself as the original purchaser of this ticket, whenever ²¹⁵ called upon to do so by an agent or conductor of the lines named thereon. I fully understand the terms upon which this ticket is issued, accept the same, and agree that it shall be forfeited unless I comply with all the conditions specified above." Barlow and his wife arrived safely in Atlanta, and on the day he reached that place, he went to the joint validating agent of all the railway companies whose lines centered in Atlanta, for the purpose of having the tickets of himself and his wife made good, in the manner indicated in the above-mentioned contracts, for their return to Pittsburg. He "signed both tickets." The agent, not being satisfied with the signatures, declined to stamp the tickets without further identification of Barlow as the original purchaser. The latter then procured the clerk of the hotel at which he had registered to go to the agent's office, and the clerk there expressed to the agent his opinion that the signature which Barlow had just placed upon his ticket was in the same handwriting as the signature which Barlow had placed upon the hotel register. Otherwise than as here stated, Barlow made no effort to identify himself as the original purchaser of these tickets. The agent still declined to stamp the tickets, and Barlow then announced his purpose to use them for passage nevertheless. It is inferable from the nature of the agent's reply that Barlow must thereby have been given to understand that the tickets would not be recognized by conductors as valid. According to Barlow, the agent, among other things, said: "The railroad company has got legal advice, and don't propose to be robbed by highway robbers and sharks." That night Barlow and his wife boarded a train of the Southern Railway, and, upon his refusal to pay fare, both were ejected by the conductor. There was evidence tending to show that the lady was ill; indeed, threatened with a miscarriage, which fact was of course known to Barlow, but it does not appear that it was known to the conductor, or that in ejecting these persons from the train the conductor was guilty of any harsh, offensive, or unbecoming conduct.

Separate actions were brought against the company by Barlow and his wife, and at the trial thereof each obtained a verdict. The defendant filed in each case a motion for a new ²¹⁶ trial, which was overruled, and it excepted. The evidence was sub-

stantially the same in each case. The plaintiffs showed the facts above set forth; and, among other things, there was, in behalf of the defendant, evidence tending to show that Barlow had no intention when he left Pittsburg of returning to that place, but that his purpose was, after reaching Atlanta, to proceed to Florida, and make his home in that state. It affirmatively appears that he did go to Florida, that he and his wife have since resided there, and that Pittsburg has never been his home since the time when they were expelled from the defendant's train. The following recital as to the material grounds relied upon by the defendant for a new trial in each of these cases may be treated as applicable to both. In Mrs. Barlow's case there was an additional ground which will be separately noticed.

1, 2. Complaint is made that in several portions of the charge the court assumed, or at least authorized the jury to assume, that Barlow, in presenting himself to the validating agent and signing the names of himself and his wife upon the contracts printed upon the tickets, did all that was essential to the validity of a demand that the agent should witness the signatures, and affix his stamp to the tickets, thus making them good for returning passage. All of us agree that the third item in the contract, which is quoted above, made it incumbent upon Barlow to use reasonable means of identifying himself to this agent as the original purchaser of these tickets; and we are of the opinion that this requirement was not met simply by writing the names of himself and wife and by having the hotel clerk to express the opinion that the signatures upon Barlow's ticket and upon the hotel register were in his opinion identical. The agent already had the benefit of a comparison of signatures, and the opinion of the clerk did not amount to anything of additional value as to this matter. All of us, except Mr. Justice Little, are also of the opinion that the third and eighth items of this contract should be construed together, and that, as a result, the contract as a whole should be held to mean that the purchaser of the ticket was expressly required to identify himself to the validating agent by means otherwise than ²¹⁷ by merely signing his name. In other words, we are of the opinion that the word "agent," as used in the eighth item, was intended to embrace and refer to the validating agent mentioned in the third item, as well as any other agent of the company whose business or duty would require at his hands any action with reference to such ticket. It would seem that of all agents re-

quired to render service in this connection, the validating agent was the most important, because upon him, and him alone, devolved the duty of making the ticket good for a full half of the entire amount of travel for which it provided.

3. According to the decisions of this court in *Morse v. Southern Ry. Co.*, 102 Ga. 302, and *Southern Ry. Co. v. McKenzie*, 102 Ga. 313, following the ruling made in the case of *Head v. Georgia Pacific Ry. Co.*, 79 Ga. 358, 11 Am. St. Rep. 434, one holding the return portion of a railway excursion ticket, although the same has not been properly validated, is entitled to ride thereon if the failure to validate was due to the fault of the railway company. It would seem to follow that a person holding such a ticket, and being entitled to ride thereon, would have the right to board a train, although he might know that the ticket would not be accepted for passage. One who has a perfect legal right to ride upon a ticket in his possession is not to be deterred from an attempt to exercise that right because he may have reason to believe that the railroad company will unlawfully disregard its contract. If, therefore, under such circumstances the passenger be unlawfully ejected from a railway train, he may recover all damages which he may show by evidence he is entitled to receive. Some of the charges of the court complained of were not in accord with what has just been said, and were therefore erroneous. We do not, however, wish to be understood as holding that in the present case it appeared that Barlow and his wife were entitled to ride upon the tickets which he held. We have already expressed above the views we entertain as to the law applicable to this question.

4. One of the defenses relied upon in the present cases was predicated upon a contention by the defendant that Barlow really had no bona fide intention of returning to Pittsburg on the day when he and his wife took the train from which they²¹⁸ were expelled, but that his purpose in entering the train was to have himself and wife ejected therefrom, and thus make cases against the railway company for damages. The authorities everywhere support the proposition that a person cannot do a thing of this kind, and then recover exemplary damages. It is the duty of every person who has been injured not to take steps for the mere purpose of aggravating his damages; for in so doing he himself invites additional wrongs or injuries, and consequently ought not afterward to be allowed to complain of the same. In this connection, in Barlow's case, the court charged in substance as follows: It did not matter what business the

plaintiff was engaged in at Pittsburg, or how long he stayed in Atlanta, so far as the railway company's interest in him was concerned; it was the business of the company to transport passengers, and if the plaintiff had a right to be carried by this ticket, the railway company had no further concern with reference to it. In Mrs. Barlow's case the charge in this connection was in the following language: "There has been something said here about this woman living in Pittsburg and going to Florida. Well, the only interest the railroad company has got in this is to have her comply with her contract; they have that right; and she has a right to have them comply with theirs. She has a right to live in Pittsburg or in Florida, just as she sees proper. That is nobody's business but hers; and when she goes to Atlanta, if she did go there, she has a right to go back, if this ticket allowed it, on the same day she got there. That is another matter to be determined by herself." We think the effect of these charges was to deprive the defendant of the benefit of its contention that Barlow, in taking the train, had no bona fide purpose of returning to Pittsburg, but that his object simply was to have himself and wife ejected, and thus lay the foundation for bringing the present actions. Of course, it was the right of Barlow and his wife to reside where they pleased, or to go to any place they chose to visit; but, taking into consideration all the facts and circumstances of these cases, it was certainly the right of the defendant to insist upon its above-stated contention. We are not ourselves intending to express any opinion as to the merits ²¹⁹ of this particular matter of controversy, but we think the determination of the same should be left to the jury under instructions giving to each side a fair opportunity to have the evidence offered in favor of that side weighed and passed upon without prejudice.

5. In the motion filed by the company in Mrs. Barlow's case, complaint is made that the court, over the defendant's objection, allowed her counsel to comment upon the alleged insult which the validating agent had given to her husband. Counsel was referring to testimony on the part of Barlow in which he swore that the validating agent had used to him the offensive language quoted in the preliminary statement preceding this discussion. We are quite sure the court ought to have required counsel to desist from making such an argument. It could have no possible legal relevancy in the trial of Mrs. Barlow's case, and the only effect it could have had was to inflame and prejudice the jury, and tend to induce them to find in her favor

an amount larger than they would otherwise have allowed. After a thorough and careful examination of the records in both of these cases, our conclusion is, that the ends of justice require a new trial in each.

Judgment in each case reversed.

All the justices concurring, except Cobb, J., absent.

RAILROADS—EXCURSION TICKETS—IDENTIFICATION.—A round-trip excursion ticket, sold by a railroad at less than the regular rate, and conditioned that, to be good for the return passage, it must be signed by the purchaser and stamped and dated by a designated ticket agent, is reasonable and valid. The purchaser of such ticket is not entitled to a return passage thereon until he has complied with the conditions named therein; and for a failure to so comply he may be lawfully expelled from the train, without unnecessary force, upon a refusal to pay his fare, without an investigation on the part of the conductor to whom the ticket is presented as to his identity: *Edwards v. Lake Shore etc. Ry. Co.*, 81 Mich. 364; 21 Am. St. Rep. 527. See *Lucas v. Michigan Cent. R. R. Co.*, 98 Mich. 1; 89 Am. St. Rep. 517.

RAILROADS—TICKETS—EXPULSION FROM TRAIN—DAMAGES.—If, by the fault of an agent of a railroad company, a passenger takes the wrong train, or is without a ticket, or has one imperfectly or erroneously stamped, and is ejected, for this or any similar reason, by the conductor of a train, in pursuance of the rules of the company, it is liable to him as for a tort: *Pittsburgh etc. Ry. Co. v. Reynolds*, 55 Ohio St. 370; 60 Am. St. Rep. 706; *Hot Springs R. R. Co. v. Deloney*, 65 Ark. 177; 67 Am. St. Rep. 913. The passenger must, however, be free from negligence: *Callaway v. Mellett*, 15 Ind. App. 366; 57 Am. St. Rep. 238. If the passenger expects to be ejected, and takes his passage for the purpose of testing the validity of the rules of the company, exemplary damages cannot be recovered: *Cincinnati etc. R. R. Co. v. Cole*, 29 Ohio St. 126; 23 Am. Rep. 729. As holding that a passenger can recover only upon his contract and not in tort, see *McKay v. Ohio River R. R. Co.*, 34 W. Va. 65; 26 Am. St. Rep. 913. Contra: *Georgia R. R. etc. Co. v. Dougherty*, 86 Ga. 744; 22 Am. St. Rep. 499. That there can be no recovery for an expulsion under such circumstances, see note to *Chicago etc. R. R. Co. v. Parks*, 68 Am. Dec. 571.

BARRIE v. MILLER.

[104 GEORGIA, 312.]

CONTRACTS OF SUBSCRIPTION—FRAUD IN.—If a contract of sale stating that the article sold is an "Edition de Luxe of Art and Architecture," a special feature of which is an "aquarelle facsimile matted in separate fascicule," is induced by false representations by the seller to the purchaser that the article described by such expressions, the meaning of which is unknown to the purchaser, is of a certain kind and character, when in fact it is of a different character, of less value, the contract is thus rendered fraudulent, and the purchaser may either rescind the sale and refuse to take the article, or he may set up the fraud in an action against

him on the contract. Evidence of such fraudulent representations is admissible, although the contract of sale stipulates that "no other conditions or representations than those herewith printed shall be binding on either of the principals."

FRAUD—EVIDENCE.—Parol evidence is admissible to prove that a contract was procured by fraud, and upon such proof it may be set aside.

S. N. Evans and H. C. Roney, for the plaintiff.

B. Wright, F. H. Miller, Jr., and J. R. Lamar, for the defendant.

³¹³ COBB, J. Barrie sued Miller on a contract for the sale of certain pictures, described as "The Edition de Luxe of Art and Architecture," the contract further stating that a special feature of the edition would be an "aquarelle facsimile matted in a separate fascicule." In the contract was the following stipulation: "No other conditions or representations than those herewith printed will be binding on either [of] the principals." Miller pleaded in substance that one Green, the agent of the plaintiff, induced him to subscribe for the pictures described in the contract, falsely and fraudulently representing that the same would be an "artist-proof edition"; that the expressions used in the contract do not show on their face whether or not they represent the kind of pictures contracted for; and that the defendant, being unlearned in the technical terms of art, and relying on the representations of plaintiff's agent, signed the contract, believing that he would receive an artist-proof edition of the pictures; that the terms used are ambiguous, and may or may not mean an artist-proof edition. He further alleges that some time after signing the contract he discovered that the agent of plaintiff was not soliciting subscriptions for an artist-proof edition, and that he thereupon wrote to plaintiff and offered to rescind; that the plaintiff received notification of this offer, but in spite of this notice, and a further notice to the agent, sent defendant by express a box, the contents of which he is ignorant, but supposes it to contain the pictures; that at his instance the express company has informed plaintiff that the box remains in the office at the risk of plaintiff; and that for these reasons he is ³¹⁴ not indebted to plaintiff in any sum whatever. A motion made by plaintiff to strike these pleas was refused, and evidence was admitted thereunder. The evidence was conflicting, that for the defendant tending to establish the truth of his pleas, and that for the plaintiff tending to show that the sale was made in good faith without any misrepresentation by

the agent, and, further, that the agent exhibited to defendant a sample of the pictures sold. The jury returned a verdict for the defendant; and plaintiff's motion for a new trial being overruled, he excepted. The motion contains, besides the general grounds, an assignment of error on the refusal of the court to strike the defendant's pleas.

1. The pleas allege, as stated above, that the expressions set out in the contract as descriptive of the pictures contracted for are ambiguous, and that it was due to the fraudulent representations of plaintiff's agent that the contract did not specify an artist-proof edition, and that defendant was led to believe by the agent that the expressions used meant such edition. The plaintiff in error invokes the familiar doctrine that parol evidence is inadmissible to vary the terms of a written contract; but this doctrine can have no application in a case like the present one. He also insists that the allegations of fraud are insufficient, because they do not allege fraud in the execution of the contract; but this, we think, is, in effect, what the defendant does. Suppose he had alleged that the plaintiff sold him an artist-proof edition of the pictures, and that he agreed to put certain technical expressions in the contract which would describe such edition, the meaning of such expressions being unknown to the defendant; that he has not done so, and for this reason defendant is entitled to rescind. This allegation would have met the objection of the plaintiff; and is not this what the pleas, fairly construed, mean? Our code defines fraud to be "misrepresentation of a material fact, made willfully to deceive, or recklessly without knowledge, and acted on by the opposite party, or if made by mistake and innocently, and acted on by the opposite party": Civ. Code, sec. 4026. In another place we find it stated that "fraud may exist from misrepresentation by either party, made with design ³¹⁵ to deceive, or which does actually deceive the other party; and in the latter case such misrepresentation voids the sale, though the party making it was not aware that his statement was false": Civ. Code, sec. 3533. Measured by these rules, the allegations of fraud in the defendant's pleas were sufficient to entitle him to go to the jury. Besides, the pleas allege that the expressions in the contract descriptive of the goods purchased were ambiguous. An "Edition de Luxe," as defined by the lexicographers, means "an elaborate and costly edition, often limited; a sumptuous edition, as regards paper, illustrations, binding, et cetera." From these definitions it will be seen that the expression quoted may mean an artist-proof edition or it may not. It is a generic expression, meaning

simply an elegant edition of some kind; and it was competent for the defendant to allege and prove that he was led to believe that the expression meant an artist-proof edition. The expression "aquarelle facsimile" is clearly ambiguous, for it may mean either a copy of a water-color or a water-color copy, which is quite a different thing, and much more valuable. These expressions being ambiguous, parol evidence was admissible to explain them: Civ. Code, sec. 5202. It was for the jury to say, in the light of all the evidence, what was the understanding of the parties: *Weems v. Georgia etc. R. R. Co.*, 84 Ga. 356. It is well settled that where a contract is procured by fraud, parol evidence is admissible to prove the fraud, and if the fraud be proved the jury are authorized to set aside the contract: *Janes v. Mercer Univ.*, 17 Ga. 515; *Ham v. Parkerson*, 68 Ga. 830; *Angier v. Brewster*, 69 Ga. 362; *McBride v. Macon Tel. Co.*, 102 Ga. 422.

The stipulation in the contract that the seller will not be bound by any representations other than those printed thereon can have no bearing in a case where fraud in procuring the signing of the instrument is the issue: Civ. Code, sec. 3669. Nor is it material in the present case that the defendant saw a sample of the goods sold. He offered to rescind before the arrival of the pictures in the express office, and has never opened the box which contains them. But even if he had, the pictures may come up to the sample and then not be an artist-proof³¹⁶ edition. Such an edition of a picture does not differ so much in appearance from any other copy of the picture as it does in value because distinguished by the signature of the artist. At any rate no point is made by the plaintiff on this. His position in the case amounts to an admission that he did not sell an artist-proof edition and consequently did not ship one. If Miller had been blind, and the agent had obtained his signature to a contract for one thing upon representing that it was for an entirely different thing, no one would pretend that he was bound by the contract. According to his plea and evidence, he was blind and helpless so far as the technical terms of art were concerned, and so informed the agent, and was a victim at the hands of one thoroughly versed in such matters.

2. The issue as to fraud being properly submitted to the jury under the defendant's pleas, and there being evidence to authorize their finding, the court below did not err in refusing to grant a new trial at the plaintiff's instance.

Judgment affirmed.

All the justices concurring.

CONTRACT OF SALE—FRAUDULENT REPRESENTATIONS—REMEDIES OF VENDEE.—A sale is vitiated by any misrepresentation of material facts respecting the property for the purpose of deceiving, and which does deceive the buyer: *Wintz v. Morrison*, 17 Tex. 372; 67 Am. Dec. 658. Every contracting party has an absolute right to rely upon the express statement of an existing fact, the truth of which is known to the opposite party and unknown to him, as the basis of a mutual agreement: *Hooch v. Bowman*, 42 Neb. 80; 47 Am. St. Rep. 691; *Ripley v. Case*, 78 Mich. 126; 18 Am. St. Rep. 428. A vendee may rescind a contract on account of the vendor's false representation of material facts: *Sutton v. Morgan*, 158 Pa. St. 204; 38 Am. St. Rep. 841. In an action to recover the purchase price, a vendee may set up misrepresentations of the vendor as a defense thereto: *Dant v. Head*, 90 Ky. 255; 29 Am. St. Rep. 869; *Connersville v. Wadleigh*, 7 Blackf. 102; 41 Am. Dec. 214.

FRAUD—EVIDENCE.—Although a contract of sale is in writing, parol evidence of fraud and misrepresentation is admissible to defeat a recovery: *Dowagiac Mfg. Co. v. Gibson*, 73 Iowa, 525; 5 Am. St. Rep. 697; *Marston v. Kennebec Mut. Life Ins. Co.*, 89 Me. 266; 56 Am. St. Rep. 412.

NEAL v. STATE.

[104 GEORGIA, 509.]

COURTS—INDEFINITE SUSPENSION OF IMPOSED SENTENCE.—A court having criminal jurisdiction has no inherent power to indefinitely suspend the execution of a sentence which it has imposed in a criminal case. Such power belongs to the executive or pardoning power.

COURTS—POWER TO SUSPEND SENTENCE.—A court may temporarily postpone the execution of a sentence which it has imposed in a criminal case only as incident to the obtaining of a new trial or a review of the judgment.

CRIMINAL LAW—SENTENCE NOT SERVED BY LAPSE OF TIME.—Under a sentence that the accused do work in the chain-gang for a term of six months, "this sentence to begin and be counted from the time of the reception of said defendant in the chain-gang under this sentence and judgment, . . . sentence of six months suspended until further order of the court," the person upon whom such sentence is imposed has not served out his sentence if he has never been placed in the chain-gang, although more than six months may have elapsed since the date of the sentence, and he may thereafter be compelled under order of court to serve the whole sentence.

CRIMINAL LAW—SENTENCE—LAPSE OF TIME.—A legal sentence of a convicted person to imprisonment or labor for a term expressed only by designating a certain length of time can be satisfied only by his actual imprisonment or service for that length of time, unless remitted by lawful authority, and the time of the sentence does not run while he is at liberty unlawfully.

W. R. Rankin, for the plaintiff in error.

S. P. Maddox, solicitor general, for the state.

⁵¹⁰ FISH, J. On the eighth day of March, 1897, in the superior court of Gordon county, the plaintiff in error was found guilty of the offense of adultery and fornication. On the same day the court sentenced him as follows: "Whereupon it is considered, sentenced, and adjudged by the court that J. M. Neal do pay, within three days, a fine of three hundred dollars and all costs of this prosecution, and work in the chain-gang six months, and then be discharged; or, in default of such payment, that said defendant do work in a chain-gang on the public works, or on such other works as the county authorities may employ the chain-gang, for and during the full term of twelve months, and then be discharged; and it is further ordered that this sentence begin and be counted from the time of the reception of said defendant in the chain-gang under this sentence and judgment. The defendant may be discharged at any time on the payment of said fine and costs. Sentence of six months suspended until further order of the court." The bill of exceptions states that the verdict was a consent verdict, and that the defendant paid the fine and cost and was discharged. On March 12, 1898, at the February term of the court, the following order was passed by the judge: "Whereas, at the February term, 1897, of this court, J. M. Neal pleaded guilty to the offense of adultery and fornication, and was sentenced by the court to pay a fine of three hundred dollars and all cost, and to work in the chain-gang for and during the term of six months, and the said sentence of six months was suspended till the further order of the court; it is therefore, upon sufficient cause being shown to the court, ordered that the sheriff of said county and his lawful deputies arrest said J. M. Neal, and that six months' sentence in the chain-gang be enforced." To this order Neal excepted, because it was "allowed and issued without notice to him, and is not based upon any rule or proceeding, issued or instituted by the court, calling upon defendant to show cause why such order should not be passed."

1. The plaintiff in error contends here that "the action of ⁵¹¹ the court, after passing sentence, in suspending the execution of the same," was "an unwarranted interference with the powers, duties, and functions of the executive." We think that this contention is sound. The constitution of the state expressly provides that the governor "shall have power to grant reprieves and pardons, to commute penalties, remove disabilities imposed by law, and to remit any part of a sentence for offenses against the state, after conviction, except in cases of treason and im-

peachment, subject to such regulations as may be provided by law relative to the manner of applying for pardons. Upon conviction for treason, he may suspend the execution of the sentence and report the case to the general assembly at the next meeting thereof, when the general assembly shall either pardon, commute the sentence, direct its execution, or grant a further reprieve. He shall, at each session of the general assembly, communicate to that body each case of a reprieve, pardon, or commutation granted, stating the name of the convict, the offense for which he was convicted, the sentence and its date, the date of the reprieve, pardon, or commutation, and the reasons for granting the same": Civ. Code, sec. 5815. There is no provision in the constitution authorizing the courts of the state having jurisdiction in criminal cases to exercise any of these powers; and the constitution declares that: "The legislative, judicial, and executive powers shall forever remain separate and distinct, and no person discharging the duties of one shall at the same time exercise the functions of either of the others, except as herein provided": Civ. Code, sec. 5720. If the execution of a sentence, which has been imposed in accordance with the law, can be suspended, either in whole or in part, as the judge may see fit, during the pleasure of the court, then the court may in this way indirectly grant a reprieve, commute a penalty, or remit any part of a sentence, and thus practically exercise powers which the constitution confers exclusively upon the governor of the state. For a sentence, the execution of which is suspended during the pleasure of the court, may never be enforced, as it may never be the pleasure of the court to revoke the order of suspension and enforce its execution. If a court can indefinitely suspend the execution ⁵¹² of a sentence, it may even indirectly exercise all the pardoning power conferred upon the chief executive of the state, except that portion of it which embraces the removal of disabilities imposed by the law, in certain criminal cases, as a consequence of conviction. The fundamental law provides that when the governor exercises any of these functions he shall report his action and the reasons therefor to the legislature. Surely the judges of courts having criminal jurisdiction cannot, unhampered by such a requirement, exercise any of these powers. In *State v. Voss*, 80 Iowa, 467, it was held that a court has no authority to suspend at pleasure the execution of a judgment for a crime committed, and that a provision to this effect in a sentence is void. In *In re Markuson*, 5 N. Dak. 180, the court ruled that several orders purporting to suspend

the operation of a judgment in a criminal case, which, for reasons stated in the opinion, could not operate as a stay or supersedeas pending an appeal to the supreme court, were without authority of law, and null and void. In *In re Webb*, 89 Wis. 354, 46 Am. St. Rep. 846, it was held that a court cannot suspend a sentence which it has pronounced in a criminal case, except as incident to a review of the case upon writ of error, or upon other well-established legal grounds. The only case which we have found involving the question of the power of a court to indefinitely suspend the execution of an imposed sentence which conflicts with the view which we have taken of this question and with the authorities cited above is *State v. Whitt*, 117 N. C. 804. In that case, a defendant, after being sentenced to five years' imprisonment and serving six days, was brought into court and, on his agreeing to pay the costs of prosecution into court, the judgment was suspended; and it was held that the court had power, at a subsequent term, on the defendant's failure to pay such costs, to sentence him to imprisonment for one year.

Upon the question whether a court, after a conviction, can indefinitely suspend the imposition of a sentence, the authorities are in conflict. In *People v. Blackburn*, 6 Utah, 347, *United States v. Wilson*, 46 Fed. Rep. 748, and *People v. Morrisette*, 20 How. Pr. 118, this question was squarely presented, and in each case decided in the negative, upon the ground ⁵¹³ that the authority to relieve a person convicted of a criminal offense is not given to the courts, but belongs to the pardoning power; but in the Utah case a mandamus to compel sentence was denied on the ground that the judge, in his discretion, had evidently intended to impose the minimum punishment, which was merely nominal, and that the purely perfunctory duty and useless expense of formally imposing sentence would not be compelled by mandamus. In *People v. Mueller* (Ill. Cir. Ct. 1883), 4 Crim. Law Mag. 725, *People v. Monroe County Court*, 141 N. Y. 288, and *People v. Webster*, 36 N. Y. Supp. 745, 14 Misc. Rep. 617, the same question was decided in the affirmative. In New York, there was a special statute authorizing the criminal court to exercise this power, but it was held that, independently of the statute, it existed at common law, and that it did not encroach upon the constitutional powers of the executive to grant reprieves and pardons; and such is the effect of the ruling in the Illinois case, though in that case the court held that the minimum sentence allowable was practically nothing, and said:

"The difference between a suspension of sentence and any punishment I should impose, on the theory of guilt, is such an incalculable minimum as to defy statement." In *Commonwealth v. Dowdican*, 115 Mass. 133, where the right of the court to postpone sentence is fully recognized, Gray, J., said: "It has long been a common practice in this commonwealth, after verdict of guilty in a criminal case, when the court is satisfied that, by reason of extenuating circumstances, or of the pendency of a question of law in a like case before a higher court, or other sufficient cause, public justice does not require an immediate sentence, to order, with the consent of the defendant and the attorney for the commonwealth, and upon such terms as the court in its discretion may impose, that the indictment be laid on file; and this practice has been recognized by statute": Citing the statutes. In North Carolina, the right of a trial court to make an order suspending sentence, upon the payment of the costs, is recognized. In *State v. Crook*, 115 N. C. 763, the court says: "The practice of making an order, where defendants are convicted or submit to a criminal charge, that the judgment be suspended upon the payment of the costs, is one that seems to be somewhat peculiar ⁵¹⁴ to our own courts." . *State v. Addy*, 43 N. J. L. 113, 39 Am. Rep. 547, was on an indictment for maintaining a nuisance, and while announcing that "the practice of suspending sentence after conviction of crime is, under some circumstances, justifiable," decided that there was in fact no suspension of sentence, but that the order of the lower court, though appearing, in form, to be a suspension upon condition of payment of costs, was, in legal effect, an order to abate the nuisance and pay the costs. The decision in *Weaver v. People*, 33 Mich. 296, seems to approve the doctrine that a court may suspend sentence in a criminal case. In a subsequent case (*People v. Reilly*, 53 Mich. 262), the same court appears to have been equally divided as to such power. Champlin, J., said: "I do not think it is competent for a circuit judge or other judicial officer to suspend indefinitely the sentence which the law makes it his duty to impose upon a person duly convicted, or who may plead guilty in his court. The effect of a suspension of sentence operates as a quasi-pardon. . . . The pardoning power under our constitution is reposed in the governor, and not in the judges."

In a still later case, *People v. Brown*, 54 Mich. 15, although the question was not strictly before the court, Chief Justice Cooley, delivering the opinion, in commenting upon a petition

to the judge of the lower court to suspend sentence, said: "They [the petitioners] formally request the judge himself, a high state official, and the chief conservator of law and public order in that part of the state, to grasp at power not confided to him and usurp authority." And, again, he said: "This judge would be usurping the functions of the executive were he to assume to give immunity from punishment. No doubt judges have done this sometimes, under pressure of such influence as appears here; but this is no reason for asking a repetition of the wrong. It is rather a reason for being especially careful and particular not to invite it, lest by and by it come to be understood that the power to pardon, instead of being limited to one tribunal, is confided to many." We think that the opinion expressed by Chief Justice Cooley, and entertained by the courts that have decided this question in the negative, is the correct one. The power to indefinitely postpone the punishment prescribed by ⁵¹⁵ the law, whether exercised by suspending the imposition, or by suspending the execution, of a sentence, is the power to perpetually prevent punishment, a power which, under such provisions as are found in the constitution of this state, does not exist in the courts. The authorities draw a clear distinction between the suspension of a sentence and the suspension of the enforcement of a sentence; and however they may differ as to the right of a court to indefinitely postpone its judgment in a criminal case, it is well established that it cannot, after the judgment is rendered, indefinitely postpone its execution. In the present case, it is to be presumed that the judge, in imposing the sentence, exercised the discretion conferred upon him by the law, as to the character and extent of the punishment, with a due regard to the circumstances of the case and the demands of justice. This being so, the sentence imposed by the court is to be taken as the one necessary for the due enforcement of the law and the vindication of justice. Therefore, the power to indefinitely suspend its execution, either in whole or in part, would be the power to prevent the enforcement of the law and to defeat the demands of justice. It is not apparent from the record why the court ordered the sentence of six months' imprisonment in the chain-gang to be suspended until the further order of the court; probably the judge had in view the reformation of the defendant. But there is no provision whatever in the laws of this state for setting at liberty a convicted criminal and hanging over his head a threatened sentence, or the threatened enforcement of an imposed sentence, for the purpose of constraining him to refrain

from further violations of the criminal statutes of the state. Of course, we are not to be understood as holding that a court may not temporarily postpone the execution of its sentence in a criminal case, pending proceedings for the purpose of obtaining a new trial or a review of the judgment. All the authorities agree that there may be a suspension for such purposes. The sentence imposed by the court below was not lawfully qualified by the addition thereto of the words, "sentence of six months suspended until further order of the court." Such words in such a sentence are of no legal force, and consequently should be ignored and the sentence executed just as if they did not appear therein.

§16 2. The plaintiff in error contends that, as the court had no authority to indefinitely suspend the execution of the sentence, the period of his six months' imprisonment in the chain-gang, in contemplation of law, commenced on March 8, 1897, the date when the judgment of the court was rendered, and when he was in custody, and that he could not be lawfully imprisoned, under this sentence, after the expiration of six months from its date. In support of this contention he cites *In re Webb*, 89 Wis. 354, 46 Am. St. Rep. 846. In that case the defendant, on the 16th of March, 1894, was sentenced to pay a fine, to pay the costs of prosecution, and to stand committed to the common jail of the county until such fine and costs were paid, the period of imprisonment to be limited to the period of six months; and in the case the costs were paid that day, the court directed "that sentence of imprisonment be suspended until the further order of the court." On October 12, 1894, at a succeeding term, the court, after reciting the sentence and the fact that the fine had not been paid, ordered and adjudged that the defendant "do forthwith pay said fine of two hundred dollars, and that he stand committed to the common jail of the county until said fine is paid, the period of imprisonment being limited in accordance with said sentence to the period of six months." The supreme court of Wisconsin held that the direction of the court that the sentence of imprisonment be suspended until the further order of the court was void, that the period of imprisonment, in contemplation of law, began on the date when the sentence was rendered, and when the defendant was in custody and failed to pay the fine, and that he could not lawfully be imprisoned after it had expired. In that case, it will be observed that, as the order suspending the execution of the sentence was void, the time when the term of imprisonment

should have begun was the day that the judgment of the court was rendered. In the case at bar, the sentence, to "work in the chain-gang six months," was "to begin and be counted from the time of the reception of said defendant in the chain-gang under this sentence and judgment." As he has never been received "in the chain-gang under this sentence and judgment," the point of time from which the imprisonment in the chain-gang was to begin to run, as fixed by ^{§17} the judgment of the court, has not arrived, and can never arrive until the defendant is received into the chain-gang. While there is this clear difference between the two cases, we are not satisfied with the reasoning by which the Wisconsin court reached the conclusion that if a defendant is, under the sentence of the court, to stand committed to the county jail for six months, and is unlawfully discharged, under an order of the court, without being sent to the jail at all, and goes at liberty for that length of time, he has, in legal contemplation, served out his sentence. Suppose a court, in this state, sentences a person convicted of a criminal offense to work in the chain-gang for twelve months, without attempting to suspend the execution of the sentence, and the sheriff, in disregard of his duty and on his own motion, immediately discharges the prisoner, and allows him to have unrestrained liberty for a year or longer, can it be held, after he has enjoyed twelve months of perfect but unlawful freedom, that he has, in contemplation of law, worked in the chain-gang for the full term for which he was sentenced? We apprehend not. What difference can it make whether the sheriff discharges the sentenced criminal unlawfully on his own motion, or discharges him unlawfully under a void order of the court? In direct conflict with the decision, on this point, rendered in *In re Webb*, 89 Wis. 354, 46 Am. St. Rep. 846, is the ruling in *Ex parte Vance*, 90 Cal. 208. There the prisoner was sentenced to pay a fine and to be imprisoned until such fine was paid, in the proportion of a day for every dollar of the fine, and was released by the sheriff without authority. The court said: "The act of the sheriff in releasing the petitioner was unauthorized, and petitioner's departure from the jail to which he had been lawfully committed, without having been discharged by due course of law, was equally so, and was, in effect, a technical escape, from which he can derive no advantage. The time of the prisoner's absence from jail, in violation of law, cannot be considered as having been spent in jail in satisfaction of the judgment which required his actual imprisonment."

To the same effect is *State v. Cockerham*, 2 Ired. 204, "where a defendant, who had been convicted of an assault, was sentenced to be imprisoned for two calendar months 'from and ⁵¹⁹ after the 1st of November next'; and did not go into prison according to the sentence, and at a subsequent term of the court it was directed that the sentence for two months' imprisonment should be immediately executed." The supreme court of North Carolina held in that case that the court below had power to make such order. Gaston, J., delivering the opinion, said: "The time at which a sentence in a criminal case shall be carried into execution forms no part of the judgment of the court. The judgment is the penalty of the law, as declared by the court; while the direction, with respect to the time of carrying it into effect, is in the nature of an award of execution. In this case the judgment was that the defendant be imprisoned two calendar months; and the words, which follow in the record, 'from and after the 1st of November next,' direct the executing of the judgment." In *Hollon v. Hopkins*, 21 Kan. 638, which was a proceeding in habeas corpus, the petitioner had been sentenced to state prison for three years from a designated date. On the day after the sentence was imposed he made his escape from the custody of the sheriff, and was not recaptured until more than three years had elapsed from the time fixed in the judgment for the beginning of his imprisonment in the penitentiary. He insisted that the sentence had expired by its own limitation; but the supreme court, in a well-considered opinion, held otherwise. The court said: "The only way of satisfying a judgment judicially is by fulfilling its requirements. Of course, if Hollon had died or been pardoned, the sentence would be at an end. But as these things have not happened, and as the sentence has not been disturbed by any judicial decision or determination, there is no way of satisfying its requirements, or of exhausting its force, except service by Hollon of the required time in the penitentiary. It has often happened that a judgment sentencing a person to be executed capitally on some particular day has not been fulfilled on that day. A reprieve has been granted, an escape effected, some unforeseen event preventing it has occurred, or the officers from some cause have failed to perform their duty, and the convict has, for the time being, escaped punishment. But in no case, so far as we are informed, has it been held that the convict was ⁵¹⁹ thereby freed from all punishment, or that he could not be executed on some subsequent day. See the following authorities: *Ex parte Nixon*, 2 S. C. 4, 6, and cases there cited; *Ex parte Howard*, 17 N. H. 545; *State*

v. Oscar, 13 La. Ann. 297; Lowenburg v. People, 27 N. Y. 337; Rex v. Harris, 1 Ld. Raym. 482. If a fine should not be paid at the time ordered, it could certainly be afterward collected. The time fixed for executing a sentence, or for the commencement of its execution, is not one of its essential elements, and, strictly speaking, is not a part of the sentence at all: See cases above cited, and State v. Cockerham, 2 Ired. 204; Ex parte Bell, 56 Miss. 282, and Dolan's case, 101 Mass. 219. The essential portion of a sentence is the punishment, including the kind of punishment and the amount thereof, without reference to the time when it is to be inflicted." In Dolan's case, 101 Mass. 219, cited above, by the Kansas court, it was held that: "The sentence of a convict to imprisonment for a term expressed only by designating the length of time is to be satisfied only by his actual imprisonment for that length of time, unless remitted by legal authority; and if a sentence is limited to take effect upon the expiration of a previous sentence, its period will not begin to run until the first sentence has so been fully performed or legally discharged." We are clearly of opinion that the contention of the plaintiff in error that he has, in legal contemplation, served out his sentence of six months' imprisonment in the chain-gang, is unsound, and that, with or without the order of the court of which he complains, it was the duty of the proper officers to see that such sentence was duly enforced.

3. It follows from the foregoing that this court will not set aside the order directing the execution of the sentence, although such order was passed more than six months after the imposition of the original sentence and though the plaintiff in error was not called upon to show why such order should not be made.

Judgment affirmed.

All the justices concurring.

COURTS—INDEFINITE SUSPENSION OF SENTENCE—CRIMINAL LAW—LAPSE OF TIME.—A court cannot suspend the execution of its sentence pronounced in a criminal case, except as an incident to the review of the case upon writ of error, or upon other well-established legal grounds. Therefore, if it does by its order, after sentencing the accused to imprisonment for a term specified, purport to suspend such imprisonment until the further order of the court, it cannot, after the expiration of the term specified, direct his imprisonment, though during such term he was at liberty, and suffered no imprisonment whatever: In re Webb, 89 Wis. 354; 46 Am. St. Rep. 846. See, also, State v. Addy, 14 Vroom, 113; 39 Am. Rep. 547. A sentence to pay a fine, accompanied with an order of commitment until payment thereof, is not unconstitutional as inflicting "indefinite imprisonment," as such sentence with award of process does not necessarily create an indefinite or any imprisonment: Ex parte Bryant, 24 Fla. 278; 12 Am. St. Rep. 200.

RAWLES v. JACKSON.

[104 GEORGIA, 593.]

AN EXECUTION NOT SIGNED by the officer authorized to issue it is not a valid process of court.

EXECUTION SALES UNDER VOID PROCESS—ESTOPPEL.—If an execution under which property is sold on foreclosure is not signed by the proper officer, and the defendant therein, who is present at the sale knowing this fact, makes no objection to the sale on that ground, and, after the purchase of the property thereat by the execution plaintiff, surrenders possession to him, he is bound by the sale and estopped to maintain ejectment, or set up that the sale was made under void process, as against an innocent purchaser for value from the execution plaintiff.

Hardeman, Davis & Turner, for the plaintiff in error.

Guerry & Hall, for the defendant in error.

⁵⁹³ LEWIS, J. This was an action of ejectment brought October 17, 1892, on the demise of Rawles against Jackson, tenant in possession. From the evidence it appeared that Rawles gave to Cowart a mortgage upon the land, which by the latter had been duly foreclosed, and an execution upon the judgment of foreclosure was made out by the clerk, who omitted to attach his signature to the same. This execution was placed ⁵⁹⁴ in the hands of the sheriff, who levied the same on the land, and duly advertised it for sale. Rawles, the defendant in fieri facias, observed at the time of the levy that the execution was not signed, but said nothing about it to the sheriff. Rawles and Cowart, the plaintiff in fieri facias, and Jackson, who subsequently bought the land from the plaintiff, were present when the land was put up for sale by the sheriff. Some party other than the defendant was undertaking to get the sheriff to accept a claim to the land, and the sheriff replied that he would accept no more claims, as he was selling under an indemnifying bond. Rawles remarked that whoever bought the land would buy a lawsuit. This remark was heard only by a few bystanders, and was not heard either by Cowart or Jackson, who did not know that the execution had not been signed. Rawles made no objection to the sale proceeding on account of this defect in the fieri facias, nor did he assert any claim to the land for himself. The land was sold and purchased by Cowart, plaintiff in fieri facias. Upon demand by the sheriff, Rawles voluntarily surrendered possession of the premises to the plaintiff, who went into possession under his sheriff's deed. A few weeks afterward Jackson, for value, and without any knowledge of any defect in the sale, pur-

chased the land from the plaintiff in fieri facias, and went into possession thereof under a deed to himself from the plaintiff. The jury returned a verdict for the defendant. Rawles made a motion for a new trial, upon the grounds that the verdict was contrary to law and evidence, and that the court erred in certain portions of the charge to the jury, which, under the view we take of this case, it is not necessary to set forth.

There can be no question about the proposition that an execution not signed by the official authorized to issue the same is not a valid process of court. In the case of *Short v. State*, 79 Ga. 550, it was held that where a tax fieri facias was issued and signed by William R. Smith, and it did not appear, either by the addition of the words "tax collector" to his signature or otherwise on the face of the paper, that he was tax collector, it was not a legal process. The execution in this case, while made out by the clerk, was not signed at all; and if there is any omission which would render such a process void, it seems to us ⁵⁹⁵ that a failure of the proper official to sign the paper would have this effect. But yet, under the facts of this case, we think the plaintiff in error was bound by the sale; that his conduct estops him from setting up title adverse to that acquired by the plaintiff in fieri facias, and his grantee. The principle decided in the case of *O'Kelley v. Gholston*, 89 Ga. 1, is embodied in section 5472 of the Civil Code, which is in the following words: "Where property is sold under void process and the proceeds are applied to valid liens against the defendant, or he receives the benefit thereof, he is bound thereby, if present and not objecting to the sale." When the sheriff made the levy in this case, the defendant in fieri facias knew that the execution levied had not been signed by the clerk. He made no objection to the levy, and took no steps to resist its enforcement. The mortgage which had been foreclosed upon his land was a valid lien thereon. The effect of the purchase at the sheriff's sale by the plaintiff in fieri facias was to credit this lien and the judgment of its foreclosure with the proceeds of the sale. In this way, then, the defendant has received the benefit of such sale. He was present at the sale, knew of the defect in the execution, and did not object to the sale on this account. It is true he states in his testimony that he said whoever bought the property would buy a lawsuit; but even if this had been heard by the bystanders who were in good faith bidding upon the property, the natural and only inference they could have drawn was that he had reference to claims which other parties were endeavor-

oring to assert to the land, and not any claim that he had which could be urged against the validity of the sale. Besides this, after the sale took place, he did not resist in any way the possession of the property by the plaintiff, but suffered him to enter upon the land and obtain possession thereof under his sheriff's deed. In the light of all these facts, Jackson, an innocent purchaser for value, bought the land from the plaintiff in fieri facias. We think, therefore, the principle announced in the section of the code above quoted is clearly applicable to the facts in this case, and that the verdict of the jury finding for the defendant was demanded by the evidence.

Judgment affirmed.

All the justices concurring.

EXECUTION—NECESSITY OF SIGNING.—A paper containing the form and peculiar phraseology of an execution issued by a justice of the peace, but which is not signed by him, is not a valid execution, and confers no authority upon an officer to make a levy: *Wooters v. Joseph*, 137 Ill. 113; 31 Am. St. Rep. 355. An execution not under the seal of the court is void: *Weaver v. Peasley*, 163 Ill. 251; 54 Am. St. Rep. 469. Contra: *Corwith v. State Bank*, 18 Wis. 560; 86 Am. Dec. 793; monographic note to *Choate v. Spencer*, 40 Am. St. Rep. 430-434.

EXECUTION SALES—ESTOPPEL TO DENY VALIDITY OF. If one stands by and allows another to purchase his property in good faith at a void execution sale, and accepts the proceeds of the sale without giving the purchaser any notice of his title, he is thereby estopped to assert his title on the ground of his ignorance of the invalidity of the sale: *Hazel v. Lyden*, 51 Kan. 233; 87 Am. St. Rep. 272.

SAVANNAH, FLORIDA AND WESTERN RAILWAY COMPANY v. GODKIN.

[104 GEORGIA, 655.]

RAILROADS—EXPULSION FROM FREIGHT TRAIN.—The forcible expulsion of a person from a freight train while it is in rapid motion, by an employé of a railway company engaged in its service on such train, gives the person thus expelled a right of action against the company to recover for personal injury thus received, whether he is on such train as a passenger or merely as a trespasser.

NEW TRIAL—EXCESSIVE VERDICT.—If, upon motion for a new trial, the plaintiff, who has recovered a verdict for personal injuries, voluntarily reduces it by striking off a part, and the court thereupon denies the motion, such ruling cannot be disturbed on appeal when it does not appear that the action of the court was caused by the striking off of part of the verdict which does not appear so excessive as to lead to the inference that it was influenced by bias, prejudice, or passion.

NEW TRIAL.—NEWLY-DISCOVERED EVIDENCE, if entirely of an impeaching character, is not necessarily ground for a new trial.

APPELLATE PRACTICE—EVIDENCE TO SUSTAIN VERDICT—NEW TRIAL.—If the evidence is sufficient to sustain the verdict, the supreme court cannot, on appeal, interfere with the discretion of the trial court in overruling a motion for a new trial.

Erwin Du Bignon, Chisholm & Claw, S. W. Hitch, and W. B. Stephens, for the plaintiff in error.

Van Epps & Leftwich and L. A. Wilson, for the defendant in error.

656 **LEWIS, J.** Godkin, a minor, by his next friend, brought suit against the railroad company for personal injuries sustained, alleging in substance as follows: While descending from the top of a car of a moving freight train, after a brakeman connected with the train had directed him to leave, he fell and his arm was so mangled by the train, which was moving at the rate of twenty-five miles an hour, that it had to be amputated. He was on the train with the knowledge, and by the invitation of the conductor in charge of it; he so informed the brakeman, and told the brakeman that the train was going too fast for him to get off; but the brakeman approached him with a long stick in his hand, and in a threatening manner compelled him to descend the ladder at the side of the car, and as he was descending, a jerk of the car threw him under the wheels. He further alleged that his injuries resulted wholly from the wrongful and unlawful acts of the defendant, as stated; that the conduct of the defendant, its agents and servants, was unlawful, wanton, and willful, and that by reason of the circumstances attending the wanton and unlawful conduct of the defendant, its agents and servants, it was liable to him for punitive damages, five thousand dollars, in addition to actual damages, twenty-five thousand dollars. Plaintiff's testimony substantially made out the case presented by his petition, and in his evidence he stated that he was fifteen years of age at the time he was injured. He also testified as to his earning capacity being thirty dollars per month. The conductor and brakeman directly contradicted the facts testified to by the plaintiff, and testified that he was on the train without permission, and as a mere trespasser; and that he was injured without the knowledge of defendant's agents by endeavoring voluntarily to leave the moving train just before it reached the depot at Waycross. There was further testimony in behalf of the defendant, showing statements

made by the plaintiff after his injury, contradictory ⁶⁵⁷ to what he testified to on the stand. There was a verdict for plaintiff for ten thousand dollars, and defendant made a motion for a new trial on several grounds, reference to which will be made in the opinion following. After hearing the motion, and before any decision thereon had been rendered, plaintiff's attorneys voluntarily wrote off from the verdict two thousand five hundred dollars. Subsequently the court overruled the motion for a new trial, and the defendant excepted.

1. At the conclusion of plaintiff's testimony, the defendant moved for a nonsuit. If there ever was any doubt in the minds of this court as to the soundness of the proposition embodied in the first headnote, it was settled in the case of *Higgins v. Southern Ry. Co.*, 98 Ga. 751. Counsel for plaintiff in error contended that the motion should have been granted, because the evidence of the defendant in error, when his case was rested, did not show that the train by which he was injured was a passenger train, but that it was a freight train. In the case above cited, the plaintiff was forcibly expelled from a moving freight train, and it was held that a right of action would lie against the company, although he may have been a trespasser upon such train. It was further contended in behalf of the defendant in error that this principle did not apply in a case of this sort where the party was ejected by an employé who was not acting within the scope of his employment, it not appearing that the trainhand or brakeman had anything to do with ejecting passengers or trespassers from the train. In the case of *Smith v. Savannah etc. Ry. Co.*, and *Brunswick etc. Ry. Co. v. Bostwick*, 100 Ga. 96, it was held by this court that such an action would lie against the company although the wrongful act was committed by an employé whose business did not relate to ejecting from such train persons not rightfully thereon.

2, 3. Plaintiff in error excepts, in the motion for a new trial, to certain charges of the court, which were simply quotations of sections 2321 and 2322 of the Civil Code. It was contended that these sections were not applicable, as the question of ordinary and reasonable care and diligence on the part of the defendant, or of contributory negligence on the part of the plaintiff, was not involved. If the plaintiff's contention was ⁶⁵⁸ correct, the company was not only guilty of a want of ordinary and reasonable care and diligence, but of the grossest sort of negligence. It was held in the case of *Smith v. Savannah etc. Ry. Co.*, 100 Ga. 96, above cited, that an action for such

a willful tort could be had by virtue of the provisions of this section of the code (section 2321). The court was, therefore, clearly right in giving this section in charge as the law pertinent to the issues involved. As to the other section (2322), even if the evidence did not authorize any charge upon the subject of contributory negligence, we cannot see how this charge could possibly have been harmful to the defendant company.

4. The railroad company assigns error in its bill of exceptions upon the order and judgment of the court allowing plaintiff to write two thousand five hundred dollars off the verdict, in that the undue prejudice, passion, bias, and partiality of the jury, manifested by the excessiveness of the verdict rendered, taints their finding upon each and every issue in the case, and cannot be cured in that manner; the company contending that, in a case of this character, there is no criterion by which the plaintiff or the court can estimate the proper amount of damages, and plaintiff had no right, and the court had no power, to allow the verdict to be reduced by writing off a portion thereof. The supreme courts of some other states of the Union have held that where general damages have been recovered by the plaintiff for personal injuries, it is in the discretion of the trial judge, should he deem the finding excessive, to refuse a new trial upon condition that the verdict be reduced to such an amount as in his judgment, under the facts and circumstances of the case, would not be excessive: 3 *Graham and Waterman on New Trials*, 1163, et seq.; 16 *Am. & Eng. Ency. of Law*, 593; *McBride v. Daniels*, 92 Pa. St. 332; *Branch v. Bass*, 5 *Sneed*, 366; *Reddon v. Union Pac. Ry. Co.*, 5 *Utah*, 344. See, also, other cases cited in note 2. But this court has not gone to that extent; the rule in this state being, that where general damages have been recovered for a personal tort, if they be so excessive as to lead the court to suspect bias or prejudice, the judge has no power to require a portion of the damages written off, and thereupon refuse a new trial; otherwise where the damages claimed are ⁶⁵⁹ special, and from the testimony can with some accuracy be computed in dollars and cents, as in cases of tortious homicides: *Savannah etc. Ry. Co. v. Harper*, 70 Ga. 119; *Carlisle v. Callahan*, 78 Ga. 320; *Central R. R. v. Crosby*, 74 Ga. 737; 58 *Am. Rep.* 463; *Brunswick Light Co. v. Gale*, 91 Ga. 813. But the case we are now considering does not fall within any of the rulings above cited. It does not appear from the record that a new trial was refused in this case because of the voluntary ac-

tion on the part of the plaintiff in writing off a portion of his verdict. Nor can we gather from the record that the trial judge was of the opinion that the verdict as rendered by the jury was so excessive as to lead to the inference that it was influenced by bias, prejudice, or passion. If the plaintiff told the truth in his testimony, this was a most outrageous and aggravated tort, resulting not only in great pain and suffering, but in the loss of an arm, and thus in the infliction of a seriously maimed condition for life. In addition to compensatory damages for these injuries, the tort was of such a character as to render the defendant liable for punitive damages, to deter the wrongdoer from repeating the trespass, and to compensate the plaintiff for his wounded feelings. What court can say, in the light of the facts as revealed by the plaintiff, if true, that a verdict for ten thousand dollars was excessive? We do not mean to say that we would interfere with the discretion of the trial judge in setting aside the verdict on account of this amount being excessive in this particular case, but simply to say that the record does not authorize us to hold that he had reached such a conclusion before overruling the motion for a new trial. The voluntary reduction of the verdict by plaintiff's counsel, whether they had a right to take such action or not, is not a matter of which the defendant can complain.

5. Upon an examination of the newly-discovered evidence embraced in the motion for a new trial, we discover that, in so far as any of it is admissible, it is entirely of an impeaching nature. Under the repeated rulings of this court, the discretion of the trial judge in overruling the motion on this account will not be controlled.

6. There were other grounds in the motion for a new trial, which were without merit. The charge of the court was full and complete, and fairly covered all the issues in the case. The evidence is conflicting; and while the record impresses us with the fact that a decided preponderance of the testimony was in favor of the defendant below, yet the jury is the tribunal constituted by the constitution and laws of the land to pass upon issues of fact. The law imposes upon the trial judge the discretion to set aside their verdict, should, in his judgment, the ends of justice require a new trial. But when the jury have spoken, and the judge has refused to interfere with their finding because the verdict was contrary to evidence, this court, under its repeated rulings, and under the view it takes of its

constitutional powers, will not reserve the judgment below on such ground where there is any evidence to sustain the verdict. Judgment affirmed.

All the justices concurring.

RAILROADS—EXPULSION FROM FREIGHT TRAIN—TRESPASSERS.—A railway company does not owe the same degree of care to mere strangers unlawfully upon its premises that it owes to passengers conveyed by it. To such strangers it is liable only for injuries resulting from its negligent or tortious acts: *Reary v. Louisville etc. Ry. Co.*, 40 La. Ann. 32; 8 Am. St. Rep. 497; *Chicago etc. R. R. Co. v. Mehlsack*, 131 Ill. 61; 19 Am. St. Rep. 17. Recovery by a trespasser for injuries received by reason of his expulsion from a freight train by the servants of the company: See *Kansas City etc. R. R. Co. v. Kelly*, 36 Kan. 655; 59 Am. Rep. 596, and note, 601; *Hoffman v. New York Cent. etc. R. R. Co.*, 87 N. Y. 25; 41 Am. Rep. 337, and note thereto.

DUTY OF RAILROAD COMPANY TO PASSENGERS on freight trains: *Ohio Valley Ry. Co. v. Watson*, 93 Ky. 654; 40 Am. St. Rep. 211; *Alabama etc. R. R. Co. v. Sellers*, 93 Ala. 9; 30 Am. St. Rep. 17.

NEW TRIAL—NEWLY-DISCOVERED EVIDENCE—APPEAL. Newly-discovered evidence which is merely cumulative or tends to impeach a witness is not ground for a new trial: *Wisconsin Cent. R. R. Co. v. Ross*, 142 Ill. 9; 34 Am. St. Rep. 49; *Brown v. Mitchell*, 102 N. C. 347; 11 Am. St. Rep. 748, and note thereto; *Brown v. Grove*, 116 Ind. 84; 9 Am. St. Rep. 823. There is no abuse of discretion in refusing to grant a new trial where the evidence warranted the verdict: *O'Brien v. Spalding*, 102 Ga. 490; 66 Am. St. Rep. 202.

TILLMAN v. STEWART.

[104 GEORGIA, 687.]

MORTGAGES—JUNIOR AND SENIOR ASSIGNMENT.—The rule under which the holder of a junior mortgage is entitled to tender to the holder of a senior mortgage the amount due thereon and demand an assignment thereof, is not applicable unless the junior mortgagee shows that such an assignment is necessary to his protection.

MORTGAGES—JUNIOR AND SENIOR—COMPELLING ASSIGNMENT.—A judgment creditor of a mortgagor, having equities at least equal to those of the mortgagee, cannot be compelled to assign to the latter an older mortgage executed by their common debtor, and to which the judgment creditor has acquired title for the express purpose of protecting his junior judgment lien.

Brannon, Hatcher & Martin, for the plaintiff in error.

W. A. Wimbish and McNeill & Levy, for the defendant in error.

⁶⁸⁷ LUMPKIN, P. J. At a time when the title to a tract of land known as "Fontaine's upper place" was unquestionably in George H. Fontaine, he mortgaged the same to one Sheppard.

Afterward Fontaine mortgaged the same land to Caroline Stewart and Edna Williams, and, still later, conveyed it to Mrs. Fontaine. Tillman obtained against Fontaine a common-law judgment of younger date than any of these mortgages, and caused it to be levied upon the premises above mentioned. Mrs. Fontaine interposed a claim. While the claim case was pending, Tillman and others filed an equitable petition against Fontaine, Mrs. Fontaine, Sheppard, the holders of the junior mortgages, and a number of other persons. This petition attacked as fraudulent these two mortgages, prayed that the court take equitable jurisdiction of specified matters of dispute among the parties relating to a considerable amount of property, including the tract of land above referred to, that the rights and equities of all persons interested be adjudicated, and that to this end a receiver be appointed and an appropriate writ of injunction issue. Upon this petition an order was granted restraining the junior mortgagees from levying upon and bringing to sale the land described in their respective mortgages, until the further order of the court. Subsequently, Tillman purchased from Sheppard an execution issued upon the mortgage held by him, and caused the same to be levied upon the mortgaged property. The holders of the other mortgages then filed their petition to enjoin Tillman from having the land sold under this levy until after the disposition of the pending litigation over the same. They made no attack upon the validity of the Sheppard mortgage, and admitted that it constituted the oldest and best lien on the premises therein described. In support of their alleged right to the injunction for which they prayed, they averred, among other things, that they had tendered to Tillman the full amount due upon the Sheppard mortgage held by him, upon condition that he would assign the same and the execution issued thereon to them. The foregoing statement, in connection with what is hereinafter said concerning the nature of their petition, will suffice to an understanding of so much of its contents as is now material to be considered. Tillman, in his answer, alleged that he had purchased the Sheppard mortgage and execution in order to protect his common-law judgment against Fontaine, and set forth divers facts and reasons for pursuing this course. The judge passed an order enjoining the further progress of the Sheppard execution, unless Tillman, the assignee thereof, would within ten days accept the tender made to him by the plaintiffs, and on the conditions by them proposed. To this order Tillman excepted.

It seems no longer open to question that the holder of a junior mortgage is equitably entitled, when necessary to his protection, to make a tender to a prior mortgagee, who is proceeding to enforce his mortgage, of the principal, interest, and all costs due thereon, and demand a transfer thereof. In other words, the junior mortgagee has a right to redeem in order to protect his interests: See Sheldon on Subrogation, 2d ed., sec. 17 et seq. A full and intelligent discussion of the subject is to be found in *Jenkins v. Continental Ins. Co.*, 12 How. Pr. 66, where, in a very clear opinion, Woodruff, J., explains the reasons upon which this rule rests. But giving the doctrine above announced its fullest scope, it by no means follows that the plaintiffs in the present case are entitled to invoke it in their behalf. In the first place, they do not satisfactorily make it appear that it is necessary to their protection that they should control the senior mortgage. According to their own allegations, "the mortgaged property is approximately worth the amount of" this senior mortgage and the junior mortgages held by them. While they do allege that they have been enjoined from either bidding on the property if brought to sale under this senior mortgage, or from claiming the surplus which would be in the sheriff's hands after paying off this lien, and that accordingly a sale under it would defeat their lien and give the defendant an unconscionable advantage over them, these particular averments are not borne out by the very exhibit attached to their petition and on which they rely. On the contrary, this exhibit is a copy of the restraining order already mentioned; and it simply enjoined these plaintiffs "from levying upon or selling the land . . . described in their respective mortgages until the further order of the court." They would, therefore, be entirely free to bid as purchasers, if the land should be brought to sale under the senior mortgage and was about to be sacrificed; or, in case it brought its value, they could notify the sheriff that their lien upon the property had been transferred by the sale to the proceeds arising therefrom, place ⁶⁹⁰ their executions in his hands, and instruct him not to pay out any part of the surplus, after satisfying the prior mortgage debt, to holders of inferior liens. So it will be seen that for neither of the reasons set forth by them would they be prejudiced by such a sale; and they do not even suggest how, in any other way, they would be hurt if unable to get a transfer of the senior mortgage. Besides, they appear in court confessedly as holders of second mortgages which have been at-

tacked as fraudulent, and themselves show that so much reason for the attack existed as to justify a court of competent jurisdiction in restraining them from seeking to enforce their claims until the bona fides thereof could be more closely scrutinized. Certainly, a court of equity should hesitate to put in operation its extraordinary power to compel a prior mortgagee to transfer his lawful and undisputed mortgage to a second mortgagee, when it is at least a matter of doubt whether the latter has any rights whatever in the premises. Therefore, we are far from being prepared to say, even if the present action had been instituted against the original holder of the senior mortgage, the plaintiffs would have been entitled to compel a transfer thereof to themselves.

But the present holder of this senior mortgage is not the original mortgagee, whose only right was to enforce the collection of his debt. On the contrary, the defendant is, like the plaintiffs, a junior encumbrancer. He purchased the senior mortgage execution with a view to controlling the same in order that he might thus be able possibly to protect a lien held by him which is even inferior to those held by the plaintiffs, if the latter are good. As between him and them, he certainly appears to have the more need of controlling the mortgage in controversy—if, indeed, any necessity exists that either should do so in order to secure protection. The plaintiffs have no concern in the property's selling for more than the amount called for by the senior mortgage and those held by themselves; whereas the defendant will, if the junior mortgages are valid, lose all participation in the fund, so far as his judgment is concerned, unless the property brings enough to more than satisfy all the mortgage liens. Moreover, it is to his interest that the sale under the senior mortgage should take place at once; for, ^{as} so far as appears, the property will bring as much now as it might probably sell for in the near future, and the senior mortgage, because of accruing interest (which the record shows is not being paid as it falls due), is constantly growing larger in amount, and therefore the longer its collection is postponed the greater will be the proportion of the proceeds of the land which it will absorb.

Suppose, however, the equities, as between the plaintiffs and Tillman, were equal; that is to say, that the former in the first instance had as much right as did the latter to demand an assignment of the mortgage, and had in fact procured such an assignment, could he (a junior encumbrancer) bring a similar ac-

tion to compel them (also junior encumbrancers) to give up the protection the mortgage afforded, after they had in good faith acquired the transfer? We apprehend not; and yet it would seem that he could present a much stronger case, in so far as showing a necessity for the court to intervene for his protection is concerned, than they have done in their behalf. The conclusion is irresistible that where one of two junior encumbrancers, with equities evenly balanced, actually secures a transfer of a prior mortgage in the way of both, a court of equity would not be justified in depriving him of the advantage thus honestly gained in order that this very advantage might be conferred upon the other junior mortgagee. Such a thing would not be in harmony with the recognized principles of equity jurisprudence, which are daily applied in enforcing the doctrine that where equities are otherwise equal, diligence on the part of one whereby he secures a fair advantage is not only permissible, but to be encouraged.

A logical result growing out of the plaintiffs' supposed right to compel Tillman to assign to them his superior lien would be to compel them, on his petition, to assign it back to him after they obtained it, thus presenting a sort of equitable game of battledoor and shuttlecock. Our attention has not been called to any case where any court has advanced or applied the rule that one junior encumbrancer can compel another, under any circumstances, to forfeit an advantage gained by procuring a transfer of a senior mortgage. Obviously, such a rule would ~~be~~ be difficult of intelligent application and enforcement; for it must often happen that it is a question of grave uncertainty which of two or more persons holding junior liens is best entitled to the protection afforded by controlling a senior lien, if, perchance, any satisfactory solution whatever of the question can be arrived at. The following are a few of the numerous Georgia cases which show that this court has hesitated to interfere with vested legal rights fairly acquired upon the idea that equity required so doing: *Green v. Ingram*, 16 Ga. 164; *Robinson v. Thompson*, 30 Ga. 933; *Winn v. Henderson*, 63 Ga. 365; *Thomas v. Wilkinson*, 65 Ga. 405; *Sanders v. Foster*, 66 Ga. 292; *Georgia Chemical Works v. Cartledge*, 77 Ga. 547. We are satisfied that the injunction now under review ought not to have been granted.

Judgment reversed.

All the justices concurring, except Little, J., disqualified.

MORTGAGES—RIGHTS OF JUNIOR MORTGAGEE—SUBROGATION TO THE RIGHTS OF ANOTHER.—Rule that a junior mortgagee is entitled to redeem from a senior mortgagee: *Saunders v. Frost*, 5 Pick. 259; 16 Am. Dec. 394. It is only when the payment of encumbrances is necessary to protect the rights of the payer, or when they are paid in pursuance of an agreement with the debtor that the payer can hold the encumbrances as security for the money advanced by him, that the payer will be subrogated to the rights of the holder of such liens: *Johnson v. Barrett*, 117 Ind. 551; 10 Am. St. Rep. 83, and note; *Opp v. Ward*, 125 Ind. 241; 21 Am. St. Rep. 220; *Reyburn v. Mitchell*, 106 Mo. 365; 27 Am. St. Rep. 350, and note.

RAMSPECK v. PATTILLO.

[104 GEORGIA, 772.]

INSURANCE—DOUBLE AGENCY.—A contract by which a fire insurance agent, without the consent of his company, agrees to become, in his individual character, the agent for a property owner who desires to obtain insurance in that company, is against public policy and void, and, in such case, in the event of loss to the property owner of property which he has supposed to be insured, he cannot recover damages of such agent for his negligence in failing to obtain or complete the insurance according to his contract.

AGENCY—CONTRACT TO ACT FOR BOTH PARTIES.—An agreement to act as agent for both of the parties to a transaction requires the consent of both of the principals, otherwise it is void as against public policy.

P. F. Smith, for the plaintiff.

J. E. Van Valkenburg, for the defendant.

773 **SIMMONS, C. J.** Ramspeck brought suit against Pattillo for breach of contract, the petition alleging: Defendant was agent of a certain insurance company, and had been, as such, insuring in said company plaintiff's property regularly during a period of from ten to twenty years, renewing all policies at their expiration with new policies in the same company, unless otherwise instructed by plaintiff, and sending bills for the premiums thereof to the plaintiff from time to time as suited defendant's convenience, which bills plaintiff had always paid, and which new and renewal policies plaintiff had always accepted. Some five years before the filing of the petition, this custom took the form of a more explicit agreement between plaintiff and defendant, whereby plaintiff promised to continue to insure his property with defendant, in preference to any other company or agent; and defendant bound himself to renew and rewrite all policies of plaintiff in said company as aforesaid, and to keep plaintiff's property, once placed with defendant, covered with insurance, plaintiff to pay all bills presented to

him for premiums; and whereby it was agreed that none of plaintiff's property should become uninsured by mere expiration of the policy. The consideration for this agreement was the mutual promises made by the parties; the convenience, profit, and increased business coming to Pattillo by reason of the agreement; the lessened labor of soliciting the insurance; the certainty of payment of premiums; the knowledge of the condition, title, and insurance of the property insured, and the consequent lessening of the risk; and the large sums of money paid not only for insurance but in consideration of the agreement, plaintiff having paid large sums in conformity to the agreement. Further, plaintiff refrained from seeking insurance elsewhere. Plaintiff was owner of certain land with a building thereon, regularly insured in defendant's company for nine hundred dollars, the policy to expire on January 23, 1893. Shortly before that time defendant requested plaintiff to renew the policy, stating that there had been an increase in the rate; and plaintiff agreed and instructed defendant to continue the insurance, but in the amount of seven hundred and fifty dollars and for a term of three years. All of this was agreed to, and memoranda made. Plaintiff thus became bound for the premiums ⁷⁷⁴ upon the policy, and paid all bills for premiums sent or presented to him thereafter by defendant, to amounts aggregating much more than the premiums of the above-mentioned policy. Plaintiff paid the premiums on the policy ordered, as he had agreed to do, and supposed that the policy had been written; but in fact this was never done, and the failure to do it was the result of defendant's negligence and in violation of their long, fixed, and uniform custom and the express agreement. Defendant did not notify plaintiff of the failure so to insure, but deceived plaintiff into the belief that the property was insured, and thus prevented his taking other insurance as he would have done had he known of defendant's failure to insure the property. This negligence continued until October 4, 1894, when the property was destroyed by fire, being a total loss. The property, at the time immediately preceding the loss, was worth more than one thousand dollars, and had the policy been issued as promised, its full face value could have been collected. After the fire, plaintiff set about making his proofs of loss, and discovered then, for the first time, that the property was not insured at the time of the loss. The insurance company refused to pay the loss, holding itself not liable because no policy had been issued. By reason of the negligence

and failure of defendant, plaintiff was damaged in certain amounts. The petition also alleged demand and refusal to pay, et cetera. To this petition Pattillo demurred upon the grounds that it joined in the same action a claim arising out of breach of contract with an alleged tort growing out of negligence and deceit, and that it contained no cause of action against defendant. The court sustained the demurrer and dismissed the action, and to this plaintiff excepted.

The allegations of the petition, when reduced to their last analysis, mean that a contract was entered into by Pattillo, as agent of the insurance company, and Ramspeck, whereby Pattillo, for a valuable consideration, agreed to keep Ramspeck's property insured in companies represented by Pattillo, and that Pattillo negligently failed to keep insured one house which was destroyed by fire to the damage of Ramspeck. This was clearly a double agency on the part of Pattillo, imposing upon ⁷⁷⁵ him inconsistent duties. The insurance company, having appointed Pattillo its agent, was entitled to his services and his best judgment and discretion in issuing policies upon property. It relied upon him entirely to select property on which was the least risk of fire and to properly classify the risks. It was to Ramspeck's interest to have his property insured, whether the risk was small or great. If Pattillo made this contract with Ramspeck, his duties were certainly conflicting. He could not be faithful to the interests of the company, procuring for it the best risks, and be at the same time faithful to Ramspeck by insuring his property though the risk might be undesirable to the company. The law will not permit an agent to assume such conflicting duties, and declares that such contracts are against public policy. "An agent cannot make a valid contract where, in the same transaction, he acts as agent for both parties": 1 Am. & Eng. Ency. of Law, 1st ed., 380. In the case of Croghan v. New York Underwriters' Agency, 53 Ga. 109, McCay, J., in speaking of this question, said: "Now, it is not competent for one to employ an insurance agent to effect an insurance or renewal in the agent's own company. He cannot take the agency of one wishing to insure, without the consent of his principal. To be agent for both parties to a contract is to undertake inconsistent duties, and such a mutual agency requires the consent of both principals to the mutuality of the agency." In the case of Rice v. Wood, 113 Mass. 133, 18 Am. Rep. 461, Devens, J., after stating the facts of the case said: "It was, therefore, an agreement which placed the plaintiffs

[agents] under the temptation to deal unjustly with the owner of the real estate: *Walker v. Osgood*, 98 Mass. 348; 93 Am. Dec. 168. Contracts which are opposed to open, upright, and fair dealing are opposed to public policy. A contract by which one is placed under a direct inducement to violate the confidence reposed in him by another is of this character." In the case of *Farnsworth v. Hemmer*, 1 Allen, 494, 79 Am. Dec. 756, the court said: "It is of the essence of his [the agent's] contract that he will use his best skill and judgment to promote the interest of his employer. This he cannot do where he acts for two persons whose interests are essentially adverse. He is, therefore, guilty of a breach ⁷⁷⁶ of his contract. Nor is this all. He commits a fraud on his principals in undertaking, without their assent or knowledge, to act as their mutual agent, because he conceals from them an essential fact entirely within his own knowledge, which he was bound, in the exercise of good faith, to disclose to them: *Story on Agency*, sec. 31; *Copeland v. Mercantile Ins. Co.*, 6 Pick. 198, 204; *Pugsley v. Murray*, 4 E. D. Smith, 245; *Rupp v. Sampson*, 16 Gray, 398; 77 Am. Dec. 416." See, also, *Mechem on Agency*, secs. 66, 67; *Civ. Code*, sec. 3010. Such being the law, it is clear that Ramspeck cannot recover from Pattillo, the agent, upon the contract which he alleges he made with him as agent, although Pattillo failed and neglected to perform. The court, therefore, did not err in holding that no cause of action was set out in the petition.

Judgment affirmed.

All the justices concurring.

AGENCY—ACTING FOR BOTH PARTIES—CONTRACT.—An agent cannot act for both his principal and the adverse party in the same transaction, unless by the consent of his principal, given after a full knowledge of all the facts and circumstances: *Wildberger v. Hartford Fire Ins. Co.*, 72 Miss. 338; 48 Am. St. Rep. 558. An agent acting for both parties can recover compensation from neither, unless his double employment was known and assented to by both: *Rice v. Wood*, 113 Mass. 133; 18 Am. Rep. 459; *Walker v. Osgood*, 98 Mass. 348; 93 Am. Dec. 168. If an insurance agent is appointed a receiver of a stock of merchandise, and issues a policy of insurance thereon to himself without the consent of his principal, it is void: *Wildberger v. Hartford Fire Ins. Co.*, 72 Miss. 338; 48 Am. St. Rep. 558; see note to *Potter's Appeal*, 7 Am. St. Rep. 280.

CASES
IN THE
SUPREME COURT
OF
ILLINOIS.

ROYAL NEIGHBORS OF AMERICA v. BOMAN.

[177 ILLINOIS, 27.]

INSURANCE—QUESTION OF MEDICAL EXAMINER'S AGENCY—HOW DETERMINED.—If one acts as a medical examiner for an insurance company, where an application is made for insurance, the question as to whose agent he is is one of fact, to be determined from all the evidence bearing on that subject, notwithstanding any statement in the application that he is the agent of the insured.

INSURANCE—MEDICAL EXAMINER IS AGENT OF INSURANCE COMPANY NOTWITHSTANDING STIPULATION IN APPLICATION.—Notwithstanding an express stipulation, in an application for insurance, that the applicant makes the regular examining physician of the company his agent, such examiner, in making a medical examination of the applicant, on behalf of the insurance company, is the latter's agent, and the company is bound by his report to it, where no fraud or intent to deceive on the part of the applicant is shown.

INSURANCE—WHEN FALSE ANSWERS INSERTED BY MEDICAL EXAMINER DO NOT INVALIDATE POLICY.—If an applicant for insurance answers questions truthfully, false answers inserted by the medical examiner, in the application, do not invalidate the insurance, although it is stipulated therein that he is the agent of the applicant.

INSURANCE—WHAT STIPULATION DOES NOT ESTOP BENEFICIARY FROM SHOWING THAT MEDICAL EXAMINER INSERTED FALSE ANSWERS.—The beneficiary of an insurance policy is not estopped, by a stipulation in the application for insurance that the medical examiner is the agent of the applicant, from showing that the examiner inserted false answers to questions which were, in fact, correctly answered by the applicant.

Suit to compel the Royal Neighbors of America to levy and collect an assessment, and to pay to the plaintiff, Joseph E. Boman, the amount of a benefit certificate. The order named

was a fraternal benefit society. Boman's wife was a member of the local camp, and, on February 7, 1895, made application for a benefit certificate at the office of Dr. F. S. Meacham, who was, at that time, a duly elected regular medical examiner of the order. He made a medical examination of the applicant, and, at the same time, filled out the answers to the questions in the application blank. A benefit certificate was issued on the applicant's life, in the sum of one thousand dollars, payable at her death to her husband. In about a year afterward, Mrs. Boman died, and was, at the time, in good standing in the order. The proof of death required was made, but the order refused to pay the money provided for in the policy. Boman then filed this suit in chancery. The bill was answered by the order, and the affirmative defense interposed that Mrs. Boman, in her application for the benefit certificate, had made untrue and fraudulent answers to questions in relation to her previous condition of health, such as, under the terms of the contract, would forfeit all right to the benefit promised in the certificate. The application signed by Mrs. Boman contained clauses in which she adopted the statements and answers in the application as her own, whether written by herself or not; in which the statements and answers made by her were declared and warranted to be full, complete, and literally true; in which she agreed that the exact, literal truth of each and every answer and statement should be a condition precedent to any binding contract issued upon the faith of answers and statements; and in which she constituted and made the officers of the local camp of the order, who had aided her in making the application, her agents for such purpose. The certificate issued to Mrs. Boman contained a clause making the application and medical examination a part thereof. It appeared from the evidence that, after the medical examiner had filled up the blanks in the application, Mrs. Boman signed it without reading it. The answers, as written by the examiner, to some of the questions were untrue, but the chancellor found as a fact that Mrs. Boman made truthful answers to the questions, but that the answers inserted by the physician were not those given by her, and that the doctor was acting as the agent of the order. A decree was rendered against the order for the sum of one thousand and forty-three dollars and fifty cents, which was affirmed on appeal to the appellate court, and the order further appealed to the supreme court.

J. G. Johnson and J. W. White, for the appellant.

Hamilton & Woods, for the appellee.

WILKIN, J. The questions presented for decision in this cause arise upon the construction and effect to be given, under the circumstances of this case, to the foregoing clauses contained in the application and certificate. It is contended on behalf of appellant that by the terms of the application appellee is estopped from asserting that Dr. Meacham was the agent of the order, and not of the applicant for the certificate. Evidence was admitted on the hearing, over the objection of appellant, to establish the real position of the medical examiner in relation to applications for benefit certificates. The question as to whose agent Dr. Meacham was is one of fact, to be determined from all the evidence bearing on that subject, and not merely from the statement in the application that he was the agent of the assured. The question is open to inquiry and may be shown by parol, notwithstanding the express stipulation that he was to be regarded as the agent of appellant: *Lumbermen's Mut. Ins. Co. v. Bell*, 166 Ill. 400; 57 Am. St. Rep. 140; *Firemen's Ins. Co. v. Horton*, 170 Ill. 258; *Phenix Ins. Co. v. Stocks*, 149 Ill. 319. The superior court of Tennessee, in a case very similar to this, held that one who acts as a medical examiner for an insurance company, which ratifies his examination of an applicant, is its agent in respect to such examination, notwithstanding a recital in the application that he shall be regarded as the agent of the applicant as to all statements made by the latter: *Knights of Pythias v. Cogbill*, 99 Tenn. 28. While such stipulations are now usually inserted either in the application or in the policy, yet they cannot change the facts, and where a duly appointed agent of the company acts in its behalf, within the scope of his authority as otherwise determined, his acts are binding upon the company: See 11 Am. & Eng. Ency. of Law, 334, and cases there cited. We perceive no sound ground, on the testimony, to reverse the finding of the chancellor that Dr. Meacham, at the time he received Mrs. Boman's application, was the agent of appellant.

Appellant contends that it was the duty of the applicant to read the application and to know what she signed, and, failing to do so, the beneficiary is estopped from questioning the truth of the answers therein contained, and the case of *New York Life Ins. Co. v. Fletcher*, 117 U. S. 519, is cited in support of this view. The case cited, and all cases which follow its doc-

trine, proceed upon the ground that the assured cannot escape the duty of reading the application, which must be the basis upon which his insurance will rest; but the majority of the various state courts, for good reasons, as we think, seem not to have adopted the views therein expressed. Whether the beneficiary should be estopped from questioning the truth of the answers contained in the application also depends upon the peculiar facts of each case and the relation of the parties. As is well said on this subject in a note to *Wheaton v. North British Ins. Co.*, 9 Am. St. Rep. 233: "The ground thus taken, though defensible when viewed in connection with ordinary contracts and writings, is more questionable when used to support the claim that the assured, rather than the insurer, shall suffer from the fraud of the latter's agents. It is notorious that contracts of insurance are, on the part of the assured, entered into without the advice of counsel, and chiefly upon the representations of the agents of the insurer. Such agent is justly looked upon as the accredited agent of the company, in whom it has confidence and holds out as worthy of the confidence of its patrons. Furthermore, the assumption is perfectly natural that he knows just what information his principal desires and in what language it may be best expressed, and human nature must be far ³² different from what it is now before the average applicant for insurance can be taught that he must be deaf to the representations of the agent while he sharpens his comprehension and applies it to the careful scrutiny of the insurance stationery, which, even without the suggestion of the agent, it is impossible for him to regard as other than a mere 'matter of form.'" So in this case, when, in answer to the question as to whether or not she had ever had bronchitis, Mrs. Boman told him she had had an attack of "acute bronchitis," and Dr. Meacham said "it was of no consequence" and inserted "no" in answer to the question, she had a right to rely on his statement, on the theory that he knew just what information his principal desired and how it should be expressed. He was acting in the interests of the order, and his knowledge must be held to be the knowledge of the principal. It was his duty to ascertain the actual facts about this risk, and his report to the company must, where no fraud or intent to deceive on the part of the applicant is shown, be conclusive upon it. Where one makes true answers to the questions in an application for insurance, the validity of the insurance is not affected by the falsity of the answers inserted by the agent of the company,

even though the application contained a stipulation that the agent took the application as the agent of the insured: *Bernard v. United Life Ins. Assn.*, 17 Misc. Rep. 115; 39 N. Y. Supp. 356; *Clubb v. American Acc. Co. of Louisville*, 97 Ga. 502; *Insurance Co. v. Wilkinson*, 13 Wall. 222; *Andes Ins. Co. v. Fish*, 71 Ill. 620.

Under the circumstances of this case, the beneficiary is not estopped to question the truth of the statements made in the application, and the finding of the chancellor in that respect was correct.

We are satisfied the decree of the circuit court finding in favor of appellee, and its affirmance in the appellate court, are right.
Decree affirmed.

INSURANCE—FALSE ANSWERS WRITTEN BY AGENT—ESTOPPEL.—If answers are written in an application for insurance by an agent of the insurer, without the knowledge or consent of the applicant, the company is estopped from making any defense based upon the falsity of such answers, especially where the agent has been correctly informed of the real facts by the applicant: *Notes to German Ins. Co. v. Hayden*, 52 Am. St. Rep. 213; *Deltz v. Insurance Co.*, 13 Am. St. Rep. 915; *Phenix Ins. Co. v. Pickel*, 12 Am. St. Rep. 403; and this, although the applicant has warranted the truth of the answers: See monographic note to *Wheaton v. North British etc. Ins. Co.*, 9 Am. St. Rep. 233, treating of applications made out by agents.

INSURANCE—AGENCY—FILLING APPLICATIONS—RIGHTS OF INSURED.—An insurance company is bound by the acts of its agent: Note to *Deltz v. Insurance Co.*, 13 Am. St. Rep. 915. The agent of an insurance company, in filling blanks, does not thereby become the agent of the applicant: Note to *Continental Ins. Co. v. Pearce*, 7 Am. St. Rep. 565; notwithstanding stipulations seeking to make the agent of the insurer the agent of the insured: Monographic note to *Clark v. Union Mut. etc. Ins. Co.*, 77 Am. Dec. 726, on the effect of stipulations seeking to make the agent of the insurer the agent of the assured. An applicant for life insurance, when answering questions of warranty, has the right to rely upon information given him by the agent of the company: *Equitable Life Ins. Co. v. Hazlewood*, 75 Tex. 338; 16 Am. St. Rep. 893; and an agent, authorized to take applications for insurance, should be deemed to be acting within the scope of his authority, where he fills up a blank application for insurance: Note to *Phenix Ins. Co. v. Pickel*, 12 Am. St. Rep. 403. The fraud, misrepresentations, misstatements, or mistakes of the company's agent do not prejudice the assured in his right to recover upon a contract of insurance to which he innocently became a party: Note to *State Ins. Co. v. Taylor*, 20 Am. St. Rep. 289.

BARTLETT v. CICEBO LIGHT, HEAT AND POWER Co.

[177 ILLINOIS, 62.]

RECEIVERS—DAMAGES FOR TORTS AS OPERATING EXPENSES OF CORPORATION.—If a receiver has been placed in charge of a corporation, damages for injuries to persons or property during the receivership, caused by the torts of the receiver's agents and employes, are classed as a part of the operating expenses of the corporation, and payable as other necessary expenses of the receivership, first out of the net income, if that is sufficient, but, in the event of a deficiency, to be paid out of the corpus.

RECEIVERS—CORPORATE LIABILITY FOR TORTS DURING RECEIVERSHIP.—A corporation is answerable for injuries to persons or property during the time that the corporation is in the hands of a receiver, caused by the negligence of his agents and employes.

RECEIVERS—DISCHARGE OF, DOES NOT AFFECT CORPORATE LIABILITY FOR TORTS DURING RECEIVERSHIP. The discharge of a receiver for a corporation does not exonerate it from liability for injuries to persons or property during the receivership, caused by the negligence of the receiver or his subordinates. It is answerable as well after the discharge of the receiver as while he is in office.

RECEIVERS—CORPORATIONS—CLAIMS FOR TORTS DURING RECEIVERSHIP FOLLOW THE PROPERTY.—A receiver of a corporation not being personally liable, upon his discharge, for injuries to persons or property during the receivership, caused by the negligence of his subordinates, claims for such injuries follow the property or fund, which alone can be used to satisfy them.

RECEIVERS—CORPORATE LIABILITY, AFTER DISCHARGE OF, FOR TORTS DURING RECEIVERSHIP.—If the receiver of a corporation is discharged, and its property is restored to its possession, with improvements, the corporation is answerable for injuries to persons or property, occurring during the receivership through the negligence of the receiver or his subordinates, at least to the extent to which the net income was applied by the receiver to the permanent improvement of the property, and, if the corporation desires to limit its liability to this amount, the question must be raised by its pleadings.

Action to recover damages for the death of plaintiff's intestate, alleged to have occurred through the negligence of the defendant corporation. It was averred in the declaration that the plaintiff's intestate came to his death while in the employment of a receiver, who was in control of the company's plant. A demurrer to the original declaration was sustained, and also a demurrer to the amended declaration. The plaintiff elected to stand by his amended declaration, and judgment was entered in favor of the company for costs. On appeal to the appellate court, this judgment was affirmed, and from such judgment of affirmance a writ of error was prosecuted to the supreme court.

James A. Fullenwider and Cyrus J. Wood, for the plaintiff in error.

Cutting, Castle & Williams, for the defendant in error.

⁷³ **MAGRUDER, J.** The main question presented by the demurrer to the amended declaration in the present case is this: Where a corporation has been placed in the hands of a receiver, and an injury or death has been caused by the negligence of the receiver while he is operating the property of the corporation; and where, by stipulation between the parties, the receiver is discharged, and the property is restored to the possession of the corporation, can the corporation itself be held liable for damages for the injury so received during the receivership? As a general rule, a corporation, while its property is in the hands of a receiver, has no control over either the receiver or his servants, and, therefore, in the absence of any liability imposed by statute, is not responsible for the negligence or torts of the employes of the receiver; and no suit for damages occasioned thereby can be maintained against the corporation itself. But there is an exception to this rule which will be hereafter stated.

The amended declaration in this case contains the following averment: "And the plaintiff avers further that during the receivership the said receiver had the entire management and control of the business of the defendant company, collected large sums due it, sold its bonds and other property, and applied the receipts to the running of the business of the company and to the improvement and betterment of the company's property, and that the said property at the close of the receivership was without reservation turned back into the possession of the company."

We do not deem it necessary to discuss any other of the points made, or questions raised by counsel, except that suggested by the averment of the declaration above ⁷⁴ quoted. In view of this averment, we are of the opinion that the court below erred in sustaining the demurrer to the declaration.

The receiver holds the property in his possession as an officer of the court. But the appointment of the receiver does not dissolve the corporation. The corporation still remains in existence, and is still clothed with its franchises. The appointment of the receiver merely gives him the temporary management of the corporation under the direction of the court, instead of leaving it under the direction of the manager ap-

pointed by the directors of the corporation: Bloomfield R. R. Co. v. Van Slike, 10th Ind. 480; Ohio etc. Ry. Co. v. Russell, 115 Ill. 52; Heffron v. Gage, 149 Ill. 182; Safford v. People, 85 Ill. 558; Toledo etc. Ry. Co. v. Beggs, 85 Ill. 80; 28 Am. Rep. 613. By the appointment of the receiver the corporation's capacity of being sued is not affected. The receiver is legally the agent of the company, although under the direction of the court; and the title to the property is not divested by his appointment: Ibid.

Damages for injuries to persons or property during the receivership, caused by the torts of the receiver's agents and employes, are classed as a part of the operating expenses of the corporation: 20 Am. & Eng. Ency. of Law, 385, and cases cited in note 1; Green v. Coast Line R. R. Co., 97 Ga. 15; 54 Am. St. Rep. 379; Sloan v. Central Iowa Ry. Co., 62 Iowa, 728; Missouri etc. R. R. Co. v. McFadden, 89 Tex. 138; People v. Yoakum, 7 Tex. Civ. App. 85. Such damages, being part of the operating expenses, are accorded the same priority of payment as belongs to other necessary expenses of the receivership, and "will be paid out of the net income if that is sufficient, but in the event of a deficiency they will be paid out of the corpus": 20 Am. & Eng. Ency. of Law, 385, and cases in note.

Where the net income derived from the business during the receivership is diverted from the payment of such operating expenses, and applied to the permanent improvement ⁷⁵ of the property of the corporation, and the receiver is afterward discharged, and the property is again turned over to the corporation, in such case the corporation is liable for torts during the receivership to the extent of the net income so applied: 20 Am. & Eng. Ency. of Law, 389. In Texas etc. Ry. Co. v. Johnson, 76 Tex. 421, 18 Am. St. Rep. 60, it was held that a claim for damages, caused by injuries inflicted through the negligence of a receiver while he was operating a railway, was entitled to payment out of the current receipts; that if the current earnings be invested by the receiver in the betterment of the road, which without sale was returned to the company with its other property at the close of its receivership, then the company must be held to have received the property, charged with the satisfaction of any claim which the receiver ought to have paid out of the earnings: Texas etc. R. R. Co. v. Bailey, 83 Tex. 19.

The receivers in such cases are not personally liable upon their discharge for claims of this character, but the claims follow the property or fund which alone can be used to satisfy

them: Gluck and Becker on Receivers of Corporations, 2d ed., secs. 493, 494, 495. Not merely claims arising out of contracts, but claims for torts, arising through the negligence of the receivers or their subordinates, thus follow the property or fund: *Ibid.*

Where the earnings of the road have thus been invested in betterments upon it, and the receiver has been discharged, and the property has been returned to the owner with such improvements, it necessarily follows that the company must be liable, because the receiver, by virtue of his discharge, ceases to be liable: *Texas etc. Ry. Co. v. Comstock*, 83 Tex. 537; *Boggs v. Brown*, 82 Tex. 41; *Texas etc. Ry. Co. v. Johnson*, 76 Tex. 421; 18 Am. St. Rep. 60; *Brown v. Gay*, 76 Tex. 444. "Where the receiver is discharged, and the property restored with improvements, the company is liable for accidents during the receivership": 2 Cook on Stock and Stockholders, 7th 3d ed., sec. 875, note 2, pp. 1447, 1448, and cases there cited.

If such were not the law great and irreparable injustice would be done in many cases. As a receiver is not personally liable for the torts of his servants, but only liable in his official capacity, and as the damages for such torts cannot be recovered in suits against him personally or collected on execution against his individual property, a judgment, rendered while the receiver is in possession, should provide for its payment out of the trust fund or the property in the hands of the receiver or under his control: *McNulta v. Lockridge*, 137 Ill. 270; 31 Am. St. Rep. 362. In the case at bar, suit has not been brought against the receiver, but has been brought against the company, to which the trust fund or property was restored after the discharge of the receiver. In the absence of all personal liability on the part of the receiver, there is no reason why the trust fund or property should not be liable, as well after the discharge of the receiver as while he is in office. Where the receiver has returned the property to the company, the fund or property remains the same, and the only difference in the circumstances is, that it is in the possession of the company instead of being in the possession of the receiver. In the case at bar, if the plaintiff has no remedy for the death of his intestate against the company, then he has no remedy at all, inasmuch as the receiver, during whose administration the death occurred, has been discharged from his office, and cannot be held personally liable.

The doctrine above announced has been well stated, and has

been placed upon correct grounds, by Thompson in his Commentaries on the Laws of Corporations, volume 5, section 7151, where the author says: "The receiver becomes the new custodian of a property which was before, in a sense, a trust property in the hands of the corporation. In the management of this trust property, negligences are committed by his servants, for which, under the settled ⁷⁷ principles of law, the receiver is liable—not personally, except where he has been guilty of personal fault, but out of the trust funds in his hands. The liability is then essentially a liability of the fund, and not of the custodian. When, therefore, the fund is transferred to a new trustee, whether it be to a new and reorganized corporation created by the purchasers at a mortgage sale for the purpose of receiving and operating the property, or whether it be the original corporation, its former owner, to whom it is redelivered under a new arrangement, it is the case of a trust property, to which a liability has attached, passing into the hands of a new trustee. The trust property continues liable; but, from the very nature of the case, any action brought to charge it must, if the receiver has been discharged prior to the bringing of the action, be brought against the corporation which is its custodian—that is to say, against the new trustee."

It is contended by counsel for defendant in error that a contrary doctrine to that here announced has been laid down by this court in the case of McNulta v. Lockridge, 31 Am. St. Rep. 362. But that case is not capable of the construction sought to be given to it. It is true that general expressions are there used to the effect that the corporation is not responsible for the negligence or torts of the employes of the receiver; but such expressions are to be understood as applying to the facts of the case. It was there held that an action can be maintained against one receiver for the torts of the servants of a preceding receiver; that the liability is enforceable against the fund, which is the subject of the trust, and follows such fund; that the judgment in such a case is in the nature of a judgment in rem, the res being the matter of the receivership, and that the plaintiff should not be deprived of his action and of the right of trial by jury because one receiver has succeeded another. The reasoning of the court in the McNulta case lends support to the doctrine that a company, which receives its property back from the receiver ⁷⁸ improved and bettered, and after such property has been managed and operated for some time at an expense paid by the receiver out of the property,

cannot escape liability for the torts of the receiver's agents or employes.

If the corporation desires to set up that it is only liable for claims of this character to the amount of the net income during the receivership which has been applied to the improvement and betterment of the property, the fact of the payment of such claims to an amount equal to the value of the improvements, if such fact exists, presents a question which the corporation must raise by the pleadings: 20 Am. & Eng. Ency. of Law, 390, and cases cited in note 1.

The judgments of the appellate court and of the circuit court of Cook county are reversed, and the cause is remanded to the latter court with directions to proceed in accordance with the views herein expressed.

CORPORATIONS — RECEIVERS — OPERATING EXPENSES — DAMAGES FOR TORTS.—A private corporation is bound to respond in damages for its negligence or tort: *Elmore v. Drainage Commrs.*, 135 Ill. 269; 25 Am. St. Rep. 863; and the necessary expenses of keeping a business of a private corporation, in the hands of a receiver, a "going concern," must be charged first upon the net income, but, if that is not sufficient, they may be charged upon the corpus of the property, or upon its proceeds after sale: *Knickerbocker v. McKindley Coal etc. Co.*, 172 Ill. 535; 64 Am. St. Rep. 54. A railway company is liable for damages for personal injuries inflicted upon an employe by reason of negligence, while the road was in the hands of a receiver, where the road has been returned to the company improved by the expenditures made by the receiver: *Texas etc. Ry. Co. v. Brick*, 83 Tex. 526; 29 Am. St. Rep. 675. The possession of a receiver of a railroad company must be exclusive to relieve the company from liability: See monographic note to *Naglee v. Alexandria etc. Ry. Co.*, 5 Am. St. Rep. 314, on the liability of a railroad corporation while its road is in the hands of a trustee or receiver. A claim for damages caused by injuries inflicted through the negligence of a receiver while he is operating the road is entitled to payment out of the current receipts: *Texas etc. Ry. Co. v. Johnson*, 76 Tex. 421; 18 Am. St. Rep. 60. The discharge of a railway receiver, and the return of the property, with betterments, to the owner, leaves the property subject to any claim or charge legally resting upon it: *Texas etc. Ry. Co. v. Johnson*, 76 Tex. 421; 18 Am. St. Rep. 60. Compare monographic note to *Green v. Coast Line R. R. Co.*, 54 Am. St. Rep. 425, 430, showing that claims for injuries, either to persons or property, incurred while a receiver is in control of railroad property, are payable by him as other expenses of the management, and that they are payable out of current income; but, if this has been diverted, they are payable out of the corpus of the property. There seems to be a growing disposition to apply these doctrines to private corporations as well as to railroad companies, but as yet the cases in which it has been done are not numerous: See the principal case and *Knickerbocker v. McKindley Coal etc. Co.*, 172 Ill. 535, 548; 64 Am. St. Rep. 54, 59. Compare *McNulta v. Lockridge*, 137 Ill. 270; 31 Am. St. Rep. 362.

CARLINVILLE v. CASTLE.

[177 ILLINOIS, 105.]

DEDICATION—NECESSITY OF INTENTION AND ACCEPTANCE.—A dedication is not good unless the acts of both the donor and of the public authorities are unequivocal and satisfactory of the design to dedicate on the one part and to accept and appropriate to public use on the other.

DEDICATION—NECESSITY OF DEFINITE DESCRIPTION.—A dedication is not good without a definite description of the property to be dedicated.

DEDICATION—ILLUSTRATION OF LACK OF INTENTION AND WANT OF DESCRIPTION.—If a lot, shown by a town plat to be fifty-five feet wide, is conveyed by describing the tract conveyed as commencing at the southeast corner of said lot; thence running north thirty-nine feet to a public alley; thence west to the western boundary; thence south thirty-nine feet; thence east to the place of beginning, the deed does not dedicate, for a public alley, that part of the lot not conveyed, for there is no evidence of a design to dedicate, and no description given.

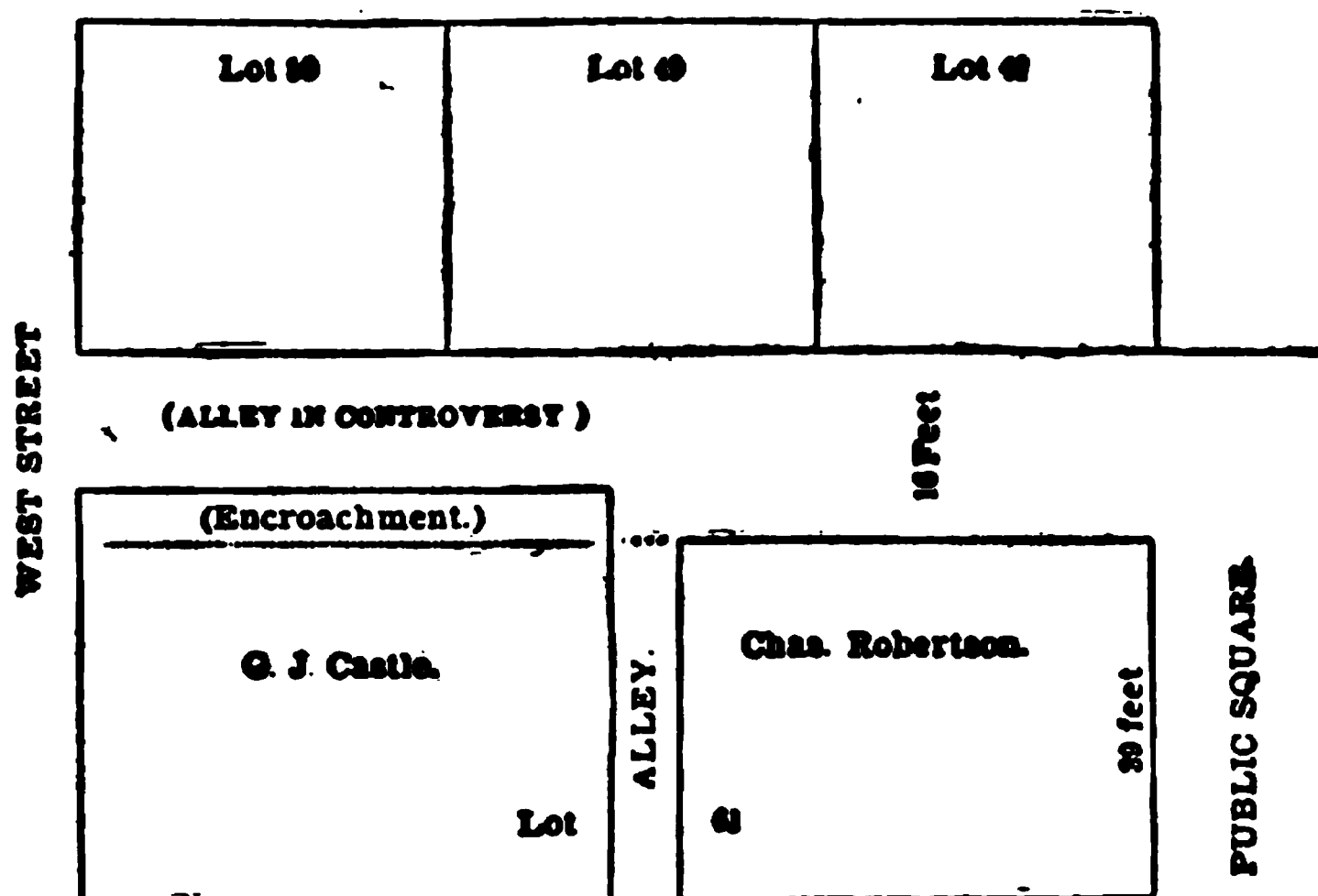
EJECTMENT, BY CITY, TO RECOVER PUBLIC ALLEY.—ABANDONMENT AND NONUSER may be set up in bar of a city's action of ejectment to recover its rights in a public alley, where it has permitted the adjoining owner to occupy it adversely for a period of twenty years or more, without making any effort to regain possession, or to assert any right to the property.

Edward T. Frey, city attorney, and Bell & Burton, for the plaintiff in error.

Rinaker & Rinaker, for the defendant in error.

¹⁰⁶ **CRAIG, J.** This was an action of ejectment brought by the city of Carlinville, against George J. Castle, to recover a portion of lot 61 of the original town (now city) of Carlinville. The premises sought to be recovered are alleged to be a portion of a public alley.

The original plat of Carlinville was filed for record, August 27, 1829. Lot 61 is situated on the west side of ¹⁰⁶ the public square, fronting on the square fifty-five feet and extending west one hundred and ninety-eight feet to West street. A copy of the original plat, and also a plat showing location of buildings and relative lines of lots, et cetera, appear in the record but were not copied into the abstract. The following diagram will, however, be sufficient for the consideration of the questions involved in this cause:



No alley along the north part of lot 61 appears upon the original plat. It is contended by the plaintiff in error "that subsequently to the recording of the plat, a strip of ground of the uniform width of sixteen feet off of the north end of lot 61 was expressly dedicated as a public alley by the person being then the owner and then in the possession of lot 61; that the land so dedicated was accepted and used by the public as a public alley; that afterward defendant in error, or some one through whom he claims title, without authority, inclosed and erected a building upon a part of the sixteen-foot alley, being about two and one-half feet by eighty-nine and one-half feet off the south side of the west end of said alley."

It appears from the record that lot 61 belonged originally to Ezekiel Good; that on or about the seventh day of March, 1833, he conveyed the lot to John R. Lewis; that ¹⁰⁷ by a warranty deed dated March 26, 1839, and recorded March 29, 1839, John R. Lewis conveyed in fee simple to Jarrot Dugger all of said lot 61, except the sixteen feet for the entire length thereof off of the north side, and described the land as follows: "Commencing at the southeast corner of said lot 61, thence running north thirty-nine feet to a public alley, thence west to First West street, thence south thirty-nine feet, thence east to the place of beginning"; that by warranty deed dated February 22, 1849, recorded February 23, 1849, Jarrot Dugger conveyed in fee simple to Joseph C. Dugger the said thirty-nine feet off of the south side of lot 61, and described the property

in the same language above quoted, used in the deed from Lewis to Dugger. These two deeds, one made in 1839, and the other in 1849, plaintiff in error contends constituted a dedication of sixteen feet off the north side of lot 61 to the public for an alley.

In *Winnetka v. Prouty*, 107 Ill. 218, it was held that to make a good dedication, either under the statute or at common law, there should be a definite and certain description of that which is proposed to be dedicated and an acceptance by the public before the withdrawal or abandonment of the offer to dedicate. In *Grube v. Nichols*, 36 Ill. 92, it was held essential to make a sufficient dedication that the owner of the soil must devote the right of way to public use, and it must be accepted and appropriated by the public to that use by travel, and recognized as a public highway by the proper authorities, by repairs or otherwise. But when a dedication is relied upon to establish the right, the acts of both the donor and of the public authorities should be unequivocal and satisfactory of the design to dedicate on the one part and to accept and appropriate to public use on the other. It is not claimed that there is here any statutory dedication, but a common-law dedication is relied upon.

It will be observed that Lewis, by his deed of March 26, 1839, did not undertake to grant or convey to the public any part of lot 61. The deed merely conveys the ¹⁰⁸ south thirty-nine feet of lot 61 to Dugger. The conveyance of the thirty-nine feet, so far as can be determined from the language of the deed, was the sole purpose and object in view in executing the deed. However, in describing the land in the deed he uses this language: Commencing at the "southeast corner of said lot 61, thence running north thirty-nine feet to a public alley, thence west to First West street, thence south thirty-nine feet, thence east to the place of beginning." At the time this deed was made there was no alley thirty-nine feet north of the southeast corner of lot 61. No alley had been established there, by plat or otherwise. But it is said the clause in the deed was a dedication of an alley sixteen feet wide lying north of the thirty-nine feet conveyed by the deed. There is, however, nothing found in the deed providing for an alley sixteen feet wide. Upon what ground, therefore, can it be said the grantor in the deed intended to dedicate sixteen feet of land for an alley? We held in *Winnetka v. Prouty*, 107 Ill. 218, that it was necessary, in order to make a good dedication, that there should be,

a definite description of the property to be dedicated. Here no description whatsoever was given. Whether the alley should be one foot, five feet, or ten feet wide does not appear from anything found in the deed or elsewhere. Nor is there anything to show how far west the alley should run. Whether it should extend the entire length of the lot or only half way along the length of the lot does not appear. If Lewis, the owner of lot 61, had intended to dedicate sixteen feet off the north side of the lot to the public for an alley when he conveyed the south thirty-nine feet to Dugger, his intention might have been declared in a very few words, and, in the absence of language manifesting an intention to dedicate, it cannot be held that the property in question was dedicated.

What has been said in regard to the deed made by Lewis applies to the deed made in 1849 by Jarrot Dugger to Joseph C. Dugger, as the two are in all respects alike, in so far as the dedication of an alley is involved.

¹⁰⁰ But if it was conceded that the deed constituted a dedication and that the public had used and traveled over the sixteen feet, except the strip of land in controversy, for many years, still the abandonment or nonuser of the land in question in behalf of the city of Carlinville was sufficient to bar a recovery. It appears from the evidence that as early as 1858 the defendant took possession of the strip of land in question and has occupied it ever since. Thus, for a period of forty years the land has been held and occupied adversely to the city of Carlinville, and during all that time no effort whatever has been made by the city to regain the possession or assert any right to the property. In *Peoria v. Johnston*, 56 Ill. 45, it was held that where ground upon which a highway was laid out, or which was dedicated for that purpose, has been in the open and exclusive adverse possession of the owner of the land for twenty years, and a complete nonuser of the easement by the public during that time, an extinguishment will be presumed. The same doctrine was declared in *Chicago etc. R. R. Co. v. Joliet*, 79 Ill. 25, and *Winnetka v. Prouty*, 107 Ill. 218. *Auburn v. Goodwin*, 128 Ill. 57, is also a case in point. There, as here, an action of ejectment was brought by the village to recover possession of certain alleys in a certain block in the incorporated village. Among other defenses, abandonment or nonuser was relied upon to defeat a recovery, and the court held, as the alleys had been fenced up for twenty years and no effort had been made by the village authorities to remove the obstruction, no recovery could be had.

Jordan v. Chenoa, 166 Ill. 530, is also a case in point. There, in an action on behalf of the city to obtain the possession of an alley, it was held that while the statute of limitations does not run in favor of an individual against a municipality holding streets and alleys for the general public under acceptance of a dedication, yet abandonment and nonuser may be set up in bar of a recovery. Under the ¹¹⁰ law as laid down in the cases cited the city of Carlinville could not recover.

Under the facts as they appear in the record we are satisfied the court decided the case correctly, and the judgment will be affirmed.

DEDICATION—INTENT—ACCEPTANCE.—To constitute a valid dedication to public use there must be a clear intent to dedicate, and an acceptance or actual use for the purpose contemplated: *Notes to Chicago v. Ward*, 61 Am. St. Rep. 202; *Whitesides v. Green*, 57 Am. St. Rep. 756; *People v. Reed*, 15 Am. St. Rep. 31; *Board of Supervisors v. Seal*, 14 Am. St. Rep. 549; *Osage City v. Larkin*, 10 Am. St. Rep. 189; *San Francisco v. Calderwood*, 91 Am. Dec. 545; monographic note to *State v. Trask*, 27 Am. Dec. 562, on dedication to public use. Dedication to public use is not established where neither an original grant nor any act of plaintiffs or of their grantors equivalent to a grant of the locus in quo for a public highway is proved, and the assent of the owner of the land, and its acceptance and use for the purposes of the dedication, is not shown: *David v. New Orleans*, 16 La. Ann. 404; 79 Am. Dec. 586.

EJECTMENT—STREETS.—Ejectment will lie in favor of a city to recover lands dedicated for a street: *San Francisco v. Grote*, 120 Cal. 59; 65 Am. St. Rep. 155; note to *Tennessee etc. R. R. Co. v. East Alabama Ry. Co.*, 51 Am. Rep. 478; but a county cannot maintain ejectment to remove obstructions from land dedicated as a street and held adversely: Note to *San Francisco v. Grote*, 65 Am. St. Rep. 158.

UNION NATIONAL BANK v. LANE

[177 ILLINOIS, 171.]

JUDGMENT—LIEN—FRAUDULENT CONVEYANCE.—A judgment is not a lien on real estate which the judgment debtor conveyed away, before the rendition of the judgment, to defraud his creditors, for, as between the parties to the conveyance, it is valid and binding, and no interest, legal or equitable, remains in the grantor upon which the lien can rest.

EXECUTION—LEVY ON LAND—NATURE OF LIEN.—As there is no manual seizure or possession by a levy of execution upon real estate, the lien created by such levy is merely constructive and arises only by a compliance with the statute.

EXECUTION—RECORDING CERTIFICATE OF LEVY—LIEN ON LAND FRAUDULENTLY CONVEYED.—The mere levy of an execution upon land, or the recording of a certificate of such levy, with the return of the execution nulla bona, does not give or create a lien upon the property, where it lies in the same county in which the judgment was rendered, but was conveyed by the debtor, before the judgment was rendered, to defraud his creditors.

EXECUTION—RECORDING CERTIFICATE OF LEVY—EFFECT OF.—The recording of a certificate of levy on land lying in the same county where the judgment was recovered does not, where the statute makes no provision, in such a case, for the recording of a certificate of levy, give any additional force or efficacy to the levy as a lien, or to the certificate as notice to parties of such levy.

FRAUDULENT CONVEYANCES—BILL TO SET ASIDE—LIS PENDENS—EQUITABLE LIENS.—If a debtor conveys his real estate to defraud his creditors, and they subsequently obtain judgments against him in the county where the land lies, the filing of bills in equity by them to set aside the conveyance as fraudulent, and the obtaining of service thereon, constitute lis pendens and create equitable liens on the land in the order in which the bills are filed and the service obtained.

The Union National Bank recovered a judgment, on May 31, 1893, against Samuel B. Barker. An execution was issued, and on June 3, 1893, the sheriff levied on certain real estate which Barker, two days before the entry of judgment, had conveyed to his wife, with the intent to hinder, delay, and defraud his creditors. The levy was indorsed on the writ and a certificate of the levy was filed for record. All that was subsequently done under this execution was to return it unsatisfied. Two judgments were afterward recovered by Lane against Barker, one in June 28, 1893, and the other on July 6, 1893. Executions were issued on both of these judgments, but were not levied. Browne and others also obtained judgments against Barker, on which executions were issued and returned unsatisfied, but no further steps were taken as to them. Bills in equity against Barker and his wife and the bank were filed by Lane, on July 1 and July 11, 1893, respectively, to set aside the deed to Barker's wife, and to subject the land to the payment of the Lane judgments. On July 7th and July 18th service was obtained on the defendants in the two suits, and the suits were afterward consolidated. The bank, on December 13, 1893, filed its creditor's bill against the Barkers, Lane, Browne, and others. Lane and Browne and others filed cross-bills to the bank's bill, setting up the facts and their respective claims. After issues were made, a decree was entered by the circuit court, finding that Barker's deed was made in fraud of the rights of his creditors, and that the bank was entitled to priority in payment, and then Lane, and last, Browne and others. Lane, Browne, and others appealed to the appellate court, where the decree was affirmed, in all respects, except that it was there determined that Lane was entitled to priority in payment of his two judgments over the bank and the other creditors, and the bank and Browne appealed from that judgment to the supreme court.

Tenney, McConnell, Coffeen & Harding, for the bank.

Custer, Goddard & Griffin, for Browne and others.

Johnson & Morrill, for Lane.

¹⁷³ CARTER, C. J. The only question of sufficient importance to be discussed here is, which of the two judgment creditors, the Union National Bank or P. A. Lane, is entitled to priority in payment out of the proceeds of the lands of Barker which had, prior to their judgments, been fraudulently conveyed to hinder and delay his (Barker's) creditors. The circuit court adjudged that the bank was entitled to ¹⁷⁴ priority, but this finding was reversed by the appellate court, and Lane was adjudged entitled to have his judgment first paid, it being conceded that Browne and the other creditors came third in the race. True, Browne et al. have attacked the judgment of the bank as collusive, and have insisted that it was without consideration and should be set aside; but after a careful consideration of the evidence we have reached the same conclusion arrived at in the courts below, and have found no sufficient evidence to sustain this contention. But, as before said, the question is, Should the judgment of the bank be first paid, or the judgments of Lane? The judgment of the bank was obtained first, followed by the judgments of Lane, and if these judgments became liens on the land in the order of their rendition, the bank obtained, of course, the prior lien; or if the bank obtained a lien, by the levy of its execution on the land, which it is entitled to enforce in this proceeding, its judgment should be first paid, for the levy was made before Lane's judgments were recovered. But the contention of Lane is, that as the land had been previously conveyed to defraud creditors, none of the judgments became a lien on the land, and that no lien was obtained by the bank by the levy of its execution, and that the only liens obtained were the equitable liens of the complainants by filing their respective bills, and that such liens were established in the order in which the bills were filed. If this view be correct, Lane obtained the first lien, because his bills were filed before those of the bank.

It is the settled law of this state that a judgment is not a lien on real estate which the judgment debtor, before the rendition of the judgment, had conveyed away to defraud his creditors, the doctrine being, that as between the parties to it the conveyance is valid and binding, and no interest, legal or equita-

ble, remains in the grantor upon which the lien can rest: *Rapleye v. International Bank*, 93 Ill. 396; *Davidson v. Burke*, 143 Ill. 139; 36 Am. St. Rep. 367; ¹⁷⁵ *Hallorn v. Trum*, 125 Ill. 247; *Lyon v. Robbins*, 46 Ill. 276. The bank contends, however, that as it levied its execution on the land as the property of the judgment debtor, and caused a certificate of such levy to be filed for record in the recorder's office before Lane had obtained his judgments or filed his bills, it thereby elected, and so gave public notice, to treat the fraudulent conveyance as void and the land as still the property of the judgment debtor, and that thereby it obtained the first lien. These several judgments were obtained in the same county in which the lands were situated, but after Barker had made his conveyance to his wife of the lands, and the issuing of the execution had no effect to create a lien where none was created by the judgment. Nor does the statute provide that the levy of the execution, or the recording of a certificate of such levy, shall give or create a lien. In the levy upon real estate there is no manual seizure or possession of the property, but the liens provided for by the statute are constructive, and arise only by a compliance with the statute. The statute has not provided that the recording of a levy in such case shall have any effect whatever. It has provided (c. 77, sec. 34) that when an execution is issued to another county and levied upon real estate, the officer making the levy shall make and file a certificate thereof in the recorder's office of his county, and that until the filing of such certificate the levy shall not take effect as against creditors and bona fide purchasers without notice. But this section has no application to this case. Conceding the superior diligence of the bank in obtaining its judgment and in levying upon the land in question situated in the same county, how can it be said that it thereby acquired the first lien, in the absence of any statute providing for a lien in such a case? True, it is also settled law that the judgment creditor may treat land fraudulently conveyed by his debtor as the property of his debtor, may levy upon it, have it sold and obtain a sheriff's deed therefor, and then bring his ¹⁷⁶ bill to remove the fraudulent conveyance: *Gould v. Steinburg*, 84 Ill. 170; *Phillips v. Kesterson*, 154 Ill. 572; but it is not necessary to determine at what step of such proceedings, made effective by the sheriff's deed, the lien would attach, for the reason that the bank did not pursue this remedy, but, after making its levy and after Lane had filed his bills and obtained his pendens, it also filed its bill. Had the bank sold under its

levy, it would have been the duty of the sheriff, under section 17 of chapter 77, to file in the recorder's office a duplicate of his certificate of sale, which, as the statute declares, would have been evidence of the facts therein stated. But it is unnecessary to determine whether or not, as to other creditors like Lane, such a sale, and the recording of the certificate thereof, would have related back to the levy so as to cut off their intervening equities, for the reason, as before said, no such course was pursued. The statute makes no provision in such a case for the recording of a certificate of levy, but does provide for the recording of a certificate of sale.

We have been referred to *McClure v. Engelhardt*, 17 Ill. 47, and *Reichert v. McClure*, 23 Ill. 516; but in those cases the execution was issued to and levied upon lands in a foreign county, and they were controlled by different statutory provisions.

Our attention is also called to *McKinney v. Farmers' Nat. Bank*, 104 Ill. 180, and other cases holding that where lands fraudulently conveyed have been attached the attaching creditor acquires a lien, dependent upon the recovery of a judgment, which will not be disturbed by a decree in chancery setting aside the fraudulent conveyance, obtained by a subsequent judgment creditor. This lien, however, like judgment liens, is, of course, the creature of the statute. Section 9 of the attachment act provides that where the writ is levied upon any real estate the officer shall file a certificate of such levy in the recorder's office, and that after such filing the levy shall take effect as to ¹⁷⁷ creditors and bona fide purchasers without notice, and not before. There is no such provision relating to the levy of executions, except in foreign counties, as we have seen.

Counsel for the bank make the plausible contention that the provisions of the statute which we have mentioned do not create the lien, but relate only to the question of notice; that the levy creates the lien, and the recording of the certificate is by the statute made legal notice of such levy, and they refer to *McClure v. Engelhardt*, 17 Ill. 47, and *Reichert v. McClure*, 23 Ill. 516. In those cases the execution was issued to and levied upon lands in a foreign county under provisions of the statute not applicable here. But if, by analogy, the reasoning be applicable to levies upon land in the same county where the judgment is rendered, the plaintiff should proceed to make his levy effective by advertisement and sale, in which case the question would arise, as before suggested, whether his recorded certificate of

sale or his sheriff's deed would relate back to the levy so as to cut off the intervening rights of creditors with or without notice. The analogy fails, however, in a case where the prior execution creditor stops with his levy—that is, stops with an act which is not of itself, by the statute, either expressly or impliedly made a lien—and files his bill, which gives an equitable lien even where there is no judgment lien. Following to its legitimate conclusion this line of reasoning, the bank's proceedings under its execution had not ripened into a lien when they were abandoned and a lien secured by the filing of its bill. But we do not intend, by anything said *arguendo*, to express any opinion as to what would have been the effect upon the rights of the parties if the bank had proceeded to sell the property under its execution and to obtain a sheriff's deed therefor.

It is sufficient to say, in conclusion, that none of the parties obtained any lien upon the lands in controversy by any judgment, execution, or levy. These were proper steps, some of them necessary to be taken, before the ¹⁷⁸ bills could be filed, but the filing of the bills and obtaining of service constituted *lis pendens* and were equitable levies upon the land, and created equitable liens thereon in their proper order: *Hallorn v. Trum*, 125 Ill. 247; *Allison v. Drake*, 145 Ill. 500; *Davidson v. Burke*, 143 Ill. 139; 36 Am. St. Rep. 367.

The appellate court decided properly in holding that Lane, by his bills, obtained the first lien on the property, and its judgment will, therefore, be affirmed.

JUDGMENT LIEN ON PROPERTY FRAUDULENTLY CONVEYED.—When a debtor conveys his property in fraud of creditors, before the rendition of judgment against him, by a conveyance valid between the parties to it, such judgment does not create a lien on such property by operation of law: *Davidson v. Burke*, 143 Ill. 139; 36 Am. St. Rep. 367, and note, *contra*, *First Nat. Bank v. Maxwell*, ante, p. 64.

EXECUTION—RECORDING.—A copy of an execution levied on real estate, with the levy indorsed thereon, need not be filed in the recorder's office: *Bagley v. Ward*, 37 Cal. 121; 99 Am. Dec. 256; but see *Little v. Sleeper*, 37 Vt. 105; 86 Am. Dec. 697.

FRAUDULENT CONVEYANCES—BILL IN CHANCERY—LIS PENDENS—SPECIFIC LIEN.—Judgment creditors, without a lien, may file a bill in chancery to subject to the payment of their debts any property fraudulently transferred or conveyed by their debtor: Note to *Hulley v. Chedle*, 58 Am. St. Rep. 737. The institution of a suit by a creditor gives a specific lien upon the property which he seeks to subject to his judgment: Note to *Norris v. Ile*, 43 Am. St. Rep. 246. *Lis pendens*, in an equity suit, begins from the service of the subpoena, after the filing of the bill: *Norris v. Ile*, 152 Ill. 190; 43 Am. St. Rep. 233; monographic note to *Stout v. Philippi Mfg. Co.*, 56 Am. St. Rep. 860, on the law of *lis pendens*.

ADAMS v. BRENNAN.

[177 ILLINOIS, 194.]

SCHOOLS—BOARD OF EDUCATION AS TRUSTEE OF SCHOOL FUNDS.—The board of education of the city of Chicago is the agent of the state of Illinois for the purpose of maintaining public schools and school buildings within that subdivision of the state, and holds the school fund received by it as trustee for the taxpayers, who are, in equity, the owners of the fund, and entitled to have it applied to the legitimate purposes of the trust.

INJUNCTION—BOARD OF EDUCATION—MISAPPROPRIATION OF SCHOOL FUNDS—SUIT BY TAXPAYER.—A board of education may be enjoined by a taxpayer from appropriating the school fund to a purpose not warranted by law.

CONTRACTS RESTRICTING EMPLOYMENT OR COMPETITION AS TO WORK ON PUBLIC BUILDINGS, OR CREATING A MONOPOLY, ARE VOID.—An agreement between the representatives of a labor or trade union and a board of education that the latter shall insert, in all contracts for work upon school buildings, a provision that none but union labor shall be employed in such work and that none but union workmen shall be employed and placed upon the pay-rolls of the board is void, not only because the board has no power or discretion to make such a contract, though it conceives its action to be for the public good, but because such a contract tends to create a monopoly and to restrict competition in bidding for work.

OFFICERS MUST NOT SURRENDER PUBLIC MONEY OR RIGHTS.—A public officer, acting as a trustee, has no right to give away public money, and no right to surrender to a committee, or anyone else, the rights of those for whom he acts.

INJUNCTION, BY TAXPAYER, AGAINST EXPENDITURE OF PUBLIC FUNDS UNDER AN UNLAWFUL CONTRACT.—If a contract for work on a public school building requires the employment of men belonging to a certain labor organization, and such men only, a taxpayer may enjoin the expenditure of the school fund under such unlawful agreement, although neither the contractor nor any excluded laborer questions it.

INJUNCTION AGAINST EXPENDITURE OF PUBLIC FUNDS UNDER AN UNLAWFUL CONTRACT—PLEADING.—If a contract which calls for the expenditure of public funds is unlawful, the contractor is bound to it, and a taxpayer's right to enjoin the expenditure of public funds, under such a contract, is not violated by the failure of his bill to show whether the contractor had entered upon the performance of his contract when the bill was filed.

Paddock, Wright & Billings, for the appellant.

Tenney, McConnell, Coffeen & Harding, and Daniel J. McMahon, for the appellees.

196 **CARTWRIGHT, J.** Appellant, a taxpayer of the city of Chicago, suing on behalf of himself and the other taxpayers, filed his bill in this cause March 14, 1898, in the superior court of Cook county, against the board of education of said city of

Chicago, John A. Knisely, a contractor, and said city of Chicago, asking to have a contract between the board of education and Knisely declared illegal, and to restrain the defendants from carrying out the same or expending money thereunder.

The facts stated in the bill are substantially as follows: In September, 1897, the board of education entered into an agreement with an organization in said city known as the "Building Trades Council," representing labor or trades unions in said city, by which the board of education on its part agreed to insert in all contracts for work ¹⁸⁹⁷ upon school buildings a provision that none but union labor should be employed in such work and that none but union workmen should be employed and placed upon the pay-rolls of said board. The Bryant school, one of the shoolhouses under the care of the board, being in need of repair, the board advertised February 5, 1898, for bids for the construction of a roof on an addition thereto, which advertisement contained the following:

"Notice.—None but union labor shall be employed on any part of the work where said work is classified under any existing union.
By order of BOARD OF EDUCATION."

On February 11, 1898, the defendant John A. Knisely, among other contractors, submitted his bid for the roof, in which he agreed to furnish material and do the work in strict accordance with the plans and specifications prepared and on file in the office of said board for the sum of two thousand and ninety dollars, and to be bound by said condition, and further stated: "I, the undersigned, will do the above work for the sum of nineteen hundred dollars, provided all conditions as to the employment of none but union labor are stricken from the specifications and contract made accordingly. This last bid is made, not necessarily because the undersigned expects to employ nonunion labor for this work, but because it is worth to him the difference to have the liberty to do so should circumstances make it necessary or advisable." On February 23, 1898, the board accepted Knisely's higher bid of two thousand and ninety dollars with the restriction, and awarded to him the contract. About March 1, 1898, the board and Knisely entered into a contract in accordance with the bid so accepted, containing a provision that none but union labor should be employed by him. The work required by the contract was classified under the existing trades unions in the city of Chicago, and the term "union labor" included only the labor of such mechanics and workmen

as were members of voluntary associations in the city of Chicago commonly known as ¹⁹⁸ labor or trades unions, which did not embrace all the citizens, taxpayers, mechanics, or workmen in said city, a large proportion of whom do not belong to any trade or labor union.

Upon the filing of the bill application was made for a preliminary injunction, which was heard upon the bill and affidavits and the record of proceedings of the board of education, which sustained the charges of the bill. The application was denied, and the court dismissed the bill for want of equity appearing upon its face.

The board of education of the city of Chicago is a public corporation, created by legislative authority as an agent of the state for the purpose of maintaining public schools and school buildings within that subdivision of the state. For the purposes of that function it receives from the taxpayers and holds as a trustee the school fund, and is bound to administer it for the benefit of the beneficiaries of the trust. The taxpayers are in equity the owners of the fund, and the board can only hold and apply it to the legitimate purposes of the trust. The law is established, beyond doubt or controversy, that a bill to enjoin public officers so situated from misappropriating the fund in their charge is a proper remedy for a taxpayer. Courts of chancery will interfere to restrain such authorities from a misuse of the fund intrusted to them or its appropriation to a purpose not warranted by law: *Colton v. Hanchett*, 13 Ill. 615; *Perry v. Kinnear*, 42 Ill. 160; *Beauchamp v. Kankakee County*, 45 Ill. 274; *Jackson v. Norris*, 72 Ill. 364; *Livingston County v. Weider*, 64 Ill. 427; *Chestnutwood v. Hood*, 68 Ill. 132; *Wright v. Bishop*, 88 Ill. 302; *Board of Education v. Arnold*, 112 Ill. 11; *Stevens v. St. Mary's Training School*, 144 Ill. 336; 36 Am. St. Rep. 438.

The bill charges that this board has negotiated a sort of treaty with the Building Trades Council, a private organization representing particular laborers or associations of workmen and constituted for the furtherance of the interests of such laborers and workmen, the effect of ¹⁹⁹ which is to give those persons a monopoly of the work to be done for the public under the charge of the board. The record of the board shows an application by a committee of this Building Trades Council for the adoption of the provision in question. The provision was adopted by resolution of the board, with an agreement on the part of the Building Trades Council to call off a strike, and a

reason given in the application to the board for the adoption of the clause was that it would do away with strikes upon school buildings and thereby save the board much annoyance and delay. Ordinarily, the restraining power of a court of equity should be directed against the enforcement, rather than the passage, of unauthorized orders and resolutions, and, if this resolution was unlawful, it is a proper time to enjoin its enforcement when a contract like the one in question is made under it: *Stevens v. St. Mary's Training School*, 144 Ill. 336; 36 Am. St. Rep. 438. In the execution of this agreement and resolution the board of education assumed to let the contract to the defendant Knisely with the stipulation that none but members of the associations in question should be employed, and at an expense of one hundred and ninety dollars more than would be required to fulfill the same contract without the restriction. The two bids were made by the same contractor, with the same responsibility in either instance, and who was prepared to perform the contract as fully and well under one stipulation as the other. The award to him was, therefore, not made in view of any question of responsibility as a bidder, but solely to carry out the agreement.

It is plain that the rule adopted by the board and included in this contract is a discrimination between different classes of citizens, and of such a nature as to restrict competition and to increase the cost of work. It is unquestionable that if the legislature should enact a statute containing the same provision as this contract in regard to any work to be done for boards of education, or if they should by a statute undertake to require this ²⁰⁰ board, as the agency of the state in the management of school affairs in the city of Chicago, to adopt such a rule or insert such a clause in its contracts, or should undertake to authorize it to do so, the provision would be absolutely null and void as in conflict with the constitution of the state. If such a restriction were sought to be enforced by any law of the state, it would constitute an infringement upon the constitutional rights of citizens, so that the state in its sovereign capacity, through its legislature, could not enact such a provision: *Millett v. People*, 117 Ill. 294; 57 Am. Rep. 869; *Frorer v. People*, 141 Ill. 171; *Braceville Coal Co. v. People*, 147 Ill. 66; 37 Am. St. Rep. 206; *Ramsey v. People*, 142 Ill. 380; *Ritchie v. People*, 155 Ill. 98; 46 Am. St. Rep. 315; *People v. Chicago Live Stock Exchange*, 170 Ill. 556; 62 Am. St. Rep. 404. There is no more reason or justification for such a contract as this than

there would be for a provision that no one should be employed except members of some particular party or church. In any such case it might be said that the board entertained a bona fide opinion that the members of some political party were more intelligent and better capable of performing the work, so that better results would be attained; or that the members of a church, on account of their higher standard of morality, would more faithfully and conscientiously carry out the contract. The fact that the board may have been of the opinion that its action was for the benefit of the public cannot afford a justification for limiting competition in bidders and requiring them to abandon the right to contract with whomsoever they may choose for the performance of the work.

There seems, however, to be a claim that the board of education, although it could not be lawfully required or authorized to make such a contract, may have some sort of discretion to do so, and the only question in the case on the subject of the validity of such contract is, whether the board possesses power beyond that of the legislature, in which is vested the entire legislative authority of the state. Upon what theory it could be claimed ²⁰¹ that this board of education, which exercises merely the function of the state in maintaining public schools within a limited portion of the state, can possess either power or discretion which the state in its sovereign capacity could not confer upon it we are unable to imagine. No argument is made which would justify such a conclusion. There can be no greater power of the board to act of its own motion than by virtue of positive law. The results, in either case, are equally in conflict with the organic law, and such legislation, contract or action, whatever form it may take, is void. Nor can the fact, if it be a fact, that an individual might make such a bargain authorize these public officers exercising a public trust to do so. The individual may, if he chooses, give away his money, but the public officer, acting as a trustee, has no such liberty, and no right to surrender to a committee or anyone else the rights of those for whom he acts.

The complainant, as a taxpayer, is a proper party to question the action of the board. The contract containing the illegal provision was entered into voluntarily by the contractor, in pursuance of his alternative propositions submitted to the board. There is injury to the taxpayer on account of the unlawful agreement, and he is not deprived of a remedy for his wrong because neither the contractor nor any excluded laborer has questioned the contract.

There is another ground upon which complainant has an undoubted right to maintain the bill, and that is, that the contract tends to create a monopoly and to restrict competition in bidding for work. The board of education may stipulate for the quality of material to be furnished and the degree of skill required in workmanship, but a provision that the work shall only be done by certain persons or classes of persons, members of certain societies, necessarily creates a monopoly in their favor. The effect of the provision is to limit competition by preventing contractors from employing any except certain persons ^{and} and by excluding therefrom all others engaged in the same work, and such a provision is illegal and void. A taxpayer may resist an attempted appropriation of his money in execution of such a contract: *Fishburn v. Chicago*, 171 Ill. 338; 63 Am. St. Rep. 236.

It is suggested that there can be no relief because the bill fails to show that the contractor, Knisely, did not enter upon the work under his contract before the bill was filed. The illegality of the contract results from public law, which he was bound to know, and the provision was wholly outside of the powers of the board of education. Under no circumstances could he be entitled to the one hundred and ninety dollars which was the direct result of such illegality. The bid furnishes, in this case, the exact measure of the injury to the taxpayers resulting from the unlawful restriction, and the question whether he had entered upon the performance of the contract could not, in any event, go further than to the question of the extent of relief to be granted.

No question concerning the merits of labor or trades unions is in any way involved in this case. The right of organization for mutual benefit in all lawful ways is not denied. The question is, whether the board of education has a right to enter into a combination with such an organization for the expenditure of the taxpayers' money for the benefit of members of the organization, and to exclude any portion of the citizens following lawful trades and occupations from the right to labor. It has no such right.

The decree of the court dismissing the bill is wrong, and it is reversed and the cause remanded for proceedings in conformity with what is here said.

CONTRACTS CREATING A MONOPOLY, OR PREVENTING COMPETITION—INVALIDITY OF.—All contracts in which the public are interested, and which tend to prevent competition re-

quired by statute, or some known rule of law, or which tend to create a monopoly, are void: *Fishburn v. Chicago*, 171 Ill. 338; 63 Am. St. Rep. 236, and note. Business transactions in violation of law cannot be made the foundation of a valid contract: *Buckley v. Humason*, 50 Minn. 195; 36 Am. St. Rep. 637.

INJUNCTION BY TAXPAYER TO PREVENT MISUSE OF PUBLIC MONEYS OR PROPERTY.—A taxpayer may sustain a bill to enjoin the imposition of an unjust and illegal burden on the municipality, or to prevent its property from being wasted and squandered: *McCord v. Pike*, 121 Ill. 288; 2 Am. St. Rep. 85; and compare monographic note thereto on the remedies of taxpayers for illegal corporate acts, et cetera. A private individual may obtain an injunction to prevent a public mischief by which he is affected in common with others: *Whitfield v. Rogers*, 26 Miss. 84; 59 Am. Dec. 244.

DORSEY v. BRIGHAM.

[177 ILLINOIS, 250.]

ELECTIONS—SCHOOL—WHEN WOMAN IS QUALIFIED TO VOTE.—Under the constitution and statutes of Illinois, a woman above the age of twenty-one years, who is a citizen of the United States, and has been a resident of the state one year, of the county ninety days, and of the election precinct thirty days, is qualified to vote at school elections; but if she does not possess these qualifications she is not a qualified voter.

CITIZENSHIP—NATURALIZATION—ALIEN WIFE OF CITIZEN.—The proper construction of section 1994 of the Revised Statutes of the United States, concerning citizenship, is, that every woman who might lawfully be naturalized by a judicial tribunal, and who lives in a state of marriage with a husband who is a citizen, becomes herself a citizen by force of the existence of the marriage relation.

CITIZENSHIP—NATURALIZATION—UNITED STATES STATUTE—CONSTRUCTION OF.—The statutes of the United States giving citizenship to the foreign-born wife of a citizen of the United States do not violate that provision of the federal constitution which requires a uniform rule of naturalization, for they operate upon a general class of persons, and extend to all of that class who are in the same situation or circumstances.

NATURALIZATION—UNIFORMITY OF LAWS AS TO. That provision of the federal constitution that Congress shall have power to enact a uniform rule of naturalization requires only that the mode or manner of naturalization prescribed by Congress should have uniform operation in all of the states.

NATURALIZATION—EFFECT OF—MINORS—FEMALES—CITIZENS ARE NOT NECESSARILY VOTERS.—Naturalization, under the laws of the United States, whether the person naturalized is male or female, confers only civil rights, and the right to vote is not a right belonging to citizenship. One may be a citizen and still have no right to vote. Minors and females may be citizens and yet not legal voters. Naturalization is provided for by the federal government, but the right to vote depends wholly upon the enactments of the law-making bodies of the respective states. The federal government has never attempted to declare the qualifications of voters.

CITIZENSHIP—NATURALIZATION OF FATHER DURING MINORITY OF CHILD—WIFE OF SON.—Citizenship may be conferred upon foreign persons, male or female, through the naturalization of the father during their minority, and, as the wife of a citizen of the United States, not being an alien enemy, is a citizen of the United States, the wives of sons so made citizens become citizens by virtue of their wifehood.

ELECTIONS—PRESUMPTION IS THAT VOTE WAS LEGAL—BURDEN OF PROOF.—As one who votes without qualification is liable to punishment criminally, the presumption is that he voted legally and did not commit a crime. Hence, the burden of proof is upon him who alleges that another has voted illegally.

EVIDENCE—PROOF OF NEGATIVE—SUFFICIENCY OF. Full and conclusive proof is not required where a party has the burden of proving a negative, but it is necessary that the proof should be at least sufficient to render the existence of the negative probable.

ELECTIONS—SCHOOL—WOMEN AS ILLEGAL VOTERS—ALIENS—SUFFICIENCY OF EVIDENCE.—If women vote at a school election, and they are charged with illegal voting, evidence that they were foreign-born and wives of foreign husbands does not establish such charge, although there is no record proof of their naturalization, or of their husbands, if there is no affirmative proof tending to show that they were not naturalized.

ELECTIONS—SCHOOL—WOMEN AS ILLEGAL VOTERS—QUALIFICATIONS.—A woman who has not resided in the county ninety days preceding a school election, or who is not twenty-one years of age at the time of such election, is not a legal voter.

ELECTIONS—SCHOOL—WOMEN AS ILLEGAL VOTERS—RESIDENCE IN COUNTY.—A woman is not a legal voter at a school election, where she has not been an actual resident of the county for ninety days preceding the election, although her husband has been a resident thereof for the full period.

ELECTIONS—SCHOOL—WOMEN AS ILLEGAL VOTERS—RESIDENCE IN SCHOOL DISTRICT.—A residence in a place is not acquired without an intention of making it a place of permanent abode. Hence, if a married woman, who is a resident of a certain school district, loses her residence there and gains one at another place, her subsequent presence in such district, as on a visit, with no intention of remaining and making it her permanent abode, does not make her a resident there, within the meaning of the election laws, and she is, therefore, not entitled to vote at a school election in such district, although she has remained therein more than thirty days before the election.

ELECTIONS—SCHOOL—WOMEN AS ILLEGAL VOTERS—ALIENS—MARRIAGE AFTER ELECTION—RETROACTIVE EFFECT.—Although a woman, who is an unnaturalized alien, marries in about five months after a school election, at which she cast a vote, citizenship conferred by virtue of the marriage relation would have no retroactive effect. She was not a citizen when she voted, and for that reason was not a legal voter.

ELECTIONS—SCHOOL—WOMEN AS ILLEGAL VOTERS—ALIENS NOT MARRIED OR NATURALIZED.—An alien woman, who has not married, and who has not been naturalized, is not a legal voter at a school election.

ELECTIONS—SCHOOL—WOMEN AS ILLEGAL VOTERS—MARRIAGE—NATURALIZATION OF HUSBANDS.—Marriage

does not make a woman a citizen, unless her husband is a citizen. Hence, although he has declared his intention to become a citizen of the United States, she is not entitled to vote at a school election where he is not yet entitled to receive his naturalization papers.

ELECTIONS—SCHOOL—WOMEN AS ILLEGAL VOTERS—FATHER'S NATURALIZATION AFTER WOMAN'S MAJORITY. A father's naturalization after his daughter has attained her majority does not make her a citizen, and she is, therefore, not a legal voter at a school election.

N. J. Pillsbury and Ray Blasdel, for the appellant.

C. C. & L. F. Strawn, for the appellees.

²⁵³ **BOGGS, J.** The appellant and one S. S. Hitch were candidates upon one ticket for members of the board of education at an election held on the seventeenth day of April, 1897, in school district number 1, township 26, range 8, east, in Livingston county, and the appellees were candidates for the same offices upon another ticket. Two members of the board were to be elected. The judges of the election declared ²⁵⁴ said S. S. Hitch duly elected to one of the same offices and that the other candidates had each received an equal number of votes. In some manner not clearly disclosed and not necessary to be known, the judges cast off the tie and declared appellee Brigham elected by lot. This is a petition filed by the appellant, Dorsey, to contest the election of said Brigham and to establish that appellant was duly elected.

By agreement of the parties, the ballots were counted in the presence and under the supervision of the court, and the result was, two hundred and sixty ballots were found for the appellant and two hundred and fifty-eight each for Brigham and Stanford. On application of the appellees, verification of the count was allowed, the result being, two hundred and sixty votes for appellant, two hundred and fifty-nine for Stanford, and two hundred and fifty-seven for Brigham. The court overruled the motion of appellant for final judgment declaring him to be the duly elected member of the board of education, and on motion of the appellees ordered the recount and verification to be stricken from the record, and appellant saved exceptions. The petition and the answer thereto challenged the legal right of a number of voters to cast ballots at said election. A hearing before the court resulted in an order that the petition of appellant be dismissed. This is an appeal to obtain a reversal of such order.

A number of ballots were cast at the election by women who were foreign born and had not been naturalized by judicial de-

cree or the judgment of any court. Certain of these female voters were the wives, others the widows, of husbands who were also foreign born, but who were shown, by certificates of naturalization introduced in evidence, to have been admitted to citizenship by the order or judgment of competent courts. Other of such female voters were the wives, others the widows, of foreign born husbands who, it was insisted, had been naturalized by judicial proceeding, but in whose cases neither certificates of such naturalization nor other record of proof thereof ^{was} was produced; and still other of such female voters were the wives or widows of native born husbands, and still other of such female voters claimed citizenship through the naturalization of their fathers or the fathers of their husbands. In some cases the female voters were married to their husbands in foreign countries, and in the cases of others the ceremony of marriage was celebrated in the United States. But in all of the cases the relation of husband and wife existed and was maintained in the United States. Whether these women were lawfully entitled to vote at said election arises first for decision.

Paragraph 342 of chapter 46 (Starr & Curtis' Annotated Statutes of 1896, p. 1741) is as follows: "Any woman of the age of twenty-one years and upward belonging to either of the classes mentioned in article 7 of the constitution of the state of Illinois, who shall have resided in this state one year, in the county ninety days, and in the election district thirty days preceding any election held for the purpose of choosing any officer of schools under the general or special school laws of this state, shall be entitled to vote at such election in the school district of which she shall at the time have been for thirty days a resident; provided, any woman so desirous of voting at any such election shall have been registered in the same manner as is provided for the registration of male voters."

One of the classes of persons the members whereof section 1 of said article 7 of the constitution of 1870 clothed with the right to exercise the elective franchise comprised "every male citizen of the United States above the age of twenty-one years." In *People v. English*, 139 Ill. 622, and again in *Plummer v. Yost*, 144 Ill. 68, we held that the true construction to be put upon the statute above set out, authorizing women to vote at any elections where "any officer of schools" is to be chosen, is, that the qualification of sex prescribed in said section 1 of article 7 of the constitution was not intended to be adopted, and in the latter of these cases we held a woman could not be ^{de-} de-

nied the right to vote at such school elections on the ground the constitutional qualification of sex was lacking. The qualification of citizenship is, however, necessary under the said section and article of the constitution. If these women possessed the qualifications of age and residence required by the said paragraph 342 of chapter 46, authorizing women to vote at school elections, and were citizens of the United States, they were lawful voters at the school election in question.

Section 1994, title 25, entitled "Citizenship," of the Revised Statutes of the United States, is as follows: "Any woman who is now or may hereafter be married to a citizen of the United States, and who might herself be lawfully naturalized, shall be deemed a citizen." Under the naturalization act in force when the foregoing section was enacted, any "free white person" not an alien enemy might lawfully be naturalized. The term, "who might herself be lawfully naturalized," incorporated in said section 1994 above recited, therefore only limited the application of the law to free white women not alien enemies: *Kelly v. Owen*, 7 Wall. 496. An alien enemy is one who owes allegiance to an adverse belligerent nation. None of these women were of such nationality, but all were friendly aliens. In *Minor v. Happersett*, 21 Wall. 162, it was declared that "from the commencement of the legislation upon this subject [naturalization] alien free white women and alien minors could be made citizens by naturalization."

The proper construction of said section 1994 of the Revised Statutes of the United States is, every woman who might be lawfully naturalized by a judicial tribunal, who lives in a state of marriage with a husband who is a citizen, becomes herself a citizen by force of the existence of the marriage relation. In *Kelly v. Owen*, 7 Wall. 496, it was said: "Whenever a woman who under previous acts might be naturalized is in a state of marriage to a citizen, whether his citizenship existed prior to the act or subsequently, ²⁵⁷ or before or after the marriage, she becomes by that fact a citizen also." It therefore would seem clear each woman voter in question who sustained the relation of wife to a citizen of the United States became also a citizen of the United States.

Counsel for appellees, however, urge the act of Congress conferring citizenship upon a foreign-born woman because of the existence of the marriage relation with a citizen is in contravention of section 8 of article 1 of the constitution of the United States. This section confers upon Congress the power to enact

legislation whereby aliens may become citizens, and is as follows: Congress shall have power "to establish an uniform rule of naturalization and uniform laws upon the subject of bankruptcies throughout the United States." The argument of counsel is, that the law-making power of the United States having adopted a rule or statute providing for the naturalization of aliens, both male and female, by proceedings in a judicial tribunal, could not, without violating the rule of uniformity prescribed by the constitution, enact another statute by the terms whereof certain alien women might become clothed with the rights of citizenship without complying with the provisions prescribed by the statute authorizing naturalization through the medium of the courts. The purpose of granting to the Congress of the United States the power of enacting a law or rule for the naturalization of aliens was to deprive the several states of that power, and the reason was, that if the power remained with the different states the terms and conditions of citizenship would depend upon the will and pleasure of each of the states and might be widely and materially different. The requirement of the constitution that Congress should enact a uniform rule of naturalization is properly construed to mean the mode or manner of naturalization prescribed by Congress should have uniform operation in all the states. Aside from this, the enactment in question has uniform operation as ²⁵⁸ to all alien women who sustain the relation of wife to a citizen, and its benefits and privileges extend equally and uniformly to all such alien women within the relation and circumstances for which it provides. It operates upon a general class of persons, and extends to all of that class who are in the same situation or circumstances. It is, therefore, a uniform rule or enactment, even if a proper construction of the said fourth paragraph of section 8 of article 1 of the constitution of the United States requires that character of uniformity contended for by appellees: *Lippman v. People*, 175 Ill. 101.

Counsel urge the object of the act conferring citizenship upon a married woman, the wife of a citizen, is to confer civil rights only—not political rights. This position is correct. Naturalization by judicial proceeding, or otherwise, under the provisions of any of the acts of Congress, whether the person naturalized be male or female, confers only civil rights—i. e., liberty of person and conscience, right to acquire and hold and transfer property, to sue and defend, security in person, estate, and reputation, and other civil rights. Naturalization creates the

person naturalized a citizen, whether male or female. But suffrage is not a right belonging to citizenship: *Van Valkenburg v. Brown*, 43 Cal. 50; 13 Am. Rep. 136. Citizens and legal voters are not synonymous. Minors and females may be citizens and yet not legal voters: *People v. Oldtown*, 88 Ill. 202. "A citizen, in the popular and appropriate sense of the term, is one who by birth, naturalization, or otherwise is a member of an independent political society called a state, kingdom, or empire, and as such is subject to its laws and entitled to its protection in all his rights incident to that relation; and the right to vote, as we have just seen, is not necessarily incident to or coextensive with the right of citizenship": *Blanck v. Pausch*, 113 Ill. 60.

As we have seen, a woman may become naturalized by order or judgment of a court under the federal statute ²⁵⁹ providing for naturalization in that manner, and thereby become a citizen, and yet such woman would not have had the right to vote at any election in this state prior to the enactment of the statute under consideration, relating to the election of school officers. On the other hand, persons not citizens of the United States may lawfully vote in this state. Section 1 of article 7 of the constitution of 1870 endows every person with the right to vote who had resided in the state one year, in the county ninety days, and in the election district thirty days next preceding the election, and who was an elector in the state on the first day of April, 1848. The constitution of 1848 vested every white male citizen above the age of twenty-one years who had resided in the state one year, and every white male inhabitant of the age aforesaid who was a resident of the state at the time of the adoption of the constitution with the right of suffrage. In *Spragins v. Houghton*, 2 Scam. 377, an "inhabitant" was defined to be one who lives in a place and has there a fixed and legal settlement, and that to determine whether one who was an inhabitant of Illinois was entitled to vote under the constitution of 1818, which conferred the elective franchise on all white male inhabitants above the age of twenty-one years who had resided in the state for six months, it was wholly unnecessary to inquire whether he was a "citizen" of the United States, but only necessary to know he was an inhabitant of the state, within the meaning of the word as given by the court. Therefore, under our present constitution, any white male inhabitant of the state who was an inhabitant of the state in 1848, and twenty-one years of age at that time, may lawfully vote in

this state, though he be foreign born and never naturalized. A foreign-born woman admitted to citizenship by a judicial proceeding under the naturalization statutes of the United States or under the statutes of the United States giving citizenship to the wife of a citizen of the United States, becomes ²⁶⁰ thereby endowed with the civil rights of a citizen of the United States; but such naturalization or condition of citizenship would have no effect, within itself, to constitute such woman a voter in the state, in the absence of a statute of this state conferring such political right.

We need not enter upon the discussion of the power of the federal government to declare the qualifications of voters. It has never attempted to exercise such power, and, aside from the limitation created by the fifteenth amendment to the federal constitution, that a citizen of the United States shall not be denied the right of suffrage on account of race, color, or previous condition of servitude, the right to vote depends wholly upon the enactments of the law-making bodies of the respective states. In our state the statute under consideration, and the section of the constitution of 1870 to which it refers, operating together, have conferred upon all women who are citizens of the United States and have the specified qualifications as to age and residence, the right to exercise the elective franchise at elections for school officers. Said women become, by force of the statute, the constitution, and their condition of citizenship, voters at elections for school officers in this state, whether the condition of citizenship resulted from an order or judgment of a court in a naturalization proceeding, or from the statute of the United States creating the condition of citizenship from the existence of the marriage relation between the woman and one who was a citizen by birth, or, being foreign born, became a citizen by judicial order or by operation of law. Citizenship may also be conferred upon foreign-born persons, male or female, through the naturalization of the father during the minority of such persons: U. S. Stats., sec. 2172, tit. 30. In this case, some of the female voters whose ballots were challenged were of this class, and others sustained the relation of wife to husbands who were of this same class. These women thus became citizens of the United States, and, if they had the requisite ²⁶¹ qualifications of age and residence, became lawfully entitled to vote by the force and effect of the said enactment of this state conferring upon women the right to exercise the elective franchise for school officers. In the cases of the greater

number of the women voters who claimed to be citizens by virtue of the citizenship of their husbands, the husbands were aliens and the naturalization of such husbands was established by record evidence.

Mrs. M. Blackburn, Mrs. Fredricka Comberink, Mrs. Mary O'Hara, Mrs. Ellen Moran, and Mrs. Margaret Beckman voted for appellant. They were all foreign born, and claimed citizenship by virtue of the alleged citizenship of their respective husbands. Their husbands, respectively, were aliens, and no record proof of the naturalization of any of them was produced. The appellees challenged the legality of the ballots cast by these women. It was, however, stipulated by the parties that the husband of Mrs. Blackburn was a citizen of the United States. In view of what has been said she must be regarded as a legal voter. The appellees produced oral evidence tending to show, and it may be conceded did establish, that Mrs. Comberink, Mrs. O'Hara, Mrs. Moran, and Mrs. Beckman were all born in foreign countries, and that they had not been naturalized by the judgment of any court awarding them certificates of naturalization. It then appeared that each of these women, and the husband of each of them, was of foreign birth, and there was no record evidence or certificates of naturalization produced showing either of them, or the husband of either, had been naturalized. Appellees contend that in this state of the proof each of these women must be regarded as incompetent to vote. We do not assent to this. The allegation these women cast illegal votes was made by the appellees. It involved a charge of crime, one voting without qualification being liable to punishment criminally. The presumption would be they had voted legally and had not committed a crime.

²⁶² The appellees' challenges also questioned the correctness of the official acts of the election officers, which are *prima facie* correct. It was incumbent upon the appellees to overcome this presumption of innocence and of proper official action by proof. Full and conclusive proof is not, however, required where a party has the burden of proving a negative, but it is necessary the proof should be at least sufficient to render the existence of the negative probable in order to overcome the presumption: *Beardstown v. Virginia*, 76 Ill. 34; *Behrensmeyer v. Kreitz*, 135 Ill. 591. The presumption is, these voters had become in some legal way naturalized citizens. This naturalization may have come through the naturalization of their husbands. Proof that they were aliens and had not themselves become naturalized

would not overcome the presumption. The mere absence of proof as to whether or not their husbands had been naturalized was equally ineffectual to overcome the presumption. Some proof tending to show their husbands had not been naturalized or at least sufficient to create a probability that the husbands had not been naturalized, was essential to overcome the presumption of innocence and of the regularity of the acts of the judges of the election, and warrant the court in declaring the votes had been cast in violation of law: *Behrensmeyer v. Kreitz*, 135 Ill. 591.

Parol evidence was heard tending to show the respective husbands of these voters had been naturalized. Appellees strenuously insist this parol evidence was inadmissible. We need not determine that contention, for if such evidence was disregarded as inadmissible, the record would but remain barren of proof tending to show, or make it most probable, such husbands had not been naturalized, and, such being the condition of the record, we must hold appellees' assertion these voters were not legal voters has not been maintained.

Annie Broadhead, alien born, voted for appellant. Her husband, John, was also an alien. He came to the United States ~~was~~ when four years old, with his mother, who came to join his father, George Broadhead, who had preceded them. A certificate was introduced showing the naturalization of the father, George Broadhead, on the seventeenth day of September, 1868, at which time the son, John, was a minor of the age of seventeen years. The naturalization of the father conferred the rights of citizenship upon the son, John, and Annie, the voter, became a citizen by virtue of her marriage with John.

Nicholas Pool, and his wife, Crescinda, voted for the appellant. Both were foreign born. Nicholas Pool was brought to the United States by his father, Joseph Pool, when about three years old. He testified his father voted while he was a minor, and he voted because he understood and believed his father became a legal voter during his minority. There was no record proof that the father had ever been naturalized, nor any proof tending to render it most probable that the father had not been naturalized. In this state of the evidence the presumption that Nicholas Pool was a legal voter must prevail. The relation of husband and wife existing between Nicholas and Crescinda conferred upon Crescinda the right of citizenship, and by force of the statute she became a legal voter.

Mrs. Annie Miller, who voted for both the appellees, had not

resided in the county ninety days preceding the election. She was not a legal voter, and appellees so conceded the truth to be.

Mrs. Lizzie Rosendahl voted for both the appellees. She was but nineteen years old. Her vote is illegal, and so conceded by the appellees.

Mrs. A. Greenstone voted for both the appellees. The election occurred on the seventeenth day of April, 1897. The statute authorizing women to vote at the election grants the right to any woman who shall have resided in the county ninety days next preceding the election. To answer the qualification of residence the voter at this election ²⁶⁴ must have been a resident of Livingston county on the eighteenth day of January, 1897. Mr. Greenstone, husband of the voter, together with the voter, his wife, resided in Chicago, Cook county, until about the eleventh day of January, 1897. He then went to Livingston county and commenced work there as a tailor. His wife did not accompany him, but remained at the Chicago home with their family until the twelfth day of February, 1897, when she came to Chatsworth and joined her husband. She had never been in Livingston county before the said twelfth day of February, which was but sixty-five days prior to the day of election, the day of the election included. By operation of law the domicile of the husband is, for many purposes, the domicile of the wife. The marriage relation implies a common home for the husband and wife. In view of the fact married persons may not be able to agree as to a place of residence, authority must reside in one of them to determine where the home shall be. The law casts upon the husband the burden of supporting the family, and for that reason empowers him to determine where the family shall abide. The domicile of the husband therefore fixes the domicile of the wife for purposes connected with the marriage relation and the duties of both husband and wife. The domicile of Mrs. Greenstone for such purposes and duties was in Livingston county at once after her husband determined to make the home of himself and family in that county. The statutory qualification is, the voter shall have resided in the county ninety days next preceding the election. The meaning to be given the word "reside" is declared by the statute (Rev. Stats., c. 46, sec. 66) as follows: "A permanent abode is necessary to constitute a residence, within the meaning of the preceding section." An abode is the place where a person dwells: Anderson's Law Dictionary, tit. "Abode." Residence and domicile may, in some cases, have the same meaning, but frequently they have other

and inconsistent meanings and import entirely different ideas: ²⁰⁵ Anderson's Law Dictionary, 376; 21 Am. & Eng. Ency. of Law, 124, 125. "A resident of a place is one whose place of abode is there and has no present intention of removing therefrom": 21 Am. & Eng. Ency. of Law, 122. A married woman, by operation of law, may have a domicile in a place where she has never been, but it could not, with any correctness of speech, be said she was a resident of that place. On the day of the beginning of the period of ninety days preceding the election in question Mrs. Greenstone was not in the county of Livingston and had never been in that county on any day prior thereto, nor was she ever in the county until some twenty days after the beginning of the period of ninety days next preceding the election. She had her domicile in the county with her husband when he fixed that as the home of himself and family, but she did not become a resident until she was actually physically within the limits of the county. Her vote must be excluded from the count.

Mrs. Emma J. Bennett cast a ballot for the appellees. Prior to her marriage she resided in the school district as a member of her father's family. Mr. Bennett, who became her husband, also resided in the school district at that time, but before the marriage he moved to Pontiac, in the same county but not in the school district, and still later changed his place of residence from Pontiac to Chicago, where he resided at the time of the marriage. The marriage occurred at the home of the bride's father in the school district, and Mrs. Bennett accompanied her husband to his home in Chicago. She visited her father's family, sometimes accompanied by her husband, but her husband did not again become a resident of the school district. Prior to the beginning of the year in which the election was held the husband located in Forrest, in Livingston county, but not in the school district, and engaged in business there as a photographer. Mrs. Bennett assisted her husband in the photograph gallery, and was with him in Forrest a portion of the ²⁰⁶ time and at times with her father's family. Mrs. Bennett's residence was at one time in the school district, but she lost her residence there and gained a residence at another place. Her presence in her father's family after this was not with the intention to remain and make her permanent abode there, and she was not a resident within the meaning of our election laws.

Mrs. Martha Crone, nee Wendtlandt, voted for the appellees. She was born in Germany, and her father still resides in that

empire. She had not been naturalized by judicial judgment or decree. She had not married when she cast her ballot at the election in question. On the sixteenth day of September following the election she intermarried with Christian Crone. If her husband was a citizen, the marriage relation constituted her a citizen from thenceforth, but would have no retrospective effect. She was not a citizen when she voted, and for that reason was not a legal voter.

Mrs. Tenie Satoff voted for the appellees. She was a native of Germany, was married there, and her husband died there. She came to this country an adult, has not remarried and was not naturalized by proceedings in the courts. She was an alien, and hence not a legal voter.

Mrs. Mary Rosenbaum voted for appellees. She was a native of Germany, as was also her husband. They were married there and removed to the United States. She had not been naturalized by order of any court not had her husband. He filed his declaration of intention to become a citizen prior to the school election, but had not received his certificate of naturalization, nor had he become entitled to receive such certificate for the reason he had not been in the United States five years at the time of the election. He was not a citizen: McCrary on Elections, sec. 71. The existence of the marriage relation did not constitute the voter a citizen, her husband not being a citizen. Her ballot must be rejected.

²⁸⁷ The conclusion hereinbefore announced, that the wife of a citizen, in virtue of the marriage relation, becomes also a citizen, and under the statute with relation to the election to school officers in question became a legal voter, disposes of all ballots challenged by the appellees except Lottie Hitch and Tillie Bock, whose ballots were for the appellant. Lottie Hitch was born in England, is unmarried, was never naturalized by any proceedings in court. Her father was naturalized by judicial proceedings, but not until after Lottie had reached her majority. Her vote must be rejected. Tillie Bock had not reached the age of twenty-one years when her vote was cast. She was challenged upon other grounds, but we need not consider or decide the question of pleadings argued by the parties in this respect, as the rejection of her vote will not change the result which we think should have been declared by the trial court.

It follows from what has been said the ballots cast for appellees by Mrs. Annie Miller, Mrs. Lizzie Rosendahl, Mrs. A. Greenstone, Mrs. Emma J. Bennett, Mrs. Martha Crone, nee

Wendtlandt, Mrs. Tenie Satoff, and Mrs. Mary Rosenbaum, seven in number, must be rejected from the count, and that the ballots cast by Lottie Hitch and Tillie Bock for the appellant must also be rejected.

We need not determine whether the count as made by the judges of the election or that had under the direction and supervision of the court should be accepted, for the reason upon the basis of the count least favorable to him a majority of at least five ballots were cast for the appellant over either of the appellees.

The order and judgment appealed from is reversed and the cause is remanded, with directions to the county court to enter an order and judgment declaring the appellant to have been elected to the office of member of the board of education within and for the said district.

ELECTIONS—NATURE OF RIGHT TO VOTE—WOMEN AS VOTERS.—Suffrage is not a natural right, but a political privilege, and is held only by those to whom it is granted, either by the constitution or written laws of the state. Suffrage is not given by the federal constitution, but it is a right of the states: *Gougar v. Timberlake*, 148 Ind. 38; 62 Am. St. Rep. 487; extended note to *Spencer v. Board*, 29 Am. Rep. 591. All citizens are not necessarily voters. A woman is a citizen, but as a citizen has no right to vote: Notes to *Gougar v. Timberlake*, 62 Am. St. Rep. 496; *Schuchardt v. People*, 89 Am. Rep. 38.

CITIZENSHIP—NATURALIZATION—RIGHT TO VOTE—WOMEN—MARRIAGE—MINOR CHILDREN.—If a woman, who is an alien, and who might lawfully be naturalized, is married to a citizen of the United States, such marriage makes her a citizen: *Kreitz v. Behrensmeyer*, 125 Ill. 141; 8 Am. St. Rep. 349; monographic note to *Ludlam v. Ludlam*, 84 Am. Dec. 212, on who are aliens. The minor children of citizens are citizens: *Ludlam v. Ludlam*, 26 N. Y. 356; 84 Am. Dec. 193. The minor children of aliens, though born out of the United States, if dwelling therein at the time of the naturalization of the parents, thereby become citizens by virtue thereof: *Gumm v. Hubbard*, 97 Mo. 311; 10 Am. St. Rep. 312. If a widow and her minor son, both of foreign birth, come to the United States, and the mother marries a citizen of the latter country, both she and her minor son are made citizens by such marriage: *Gumm v. Hubbard*, 97 Mo. 311; 10 Am. St. Rep. 312. See, also, *Kreitz v. Behrensmeyer*, 125 Ill. 141; 8 Am. St. Rep. 349.

SUFFRAGE—CITIZENSHIP.—THE RIGHT TO VOTE is not a privilege or immunity: See monographic note to *Blair v. Ridgely*, 97 Am. Dec. 263, on the power of the state to impose qualifications for voters and holders of offices; and suffrage is not a right of citizenship: Note to *Spencer v. Board*, 29 Am. Rep. 590; *Gougar v. Timberlake*, 148 Ind. 38; 62 Am. St. Rep. 487.

ELECTIONS—QUALIFICATIONS OF VOTERS—WOMEN—RESIDENCE—PRESUMPTION.—A voter must have resided in the proper locality for the requisite length of time before the election: Notes to *De Berry v. Nicholson*, 11 Am. St. Rep. 777; *Boyer v. Teague*, 19 Am. St. Rep. 567; and a ballot cast by one who has not

maintained a residence for the length of time required by statute is illegal, and should not be counted: *Young v. Simpson*, 21 Colo. 460; 52 Am. St. Rep. 254. If no provisions are made for allowing women to vote for school officers only at elections where school and other officers are to be elected, their right to vote cannot be exercised, even though at elections for school officers alone they might vote: Note to *Boyer v. Teague*, 19 Am. St. Rep. 567.

BEATTY v. WESTERN COLLEGE OF TOLEDO.

[177 ILLINOIS, 280.]

NEGOTIABLE INSTRUMENTS BECOMING DUE ON DEATH OF MAKER ARE NOT OF A TESTAMENTARY CHARACTER.—A written promise to pay a fixed sum of money to the order of a person named, on or before a certain day, is a promissory note, and not a testamentary instrument requiring the formalities of a will, although it provides that it shall become due in case of the death of the maker before the maturity thereof.

NEGOTIABLE INSTRUMENTS—STATEMENT OF CONSIDERATION OR OBJECT OF PAYMENT—NEGOTIABILITY. The negotiable character of a promissory note is not affected by a statement in the instrument of the consideration upon which it is founded, or of the object for which the money is to be expended.

NEGOTIABLE INSTRUMENTS—PAROL PROOF OF CONSIDERATION.—Whether a promissory note, upon its face, imports a consideration or not, parol evidence is admissible to show the facts in regard to the consideration.

GIFTS—PROMISSORY NOTE—WANT OF CONSIDERATION—DEFENSE OF.—A promissory note intended by the maker as a mere gift or donation to the payee is not enforceable, and, as a gift, it is always revocable until it is executed, and it is not executed until it is paid. It is open to the defense of a want of consideration, in the absence of any element of estoppel, and such defense may be interposed either by the maker or his representatives.

GIFTS—PROMISSORY NOTE—ESTOPPEL AGAINST SETTING UP WANT OF CONSIDERATION AS A DEFENSE.—The defense of a want of consideration cannot be made in an action upon a promissory note which is intended by the maker as a mere gift, where money has been expended, or liabilities have been incurred, in reliance upon the note. Thus, if the gift is for the erection of a college building, both the donor and his personal representatives are estopped from raising such defense, after the institution has expended money and incurred liabilities on the faith of the promise, and the gift will be upheld on the ground of estoppel and not by reason of any valid consideration in the original undertaking.

GIFTS—CONDITION AS TO DELIVERY—EFFECT OF. If a condition, as to the vesting of title, is attached to the delivery of a gift of money, it will invalidate the gift as one in present, but a promise by the donee, such as to pay interest or annuities, does not invalidate the gift, because it does not constitute a condition of delivery of title, but is consistent with it.

GIFTS—WHEN EXECUTED—EFFECT OF CONDITION AS TO PAYMENT OF ANNUITY.—If money is deposited with a college "for the benefit of, and to become and be" its property, and "to be used as the board of trustees or executive committee thereof may direct," in consideration of a specified annuity to be paid to the depositor, the transaction is an executed gift, not invalidated by the reservation of the annuity to be paid to the donor.

Claim against the estate of Mary Beatty, who died testate on December 7, 1893. She made Jacob Miller and Darius F. Fay executors of her will, and letters testamentary were issued to them on January 5, 1894, by the county court where her will was admitted to probate. The college, on March 20, 1894, filed the note in controversy as a claim against the estate. The matter of the claim was subsequently taken by appeal to the circuit court. In the county court, as well as in the circuit court, the appellants, as executors of the estate of Mary Beatty, filed the certificates hereinafter mentioned as a setoff against the claim of the college. A trial in the circuit court resulted in a verdict and judgment for the college for the sum of six thousand three hundred and sixty-one dollars against the estate, to be paid as a claim of the seventh class. On appeal to the appellate court, this judgment was affirmed, and from such judgment of affirmance an appeal was taken by those representing the estate to the supreme court. The note filed as a claim against the estate was dated December 9, 1887, and was signed by Mary Beatty. It was for seven thousand dollars, and was payable to the order of the treasurer of the Western College, of Toledo, Iowa, on or before December 1, 1910, without interest, but provided that in the event of the maker's death, before maturity, it should then become due. The consideration expressed was "a desire to aid the cause of Christian education, and the privilege of sending one student four years free of tuition," and the object, stated in the note, for which the money was to be expended, was the erection of the Ladies' Boarding Hall of the college named. Nothing was paid by the deceased upon the seven thousand dollar note during her lifetime, but on November 16, 1888, she deposited three thousand five hundred dollars with the Western College, "for the benefit of and to become and be" its property, and to be used as the board of trustees or the executive committee thereof might direct. On April 4, 1889, she made a similar deposit of seven hundred dollars, and on August 6, 1889, she made a like deposit of two thousand five hundred dollars, making a total of six thousand seven hundred dollars. Each of these deposits was represented by a certificate of deposit, signed by the treasurer of the college, and each deposit was made in consideration of an agreement upon the part of the college to keep up and maintain the institution, and to increase its facilities for a Christian education, and, in further consideration of an agreement on its part, to pay to Mrs. Beatty an annuity, amounting to seven and a half per cent per annum upon the

sums mentioned in the certificates during her lifetime. On the first and second deposits, three annuities were paid on each, and two annuities only were paid on the last deposit. These three certificates of deposit were filed by the appellants as a setoff to the claim of the appellee. The appellants also introduced, as a part of their claim of setoff, a note for two hundred and sixty-two dollars and fifty cents given by the college for one of the installments of interest or annuity due upon the certificate for three thousand five hundred dollars. This note was dated November 16, 1891, and bore interest at eight per cent per annum. It will be observed that the estate of the decedent was held liable for the seven thousand dollar note, notwithstanding the donation of six thousand seven hundred dollars made by the deceased.

Scott & Davis and George S. Skinner, for the appellants.

Owen G. Lovejoy, for the appellee.

²⁸⁸ MAGRUDER, J. In this case, the appellants claim that the note for seven thousand dollars, filed as a claim against the estate of Mary Beatty, was without consideration, and was a mere promise to make a donation or gift to the college of the sum evidenced by said note after the death of the donor, and, as such, was testamentary in its nature, and in violation of the statute of wills, and, therefore, of no binding force or validity and not a legal claim against the estate of the deceased. Appellants also claim that the sum of six thousand seven hundred dollars, represented by the three certificates set forth in the statement preceding this opinion, was only deposited conditionally with appellee, and was only to become the money of the appellee upon the performance of the conditions set forth on the face of the instruments; that such conditions are conditions precedent, and were to be performed before the title to the money could vest in the appellee; that when Mary Beatty died, installments of money were due to her on each of said certificates, payment of which had been demanded of the appellee in the lifetime of the deceased, and had been refused; and that thereby the appellee had forfeited its right to retain the six thousand seven hundred dollars deposited with it. Appellants also insist that the sums constituting the six thousand seven hundred dollars were not complete and executed gifts, and that the title to the money did not vest in the appellee, because it was deposited conditionally; and that, therefore, the gift was not complete at the death of Mary Beatty and was revoked by her death.

On the other hand, the appellee claims that the note for seven thousand dollars is supported by a good and sufficient consideration; ²⁸⁹ that it is not testamentary in character and is a valid claim against the estate; also, that the sums of money, amounting to six thousand seven hundred dollars, and represented by the certificates, were executed gifts of such money to appellee; that the title thereto vested in the appellee before the donor's death. Appellee, however, admits that the note for two hundred and sixty-two dollars and fifty cents with interest thereon, and the unpaid installments of interest or annuity due upon the certificates, together with interest thereon, should be deducted from the face of the note for seven thousand dollars and interest thereon at five per cent from the death of Mary Beatty. The judgment rendered was made up in the way thus indicated.

The instructions given by the trial court for the appellee substantially embodied the theory and contention of the appellee, as thus stated. The instructions asked by the appellants and refused by the trial court embodied the theory and contention of the appellants, as above set forth. We deem it unnecessary to make any more detailed statement of the propositions embodied in the instructions on both sides.

Several objections are urged against the note for seven thousand dollars which cannot be regarded as tenable. In *Dorsey v. Wolff*, 142 Ill. 589, 34 Am. St. Rep. 99, we said that, in general terms, a promissory note "may be defined to be a written promise by one person to pay to another person therein named or order a fixed sum of money at all events, and at a time specified therein, or at a time which must certainly arrive." The note for seven thousand dollars substantially corresponds with this definition. It is not invalid because made payable on or before the first day of December, 1910. In *Dorsey v. Wolff*, 142 Ill. 589, 34 Am. St. Rep. 99, we said: "A note is none the less negotiable because it is made payable on or before a named date." The note promises to pay the seven thousand dollars "for the erection of the Ladies' Boarding Hall of said college." This language would seem to limit the purpose for which the money, promised to be paid, is to be used. But the statement in a note of the consideration upon which it is ²⁹⁰ founded, or of the effect to be given to the payment, does not affect its negotiable character: 4 Am. & Eng. Ency. of Law, 2d ed., 89; *Treat v. Cooper*, 22 Me. 203; *Chesney v. St. John*, 4 U. C. App. 150; *Preston v. Whitney*, 23 Mich. 260; *Martin v. Lewis*, 30 Gratt. 672; 32 Am. Rep. 682; *Ellett v. Britton*, 6 Tex. 229.

The fact that the note is to become due in the event of the death of the maker thereof, does not make it invalid. In the recent case of *Shaw v. Camp*, 160 Ill. 425, we have held that a promissory note may be made payable on the death of a certain person, or at a fixed time thereafter, or on demand after such death. Where a note is to become due on the death of the maker, it becomes due upon the happening of an event which is certain to occur, and, therefore, there is no such uncertainty in the time of payment as makes the note invalid. A note payable "on demand after my decease" has been held to be valid: *Bristol v. Warner*, 19 Conn. 7. A note payable "one day after date or at my death" has been held valid: *Conn v. Thornton*, 46 Ala. 587; 1 Randolph on Commercial Paper, sec. 113. The mere fact that a note is payable upon the death of the maker, or at a certain day after the death of the maker, does not make it a testamentary paper, nor constitute it a will in such sense as to require its execution in accordance with the statute of wills. It is an obligation to pay, and, being delivered to the payee as an evidence of debt, and being made payable to order, it is a promissory note: *Bristol v. Warner*, 19 Conn. 7.

In *Price v. Jones*, 105 Ind. 543, 55 Am. Rep. 230, it was insisted that a note, payable one day after the death of the maker, was invalid as being an attempt to make a testamentary disposition of property. The court there said: "There is no attempt to make a testamentary disposition of property, for the instrument contains no provisions resembling those of a will. It is a promise to pay money. It differs from an ordinary promise in the single particular ²⁹¹ that it fixes the time of payment at a period subsequent to the promisor's death. It is, nevertheless, a promise to pay money, absolutely and at all events, to a person named, and it has, therefore, all the essential features of a promissory note": See, also, *Carnwright v. Gray*, 127 N. Y. 92; 24 Am. St. Rep. 424.

In *Hegeman v. Moon*, 131 N. Y. 462, it was held that a promissory note, payable after the death of the maker, was valid, and that the objection that it was of a testamentary character, and void because not executed in accordance with the statute of wills, was not well founded.

The theory upon which these cases rest is, that the dispositions made by will are in the nature of gifts, but that such instruments as are referred to in these cases are made to carry out or perform obligations made and entered into by the makers thereof, and, therefore, are not, in their essence, wills, but are

in the nature of contracts. As contracts their validity does not depend upon their conformity to the requirements of the statute of wills, but to the requirements which are necessary in the making of valid contracts: Schouler on Wills, sec. 451; Emery v. Darling, 50 Ohio St. 160.

It is contended, however, that the note for seven thousand dollars, filed as a claim in this case, was executed and delivered without any valid consideration to support it. The note recites upon its face that the maker thereof promises to pay "in consideration of a desire to aid the cause of Christian education, and the privilege of sending one student four years free of tuition." It is unnecessary to discuss the question whether this note upon its face imports a consideration or not. The general rule is, that when a note contains the words "for value received," the consideration is imported: Meyers v. Phillips, 72 Ill. 460. Whether this note, upon its face, imports a consideration or not, it is well settled that proof may be introduced to show the facts in regard to the consideration of the note. The evidence tends to show that the deceased availed herself ²⁹² of the privilege, specified in the note, of sending one student four years free of tuition. The certificate embodying such privilege was issued to Mrs. Beatty, and was made use of by a female student upon the order of Mrs. Beatty. We do not deem it necessary, however, to decide whether or not the privilege specified upon the face of the note, and the use of it made by the deceased, constituted a valid consideration. The proof tends to show that the note for seven thousand dollars was a gift or donation to the college. Such a note partakes of the nature of a voluntary subscription to raise a fund, or promote an object. It is well settled that a promissory note without consideration, and intended as a gift to the payee by the maker thereof, is but a promise to make a gift in the future, and is not enforceable. As a gift it is always revocable until it is executed, and is not executed until it is paid. "The promise stands as a mere offer and may, by necessary consequence, be revoked at any time before it is acted upon": Pratt v. Trustees, 93 Ill. 475; 34 Am. Rep. 187. In Blanchard v. Williamson, 70 Ill. 647, we said: "If a party delivers his own promissory note as a gift, it is but a promise to pay a sum certain at a future day, and we are not aware such a promise can be enforced, either at law or in equity. It could not be enforced against the maker in his lifetime, and his representatives could defend against it on the ground there was no consideration": Shaw v. Camp, 160 Ill. 425; Williams v. Forbes,

114 Ill. 167; Richardson v. Richardson, 148 Ill. 563; Pope v. Dodson, 58 Ill. 360.

But while such a note, amounting to a mere gift, is open to the defense of a want of consideration, yet that defense cannot be made to it, if money has been expended, or liabilities have been incurred, in reliance upon the note. If money has been expended, or liabilities have been incurred, which, by legal necessity, must cause loss or injury to the person so expending money or incurring liability if the note is not paid, the donor or maker thereof is, in good conscience, bound to pay; and the gift will ~~not~~ be upheld upon the ground of estoppel, and not by reason of any valid consideration in the original undertaking. We have said: "It is the expending of money, et cetera, or incurring a legal liability on the faith of the promise, which gives the right of action; and without this there is no right of action": Pratt v. Trustees, 93 Ill. 475; 34 Am. Rep. 187; Beach v. First M. E. Church, 96 Ill. 177; Hudson v. Green Hill Seminary, 113 Ill. 618.

In Simpson Centenary College v. Tuttle, 71 Iowa, 596, the supreme court of Iowa said: "Where a note, however, is based on a promise to give for the support of the objects referred to (founding a school, church, or other institution of similar character), it may still be open to this defense (want of consideration), unless it shall appear that the donee has, prior to any revocation, entered into engagements or made expenditures based on such promise, so that he must suffer loss or injury if the note is not paid. This is based on the equitable principle that, after allowing the donee to incur obligations on the faith that the note would be paid, the donor should be estopped from pleading want of consideration": Wesleyan Seminary v. Fisher, 4 Mich. 515; Amherst Academy v. Cows, 6 Pick. 427; 17 Am. Dec. 387; Roberts v. Cobb, 103 N. Y. 600; Johnston v. Wabash College, 2 Ind. 555; Roche v. Roanoke Classical Seminary, 56 Ind. 198; Simpson Centenary College v. Bryan, 50 Iowa, 293; Vierling v. Horton, 27 Ill. App. 263; Pryor v. Cain, 25 Ill. 292; Cottage Street M. E. Church v. Kendall, 121 Mass. 528; 23 Am. Rep. 286.

There was evidence in the case at bar tending to show that the appellee expended money in the construction of the building, known as "Ladies' Boarding Hall," upon the faith of the promise made by the deceased as embodied in the note for seven thousand dollars. It is true that the money represented by the three certificates was all, or nearly all, used in the construction of the

building. But the contract for the construction of it was let in the latter part of July, 1888, and the erection of the building was begun about August 1, 1888. This was some months prior to the ²⁹⁴ gift of the three thousand five hundred dollars represented by the first certificate, dated November 16, 1888. The correspondence introduced in evidence, and the statements of many of the witnesses, show that the contract was let, and the work upon the building was begun and prosecuted, with the expectation that the deceased would advance money upon the note for seven thousand dollars. It makes no difference that she did not advance any money upon that note, but preferred to donate six thousand seven hundred dollars, and take back certificates which secured to her the payment of annuities thereon during her life. The instructions given by the court to the jury required them to find whether or not the college, during the lifetime of Mary Beatty, entered into a contract to build and erect, and did build and erect, and expend moneys, and incur liabilities in building and erecting the "Ladies' Boarding Hall" on the faith and strength of the note for seven thousand dollars. The question as to the expenditure of such moneys and the incurring of such liabilities upon the faith and strength of the note was a question of fact, which was submitted to the jury by the instructions. The judgment of the circuit court in favor of appellee, and the judgment of the appellate court affirming the judgment of the circuit court, are final determinations of this question of fact so far as we are concerned. In the present state of the record, we are obliged to assume that the jury found in favor of such expenditures of money and the incurring of such liabilities on the part of the appellee. This being so, the appellee is entitled to its right of action, even if the note for seven thousand dollars was without consideration before it was thus acted upon. Upon this branch of the case, therefore, we are of the opinion that the courts below committed no error in holding the claim of appellee to be a valid claim.

As to the certificates which were introduced by the appellants below as a setoff to the claim of the appellee, it is contended by appellants that such certificates show a mere conditional gift, which was not executed in the ²⁹⁵ lifetime of the donor. The theory of the appellants is, that there was no gift in praesenti of the money named in the certificates, because of the conditions annexed to the proposed gift; and that the donor could revoke the gift because it was not absolute; and that the death of Mary Beatty did revoke it. We are unable to give our assent to this

theory. The moneys named in the certificates were actually paid over by Mrs. Beatty to the college, as her donee, during her lifetime, and at the respective dates named in the certificates. The money which was the subject matter of the gifts was actually delivered to the donee. The certificates recite that the moneys were paid "for the benefit of" the college, "and to become and be the property of" the college, and "to be used as the board of trustees or executive committee thereof may direct." If the money was delivered to the college to be the property of the college, and to be used as the board of trustees of the college should direct, then the donor, Mrs. Beatty, parted with all her right to control it, and with her actual control over it. The title to the money was vested in the college. It is true that the college agreed to pay to Mrs. Beatty an annuity, amounting to seven and one-half per cent per annum, upon the sums mentioned in these certificates during her lifetime. But the requirement of the payment of such annuities did not make the gift of the money conditional, or less absolute than it otherwise would have been. If the payments of the annuities were conditions, they were in the nature rather of conditions subsequent than of conditions precedent. A precedent condition is one which must take place before the estate can vest, and which delays the vesting of the right until the event happens. A subsequent condition is one which operates upon an estate already created and vested, and renders it liable to be defeated: *Star Brewery Co. v. Primas*, 163 Ill. 652. Where an act on which an estate or right depends does not necessarily precede the vesting of an estate or right, but may accompany it or follow ²⁹⁶ it, the condition is a condition subsequent: *Chicago v. Chicago etc. R. R. Co.*, 105 Ill. 73. Here, the payment of the annuities is not an act which necessarily precedes the vesting of the estate or right to the money, but rather accompanies or follows it. A court of equity, as a rule, will not lend its aid to divest an estate for a breach of a condition subsequent: 4 Kent's Commentaries, 8th ed., marg. p. 130. "But where a compensation can be made in money, courts of equity will relieve against such forfeitures and compel the party to accept a reasonable compensation in money": *Gallaher v. Herbert*, 117 Ill. 160. In the case at bar, the principal named in the certificates, which was delivered to the college, will not be forfeited, but the college will be compelled, and, by the judgment in this case has been compelled, to pay to the appellants all of the unpaid annuities and interest thereon as compensation.

In *Doty v. Willson*, 47 N. Y. 580, it was held that a gift was

not necessarily invalid because the right to call for six per cent interest was reserved; and it was there said that if there was a gift of the money therein specified, "the title and control of the money immediately vested in the donee, and his promise to pay the donor six per cent in no degree affected such title or control. . . . The donor could never recover back the principal, nor in any manner control it, and it is not material to inquire whether he could recover the interest." In case of a gift *inter vivos* the delivery is absolute, and the title vests immediately. If a condition is attached to the delivery, it will invalidate the gift; but a promise of the donee, which does not constitute a condition of delivery of title, but is consistent with it, will not have the effect of invalidating the gift: *Ibid.* The case of *Doty v. Willson*, 47 N. Y. 580, was approved in the case of *Young v. Young*, 80 N. Y. 422, 36 Am. Rep. 634. In the latter case it was said, in discussing the question whether it is practicable to make a valid gift in *praesenti* of an instrument securing the payment of money, ²⁹⁷ reserving to the donor the accruing interest, and, if so, by what means such a gift can be made, that the object could be accomplished "by an absolute delivery of the security, which is the subject of the gift, to the donee, vesting the entire legal title and possession in him, on his undertaking to account to the donor for the interest which he may collect thereon." It was also said in the latter case: "If an absolute delivery of the bonds to the donee with intent to pass the title was made out, the donor reserving only the right to look to the donee for the interest, the transaction may be sustained as an executed gift": *Gallaher v. Herbert*, 117 Ill. 160; *Williams v. Evans*, 154 Ill. 98.

We are of the opinion that, in the present case, there was an executed gift to the college of the moneys named in the certificates, and that the reservation of an annuity to be paid to the donor did not invalidate the gift. The certificates were merely written evidence of the transaction, and, the money having been delivered to the college, the delivery of the certificates to the college was unnecessary. The absolute character of the gift is not in any way affected by the fact that such certificates were retained by the donor, Mrs. Beatty. We concur with the appellate court, when they say, in their opinion delivered in the decision of this case: "The deceased accepted the certificates and thereby bound herself by the terms thereof, and is given by them only a right of action against the appellee for the annuities, in case of nonpayment. The title to the money is effectually

vested in the college, and to be used by it, thereby placing it beyond her power to reclaim."

The judgment of the appellate court is affirmed.

NEGOTIABLE INSTRUMENTS PAYABLE AFTER DEATH—TESTAMENTARY CHARACTER.—A promissory note, payable after the death of the maker, is a valid instrument: *Carnwright v. Gray*, 127 N. Y. 92; 24 Am. St. Rep. 424. If he expresses a desire, in a written instrument, "to advance the cause of missions, and to induce others to contribute to that purpose," and promises, absolutely and unconditionally, to pay a certain sum of money, the payment to be made out of his estate one month after his death, the instrument is a promissory note, and not a will, and having a good and valid consideration, it may be enforced by suit: *Garrigus v. Home Frontier etc. Soc.*, 3 Ind. App. 91; 50 Am. St. Rep. 262.

NEGOTIABLE INSTRUMENTS—PAROL PROOF OF CONSIDERATION.—Parol evidence respecting the consideration of a written contract is admissible in all cases, including promissory notes, between the original parties: *Folsom v. Mussey*, 8 Greenl. 400; 23 Am. Dec. 522. Even the consideration of a deed may be proved by parol to be wholly different from that expressed therein: *Moffatt v. Bulson*, 96 Cal. 106; 31 Am. St. Rep. 192. The consideration for which a note was given may be established by parol evidence: *Note to Koehler v. Dodge*, 28 Am. St. Rep. 526.

NEGOTIABLE INSTRUMENTS—EXECUTED GIFT.—It has been held that a valid gift may be made inter vivos of a promissory note payable to the order of the donor, by delivery merely, without indorsement, or other writing: *Note to Pope v. Burlington Sav. Bank*, 48 Am. Rep. 789. But it has been held, on the other hand, that the note of a donor, payable in the future, to a donee, is not the subject of a gift; that a gift is not complete until the money is paid or the property is delivered; and that a note or other promise to pay in the future is not a gift: *School District v. Sheldley*, 138 Mo. 672; 60 Am. St. Rep. 576. A note given without consideration, although payable in bank, cannot be regarded as an executed gift: *Mader v. Cool*, 14 Ind. App. 299; 56 Am. St. Rep. 304; but a note promising to pay a school district a certain sum of money for the establishment of a library is not without sufficient consideration merely because the maker receives no benefit or value moving from the beneficiary to himself. The consideration of the note is sufficient if the beneficiary expends money, or incurs liability, in reliance thereon, and in furtherance of the establishment of a library: *School District v. Sheldley*, 138 Mo. 672; 60 Am. St. Rep. 576.

ILLINOIS CONFERENCE OF EVANGELICAL ASSOCIATION OF NORTH AMERICA *v.* PLAGGE.

[177 ILLINOIS, 431.]

NEGOTIABLE INSTRUMENTS — INDORSEMENT IN BLANK—WRITING ASSIGNMENT OVER—RIGHT OF HOLDER FOR COLLECTION.—One who holds a promissory note for collection, with the payee's indorsement in blank, has authority to write over the indorsement an assignment of the note to himself, and such indorsement places the legal title to the note in the indorsee.

NEGOTIABLE INSTRUMENTS—DEFENSE THAT OTHER THAN PLAINTIFF HAS AN INTEREST.—It is no defense to an action on a promissory note, by the holder of the legal title to it, that one, not the party plaintiff, is entitled to the proceeds of the collection of the note, which has been assigned to the plaintiff.

NEGOTIABLE INSTRUMENTS—HOLDER'S RIGHT OF ACTION—ABATEMENT—SURVIVORSHIP.—An action upon a promissory note, brought by the holder of the legal title to it, does not abate upon the death of the plaintiff, but survives to his administrator.

NEGOTIABLE INSTRUMENTS—ACTION—HOLDER NEED NOT DISCLOSE INTEREST IN OTHERS.—When the holder of the legal title to a promissory note brings suit upon it, he need not disclose whether others have an equitable or beneficial interest in the proceeds of its collection.

NEGOTIABLE INSTRUMENTS—ACTION—RIGHT TO INTERVENE.—Persons who have a beneficial interest in a promissory note may intervene in a suit brought thereon by the holder of the legal title, and their rights will be protected, but, in the absence of such interference, the defendants have no concern therewith.

NEGOTIABLE INSTRUMENTS—ACTION—JUDGMENT IN FAVOR OF HOLDER AS A DEFENSE AGAINST THE PAYEE. A judgment in favor of one who has possession of a promissory note, and legal title thereto, will constitute a legal defense against the payee of the note, though possession and title are held merely for the purpose of accomplishing the collection of the paper.

RELIGIOUS SOCIETIES—POWER TO BORROW MONEY—CONSTRUCTION OF STATUTE.—Under a statute authorizing a corporation, society, or association not formed "for pecuniary profit," to borrow money for the purposes of its organization, upon consent of the body, "expressed by a vote of the majority of the members thereof," it is not indispensably necessary to hold a religious corporation, not formed for "pecuniary profit," answerable for the act of its treasurer, in borrowing money for the society, and giving its notes therefor, that the records of the society should expressly show that a majority of the members voted to borrow the money, or to ratify the treasurer's action.

RELIGIOUS SOCIETIES, INCORPORATED—RATIFICATION OF TREASURER'S ACT IN BORROWING MONEY—WHAT CONSTITUTES.—The act of the treasurer of a religious corporation, in borrowing money for the purposes of the organization, must be considered as ratified where its records show that he received the money as a loan to the association and issued its notes as evidence thereof; that the trustees used the money for the purposes of the association and paid interest on the notes; and that the association, as a body, was advised of the indebtedness, and payments of interest, and approved the action of its trustees.

Ritchie, Esher & Knobel, for the appellant.

Knecht & Bullard, for the appellee.

⁴³³ **BOGGS, J.** This is an appeal from a judgment of the appellate court for the first district, affirming a judgment, in the sum of three thousand three hundred and sixty-eight dollars and eighty-nine cents, entered in the circuit court of Cook county,

in an action of assumpsit brought by Friedrich Plagge, the intestate of appellee administrator, against the appellant association. During the pendency of the action the plaintiff died, and the appellee, his administrator, was substituted as plaintiff, and judgment rendered accordingly.

The declaration counted on five promissory notes alleged to have been executed by appellant association to as many different payees, and by such payees respectively assigned, by indorsement, to said Friedrich Plagge, deceased. It was stipulated said notes were "transferred or delivered, at least to the said decedent, as agent, for collection." Whether the signature of the payee appearing on the notes was placed there for the purpose of assigning and transferring the legal title to the indorsee, or for the purpose of acknowledging payment of interest, as contended by appellant, were questions of fact, which must be regarded as conclusively settled adversely to the appellant's contention by the judgment of the appellate court.

The court refused to instruct the jury, as asked by the appellant, that the indorsement of a promissory note for the mere purpose of enabling the indorsee to sue for and collect the same for the benefit of the indorser or payee is not such a transfer of the title to the note as will pass to the administrator of the indorsee. This ruling is assigned as for error. The indorsements were in blank. This conferred authority to the holder to write in the blank space an assignment of the instrument to him. The indorsement so filled in placed the legal title to the notes in the indorsee. The right to institute an action at law on a note is in the holder of the legal title to the note. If necessary to enable the maker to present some defense ⁴³⁴ not available against an indorsee, it might be shown the beneficial interest still remained in the payee; but the mere fact another than the party plaintiff is entitled to the proceeds of the collection of the note assigned to him is not a defense to the action: *Lohman v. Cass County Bank*, 87 Ill. 616; *Henderson v. Davisson*, 157 Ill. 379.

The legal title to the notes which vested in the decedent fully authorized him to institute action in his own name, and, upon his death, the action did not abate, but survived to his administrator, and the appellee, in that capacity, was properly substituted as plaintiff. Whether others have an equitable or beneficial interest in the proceeds of the collection of a note need not be disclosed by the pleadings in an action at law by the party holding the legal title to the note. It is sufficient, in such case, the action is in the name of the holder of the legal title. Per-

sons entitled to the beneficial interest may interfere in such actions, and their rights will be protected, but in the absence of such interference defendants have no concern therewith. A judgment in favor of a party having possession of a promissory note and legal title thereto will constitute a legal defense against the payee of the note, though such possession and legal title be merely for the purpose of accomplishing the collection of the paper.

The appellant association is a corporation organized under the provisions of chapter 32 of the Revised Statutes, entitled "Corporations," which authorizes the formation of corporations "not for pecuniary profit." The power of such corporations to borrow money is defined by section 32 of said chapter, which is as follows: "Said trustees, managers, or directors may, upon consent of the corporation, society, or association, expressed by a vote of a majority of the members thereof, borrow money, to be used solely for the purposes of their organization."

A book purporting to contain the record of the proceedings of the board of trustees of the appellant association, and also of the appellant conference, and another ⁴³⁵ purporting to contain the records kept by the treasurer of the corporation, were offered and received in evidence. These books were identified by a witness who occupied the position of treasurer of the association at the time the entries desired to be considered in evidence were made. It was and is objected these records should have been identified by the custodian thereof. They were produced by appellant in answer to notice demanding their production, and were fully identified by a witness who was a member of the board of trustees at the time of the alleged transactions, and who was at the same time treasurer and kept the treasurer's record produced in court. The appellant was not, under the circumstances, prejudiced by the ruling of the court admitting these books in evidence.

It appeared from entries in the record kept by the treasurer that that official, as treasurer for the appellant conference, received from the payees of the notes sued on, the sums of money mentioned in said notes, and other entries in the same book recorded the payment of moneys out of the funds of the conference to such payees in discharge of interest accrued on notes held by them. It appeared from the records of the board of trustees the conference was indebted to various persons for borrowed money, and that the reports of the treasurer were, from time to time, approved by the board of trustees, and that com-

mittees appointed at different times within the period in question to examine and audit the accounts of the treasurer reported such accounts correct, and that the books and papers of that official "were in good order," and that the reports of such committees were approved by the board of trustees. It appeared from the records of the proceedings of the conference the proceedings of the board of trustees as recorded were read to the conference and approved and ratified. The record of the conference contains statements, from time to time, of the amount remaining due and unpaid for borrowed money. ⁴³⁶ The records in some instances show the action of the members of the conference was unanimous, and in other instances simply that the action was taken by the conference. We do not construe the provision of the statute hereinbefore set out to make it indispensable it should expressly appear from the record of the proceedings of the conference a majority of the members voted to authorize money to be borrowed, or for measures or proceedings having the effect to ratify the act of the board of trustees in borrowing money. It seems clear from the records produced the financial officer of the corporation received the money as a loan to the conference; that he executed the notes in question to evidence such loans; that the board of trustees applied such money to the purposes of the conference, including the payment of interest on the notes in suit; that the conferences were advised as to such indebtedness and such payments, and approved and indorsed the acts of the board of trustees, and knew of and ratified the appropriation of the money so borrowed to the uses of the conference. In the absence of any evidence tending to the contrary, we ought, in such state of case, assume the consent of the conference was expressed in compliance with the statute which authorized it to borrow money. We think the court did not err in admitting the records in evidence. The records established the consent and ratification by the conference of the acts of the treasurer and board of trustees in borrowing the money and executing the notes therefor.

What has been said disposes of the objections urged to the rulings of the court as to the admissibility of testimony and in passing on the instructions asked by the appellant conference.

Other contentions of appellant relate to questions of fact only, which were finally settled by the judgment of the appellate court.

The judgment is affirmed.

NEGOTIABLE INSTRUMENTS—INDORSEMENT IN BLANK—ASSIGNMENT—LEGAL TITLE.—A bona fide holder of a note indorsed in blank is entitled to sue upon it: *Sterling v. Bender*, 2 Eng. lish, 201; 44 Am. Dec. 539; *Kunkel v. Spooner*, 9 Md. 462; 66 Am. Dec. 332; *Poorman v. Mills*, 35 Cal. 118; 95 Am. Dec. 90; for the possession of a note so indorsed is prima facie evidence of ownership: *Berney v. Steiner*, 108 Ala. 111; 54 Am. St. Rep. 144. He may sue thereon though he holds as trustee only: *Bacon v. Smith*, 2 La. Ann. 441; 46 Am. Dec. 549; or he may declare thereon as assignee: *Smith v. Kendall*, 9 Mich. 241; 80 Am. Dec. 83. An indorsement to an agent transfers the title of the instrument, as to all the parties thereto, except his principal, and the agent may sue thereon in his own name: *Poorman v. Mills*, 35 Cal. 118; 95 Am. Dec. 90.

NEGOTIABLE INSTRUMENTS—BLANK INDORSEMENT—FILLING IN ASSIGNMENT—RIGHT TO SUE—WHAT IS NO DEFENSE.—The holder of a note may fill a blank indorsement by writing over the indorser's signature any agreement consistent with the nature of the instrument and the intention of the parties: *Camden v. McKoy*, 3 Scam. 437; 38 Am. Dec. 91. He can, therefore, write an assignment to himself over the indorsement: *Ritchie v. Moore*, 5 Munf. 388; 7 Am. Dec. 688. It is enough, in actions on bills and notes, that the plaintiff's title is good as against the defendant. A defendant who owes a debt has no interest beyond the bona fides of the holder: *City Bank v. Perkins*, 29 N. Y. 554; 86 Am. Dec. 332. The naked fact of the plaintiff not being the real owner of a note is not a matter of defense, either in bar or in abatement: *Thompson v. Cartwright*, 1 Tex. 87; 46 Am. Dec. 95. It is no defense against the holder of the legal title to a note that the beneficial ownership is in another, unless there is shown, in addition, facts constituting a valid defense against the beneficial owner: *Newton v. Turner*, 5 La. 46; 25 Am. Dec. 173.

CORPORATIONS—RATIFICATION OF UNAUTHORIZED ACTS OF AGENTS.—A corporation may ratify the unauthorized acts of its agents without such ratification being evidenced by a vote or formal resolution of the board of directors, and when such unauthorized acts are clearly beneficial to the corporation, a presumption of ratification will arise from slight circumstances: *Washington Sav. Bank v. Butchers' etc. Bank*, 107 Mo. 133; 28 Am. St. Rep. 405, and note. Compare *Blen v. Bear River etc. Min. Co.*, 20 Cal. 602; 81 Am. Dec. 132; *Merchants' Bank v. Central Bank*, 1 Ga. 418; 44 Am. Dec. 665; *Bank of Alabama v. Comegys*, 12 Ala. 772; 46 Am. Dec. 278. The ratification of an agent's acts may be inferred from the acquiescence of the directors or other governing body of a corporation; from the circumstance that, after the facts became known to them, they took no steps to show dissent; did not question the accounts submitted; or kept the proceeds; or retained the benefits of the unauthorized acts of the agent: *Note to Olcott v. Tloga R. R. Co.*, 84 Am. Dec. 812.

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[177 ILLINOIS, 468.]

WATERS—TITLE TO LAND UNDER THE GREAT LAKES.—The title to, and dominion over, lands covered by water of the Great Lakes, within the limits of the several states bordering thereon, belong to each state wherein the lands are located. It holds the fee in trust for the public in the same way that it holds the title to soil under tide waters by the common law.

WATERS—RIPARIAN RIGHTS—COMMON LAW.—The common law, as it existed prior to March 24, 1606, the fourth year of James I, is in force in Illinois, and, in the absence of any statute of the state changing the common law in regard to rights of riparian or littoral owners, the common law as it then existed must control.

PURPRESTURE—WHAT IS, AND JURISDICTION TO ENJOIN OR ABATE.—If a shore-owner on Lake Michigan, without a grant or other authority from the state, erects piers in the lake in front of his premises, the piers constitute a purpresture, and, though not injurious, or not a public nuisance, may be enjoined or abated in a court of equity, upon suit of the attorney general.

WATERS—RIGHT OF SHORE-OWNER TO EXTEND FRONTAGE.—An owner of land bordering on Lake Michigan has no right to build piers or "wharf out" into the lake for the purpose of making land or increasing the boundaries of his premises, nor has he the right to do any act which will produce that result. If he does so, he inflicts an injury on the rights of the state, because the land covered by the water of the lake belongs to the state.

WATERS—LIMIT OF SHORE-OWNER'S RIGHT.—The only common-law rights possessed by a shore-owner, on Lake Michigan, in the state of Illinois, are the right to pass to and from the waters, within the width of his premises as they border on the lake, and the right to natural accretions.

WATERS—SHORE-OWNER'S RIGHTS—STATE CONTROL OVER.—The common law of England is the law of this country upon the question of the rights of a shore-owner, except where it has been modified by the constitution, statutes, or usages of the different states, or by the constitution and laws of the United States; and the rights of these owners have been committed to the several states, so that each state deals with the land under tide water within its boundaries according to its own notion of right and public policy.

PURPRESTURE—CONSTRUCTION OF PIERS WITHOUT CONSENT OF STATE.—A shore-owner, on Lake Michigan, in the state of Illinois, has no right, by virtue of being such an owner, to construct piers upon the submerged lands in front of his premises, without the consent of the state.

WATERS—RIVER BANK OWNERS AND GREAT LAKE SHORE—OWNERS ARE NOT SUBJECT TO THE SAME RULE.—The doctrine that a shore-owner, on streams navigable in fact but not navigable in law, may wharf out into the stream, cannot be extended to a shore-owner on Lake Michigan, and other Great Lakes, for the reason that, in the former case, the line of the riparian owner extends to the center thread of the stream, instead of to the high-water line, as in the latter case.

PURPRESTURE—WATERS—RIGHT TO BUILD PIERS TO PROTECT LAND FROM EROSION.—A shore-owner, on Lake Michigan, in the state of Illinois, may, no doubt, erect on his own land such structures as may be necessary to protect his land from erosion, if they do not interfere with navigation, but he has no right to intrude upon the lands of the state, without its consent, and cannot, therefore, "wharf out," or build piers, to protect the shore of his land from erosion.

PURPRESTURE—WHAT IS AND REMEDY FOR ABATEMENT OF.—Any structure placed upon land of the state below or beyond the water's edge of any of the Great Lakes is a purpresture and should be abated, on application of the attorney general

in the name of the people, whether it is detrimental to public interest or not. The state would be false to its trust should it permit shore-owners to encroach on the public domain and gradually appropriate such property to their own use.

Information in equity, brought in the name of the people by the attorney general, against Revell, as the owner of a certain tract of land bordering on Lake Michigan. The court found that the piers in question were purprestures, and the defendant prayed for and obtained an appeal to reverse the decree; but the court further found that the piers were built for the protection of the defendant's land from the erosion of the waters of Lake Michigan, and that they were not detrimental to the public interest, and would not become so until the state of Illinois wished to reclaim and use the submerged land upon which they stood. The court refused to order the purprestures to be abated until the state directly or indirectly took possession of and reclaimed and used the submerged lands adjacent to the defendant's holdings. The appellee assigned cross-errors upon these points.

Smith, Blair & Smith, and Wilson, Moore & McIlvaine, for the appellant.

E. C. Akin, attorney general, and Edward O. Brown, for the people.

⁴⁷⁶ CRAIG, J. It has been suggested in the argument of counsel for appellant that the people have no interest in this litigation—that the real parties in interest are the commissioners ⁴⁷⁷ of Lincoln Park. We do not regard this position as sustained by the record. The suit was instituted in the name of the people, by the attorney general. The commissioners of Lincoln Park, as a board, have taken no action whatever in reference to the commencement or prosecution of the action, nor have they any interest in the result, except such as may be shared by the people at large. So far as appears, the attorney general, representing the people, brought the action in good faith for and on behalf of the people. The commissioners of Lincoln Park were not made parties to the proceeding, nor are they mentioned in the information. It is true that the defendant, by a supplemental answer, undertook to bring into the controversy the rights of the commissioners of Lincoln Park under an act of the legislature; but that matter was not responsive to anything found in the information, and, in our opinion, it had no proper place in the record. When the commissioners of Lincoln Park undertake to condemn or otherwise appropriate any part of the

submerged lands of the lake fronting upon the premises of appellant, then will be the proper time to determine their rights and their powers, but until that time arrives nothing need be said upon that question.

The appellant, as a shore-owner, constructed from his premises into the lake two piers, extending from the shore into the waters of the lake some two hundred feet, and the main question involved here is his right to build and maintain those structures. A description of the structures so built by appellant in the lake will be found in appellant's argument, substantially as follows: "Defendant purchased the premises in question in July, 1890. The pier at Barry avenue was built by FitzSimons, at Revell's instance, in the fall of 1890, and the addition on the east end in 1891. The whole structure is about two hundred and twenty feet in length—twenty feet on land and two hundred feet in water. The north side consists of close piling, and the south of piles six feet apart, with single sheeting. The two sides ⁴⁷⁸ are about eight feet apart, and the space between is filled with rip-rap, with two lines of planking on the top to walk on. The pier at George street is not quite so long, and is made of a single row of piling, spaced and sheeted and anchored to piles to the south. At the east end is a bulkhead eight by fifteen feet, filled with rip-rap and covered with plank. The latter was built by the O. B. Green Dredging Company in 1893. Both piers are practically perpendicular to the shore."

The law is well settled in the different states that the title to and dominion over lands covered by tide waters within the boundaries of the several states belong to each state wherein the lands are located. The state holds the fee in trust for the public. The doctrine established in regard to lands covered by tide waters has also been held applicable to lands bounded by fresh water in our large lakes: *People v. Kirk*, 162 Ill. 138; 53 Am. St. Rep. 277; *Shively v. Bowlby*, 152 U. S. 9. In the case last cited it is said: "By the common law, both the title and the dominion of the sea, and all rivers and arms of the sea where the tide ebbs and flows, and of all the lands below high-water mark within the jurisdiction of the crown of England, are in the king. Such waters, and the land which they cover either at all times or at least when the tide is in, are incapable of ordinary and private occupation, cultivation, and improvement, and their natural and primary uses are public in their nature, for highways of navigation and commerce, domestic and foreign, and for the purpose of fishing by all the king's subjects. Therefore, the

title *jus privatum* in such land, as of waste and unoccupied lands, belongs to the king as the sovereign, and the dominion thereof, *jus publicum* is vested in him, as the representative of the nation, for the public benefit." In *Illinois Cent. R. R. Co. v. Illinois*, 146 U. S. 452, in speaking of this question the court said: "That the state holds the title to the lands under the navigable waters of Lake Michigan within its limits in the same manner ⁴⁷⁹ that the state holds title to soils under tide water by the common law we have already shown, and that title necessarily carries with it control over the waters above them whenever the lands are subject to use. . . . It is a title held in trust for the people of the state, that they may enjoy the navigation of the waters, carry on commerce over them, and have liberty of fishing therein freed from the obstruction or interference of private parties." Indeed, the doctrine that the state holds the title to the lands covered by the waters of Lake Michigan in trust for the people is not controverted in the argument. It will not, therefore, be necessary to cite further authorities upon that question.

The appellant here owned the premises bordering on the lake, but his title to the premises extended only to the water's edge, and the fee in and to the lands covered by the waters of the lake was vested in the state and held by the state in trust for the people. The fee being in the state, the important question presented is, whether appellant, without a grant or other authority from the state, had the right to go upon the submerged lands and erect the structures complained of in the information. This state has adopted the common law as it existed prior to March 24, 1606—the fourth year of James I—and, in the absence of any statute of the state changing the common law in regard to rights of riparian or littoral owners, the common law as it then existed must control.

. Upon an examination of the authorities, we think it is clear that the act complained of in the information was a trespass upon the lands of the state; that the erection of the piers in the lake in front of appellant's premises was a purpresture. But it is said in the argument that the erection of the structures complained of was not injurious to the state, and hence there was no basis for the interference of a court of equity. We do not concur in that view. Although the act complained of was not injurious and was not a public nuisance, still it was an ⁴⁸⁰ unlawful act of such a character as would properly authorize a court of equity to interfere upon the information of the attorney general, as is well established by the authorities.

Coulson and Forbes on the Law of Waters, page 15, say: "Any unauthorized intrusion or encroachment upon the soil of the shore, such as the building of quays, piers, moles, et cetera, is termed a purpresture, and may be abated by the crown or the owner of the shore, or restrained by injunction at suit of the attorney general, whether they create a nuisance or not. Such purprestures may or may not be nuisances to navigation. Whether they are so or not is a question of fact." On page 670 the authors say: "Any invasion of the right of the crown to the bed of the sea or navigable river is a purpresture, and may be restrained by injunction at the suit of the attorney general, whether it be a nuisance or not. If the act complained of be merely a trespass upon the property of the crown, and not a nuisance to the navigation, the court will generally direct an inquiry whether it is more beneficial to the crown to abate the purpresture or suffer it to remain."

Wood on Nuisances, section 84, says: "A purpresture purely is not indictable, but when a purpresture and encroachment is both a purpresture and a nuisance it is indictable, abatable, and punishable as for a nuisance. The remedy for a purpresture simply is by information in equity at the suit of the attorney general or other proper officer."

Eden on Injunctions, chapter 11, in discussing the question, says: "Purprestures—more properly pourprestures—is derived from the French 'pourprise,' and, according to Lord Coke, signifies a close or inclosure—that is, when one encroaches and makes that safe to himself which ought to be common to many. It is laid down by all the old writers that it might be committed either against the king, the lord of the fee, or any other subject, but in its ⁴⁸¹ common acceptation it is at present understood to mean any encroachment upon the king, either upon part of the demesne lands, or in the highways, rivers, harbors, or streets. The remedy for this species of injury is either by information of intrusion at common law, or by information at the suit of the attorney general in equity. In case of a judgment upon an information of intrusion, the erection complained of, whether it were a nuisance or not, was abated. But upon a decree upon an information in equity, if it appeared to be a purpresture without being at the same time a nuisance, the court might direct an inquiry whether it was most beneficial to the crown to abate the purpresture or to suffer the erection to remain and be arrented."

Story in his Equity Jurisprudence, section 922, says: "In

cases of purpresture, the remedy for the crown is either by an information of intrusion at the common law, or by an information at the suit of the attorney general in equity. In a case of a judgment upon an information of intrusion, the erection complained of, whether it be a nuisance or not, is abated. But upon a decree in equity, if it appeared to be a mere purpresture without being at the same time a nuisance, the court may direct an inquiry to be made whether it is most beneficial to the crown to abate the purpresture or to suffer the erections to remain and be arrented."

Gould on Waters, section 21, declares: "There is a broad distinction between the violation of the public right and an invasion of the proprietary interest of the crown. The one creates a public nuisance; the other a purpresture. Any encroachment upon the king, either upon part of the demesne lands or any public rivers, harbors, or highways, is called a purpresture. If a littoral proprietor, without grant or license from the crown, extends a wharf or building into the water in front of his land it is a purpresture, though the public rights of navigation and fishery may not be impaired. . . . The remedy for a ⁴⁸² purpresture is either by an information of intrusion at common law, or by information in equity at suit of attorney general."

In Angell on Tide Waters, page 200, will be found this language: "A wharf or pier or other erection may, therefore, be below high-water mark or even below low-water mark, but not necessarily a nuisance though a purpresture. The remedy for a purpresture, it is laid down, is either by information of intrusion at common law, or by information at the suit of the attorney general in equity. The judicial department of the English court of exchequer is divided into one of equity and one of law, and the primary business of the former is to recover any lands belonging to the crown, so that purprestures upon arms and creeks of the sea are proper subjects of information in the court of exchequer. The king's attorney general, on the part of the crown, may proceed, for the purpose of protecting either the *jus privatum* of the king from the purpresture or the *jus publicum* of the subject from nuisance, by information on the king's remembrancer's side of the exchequer by English bill, praying a personal decree against the defendant in the suit": See, also, *Attorney General v. Terry*, 9 Ch. App. 423; *Attorney General v. Burrige*, 10 Price, 350; *Attorney General v. Parmeter*, 10 Price, 378; *Attorney General v. London*, 8 Beav. 270.

In opposition to the above authorities the case of *People v. Davidson*, 30 Cal. 379, is cited and relied upon. In that case it was held that the district courts of California have no power to decree the destruction or to enjoin the erection of a wharf unless it is or will be a nuisance, or is or will be followed by some form of irreparable damage, or unless it is or will be an appreciable hindrance to the execution of some legislative act relating to fishery or to commerce or navigation. So far as this case is in conflict with the rule established by the authorities cited we are not inclined to follow it. We think the decided weight of authority is that a purpresture may be enjoined⁴⁸⁸ or abated in a court of equity although it is not injurious or not a public nuisance.

But, aside from this position, it is apparent from an examination of this record that the construction of the piers was injurious to the state. It is true the appellant testified that the piers were constructed to prevent erosion and protect his shore bordering on the lake; but it is apparent from the evidence that the effect has been to add new land to his premises, and that the accretions resulting from the construction of the piers have extended the boundary of his premises into the lake. In other words, the erection of the piers has increased appellant's land and diminished the land belonging to the state. This being so, it cannot be said that the construction of the piers was not injurious to the state. The appellant had no right to build piers or "wharf out" into the lake for the purpose of making land or increasing the boundary of his premises, nor had he the right to do any act which would produce that result. As has heretofore been said, the lands covered by the waters of the lake belong to the state, and appellant had no right, by any device whatever, to extend his boundary line beyond the water's edge, and when he did so an injury was inflicted on the rights of the state which might be inquired into and abated in a court of equity on the application of the attorney general.

It is, however, insisted that the court erred in decreeing that appellant had no riparian rights as against the state. We do not understand that the decree goes to the extent claimed in the argument. But however that may be, the main question presented by the record and discussed in the argument is, What are the riparian rights of appellant, as a shore-owner, on Lake Michigan? There is one riparian right which existed at common-law which is not disputed or called in question in the

argument, and that is, where land bordering on the lake gradually and imperceptibly encroaches upon the water the accretion ⁴⁸⁴ thus made belongs to the shore-owner. This riparian right of appellant was not disturbed or interfered with by the decree. The shore-owner also has another riparian right which is undisputed: the right of access from his land to the lake—in other words, the right to pass to and from the waters of the lake within the width of his premises as they bordered on the lake. This right cannot be diverted or taken from the shore-owner without just compensation being made therefor, as provided by law. These are common-law rights, and, as we understand the law, they are the only common-law rights possessed by the shore-owner. Other rights may have been conferred in different states by statute, usage, or custom, but the question involved here is whether such additional rights exist in this state.

In the well-known case of *Shively v. Bowlby*, 152 U. S. 9, the supreme court of the United States, after a thorough examination of the authorities, held that the common law of England is the law of this country upon the question of the rights of a shore-owner, except where it has been modified by the constitutions, statutes, or usages of the different states or by the constitution and laws of the United States. The court also held that the rights of these owners have been committed to the several states, and that each state has dealt with the lands under tide water within its boundaries according to its own notion of right and public policy. We are aware of no statute of this state changing the common law, nor has there been established any custom or usage which modifies the common-law. What, then, is the common-law in regard to the right of a shore-owner to build out from the shore into the waters of the lake, as was done by appellant in this case?

In *Shively v. Bowlby*, 152 U. S. 9, after declaring that it is settled in England that the title to the soil of the sea, or arms thereof, below ordinary high-water mark, is in the king, it is said: "It is equally well settled that a grant from the sovereign of land bounded by the sea or ⁴⁸⁵ any navigable tide waters does not pass any title below high-water mark, unless either the language of the grant, or long usage under it, clearly indicates that such was the intention. . . . By the law of England, also, every building or wharf erected without license below high-water mark, where the soil is the king's, is a purpresture, and may, at the suit of the king, either be demolished

or be seized and rented for his benefit, if it is not a nuisance to navigation: Citing many cases. By recent judgments of the house of lords, after conflicting decisions in the court below, it has been established in England that the owner of land fronting on a navigable river in which the tide ebbs and flows has a right to access from his land to the river, and may recover compensation for the cutting off of that access by the construction of public works authorized by an act of parliament, which provides 'for compensation for injuries affecting lands, including easements, interests, rights, and privileges in, over or affecting lands.' The right thus recognized, however, is not a title in the soil below high-water mark, nor a right to build thereon, but a right of access only, analogous to that of an abutter upon a highway: *Buccleuch v. Metropolitan Board of Works*, L. R. 5 H. L. 418; *Lyons v. Fishmongers' Co.*, L. R. 1 App. Cas. 662. 'That decision,' says Lord Selborne, 'must be applicable to every country in which the same general law of riparian rights prevails, unless excluded by some positive rule or binding authority of the *lex loci*': *North Shore R. R. Co. v. Pion*, L. R. 14 App. Cas. 612-620, affirming 14 Can. Sup. Ct. 667. The common law of England upon this subject at the time of the emigration of our ancestors is the law of this country, except so far as it has been modified by the charters, constitution, statutes, or usages of the several colonies and states, or by the constitution and laws of the United States."

Under the common law as declared in this case—and it is fully sustained by the authorities—it is apparent ⁴⁸⁶ that appellant as owner of premises bounding on Lake Michigan, took no title to any submerged lands under the waters of the lake, nor did he, by virtue of being a shore-owner, have any right to construct piers upon the submerged lands without the consent of the state.

It is, however, suggested in the argument, that this court, in passing upon the rights of riparian owners upon the Mississippi and other rivers in the state navigable in fact but not navigable at law, has held the shore-owner may wharf out from the shore into the stream, and that the same doctrine should be extended to a shore-owner on Lake Michigan. Those cases have no bearing here, for the reason that they all are predicated on the theory that the line of the riparian owner extends to the center thread of the stream. Being the owner of the soil under the water he had the right to build such structures on his own land as he might desire, except such as might interfere with the

navigation of the stream. Under the rule established in those cases, beginning with *Middleton v. Pritchard*, 3 Scam. 510, 38 Am. Dec. 112, it was held in *Ensminger v. People*, 47 Ill. 384, 95 Am. Dec. 495, that a riparian owner in the Ohio river having the title to the land between high and low-water mark, and the right to the exclusive use thereof, had the right to establish a private wharf on his land and make reasonable charges for its use by those navigating the river. The right, however, as is apparent from the rule established in the case, rests upon the ownership of the underlying soil.

Much reliance is, however, placed, in the argument, in *Illinois Central R. R. Co. v. Illinois*, 146 U. S. 387. It is true that the majority of the court in that case held that a littoral owner of lands bordering on Lake Michigan had the right to wharf out from his premises into the lake in aid of navigation; but upon an examination of that case it will be found that the decision is predicated largely upon *Yates v. Milwaukee*, 10 Wall. 497, *Railroad Co. v. Schurmeier*, 7 Wall. 272, and *Dutton v. Strong*, 1 Black, 23, or two of ⁴⁸⁷ them; and in *Shively v. Bowlby*, 152 U. S. 9, decided two years after the *Illinois Central* case, the doctrine laid down in the three cases above cited seems to have been substantially repudiated. It is there said: "Some passages in the opinions in *Dutton v. Strong*, 1 Black, 23, *Railroad Co. v. Schurmeier*, 7 Wall. 272, and *Yates v. Milwaukee*, 10 Wall. 497, were relied on by the learned counsel for the plaintiff in error as showing that the owner of land adjoining any navigable water, whether within or above the ebb and flow of the tide, has, independently of local law, a right of property in the soil below high-water mark, and the right to build out wharves, so far, at least, as to reach water really navigable. But the remarks of Mr. Justice Clifford in the first of those cases, upon which his own remarks in the second case and those of Mr. Justice Miller in the third case were based, distinctly recognize the diversity of laws and usages in the different states upon this subject. . . . And none of the three cases called for the laying down or defining of any general rule independent of local law or usage or of the particular facts before the court. . . . In *Dutton v. Strong*, 1 Black, 23, there can be no doubt of the correctness of the decision, for even if the pier had been unlawfully erected by the defendants as against the state, the plaintiffs had no right to pull it down or injure it, and, upon the facts of the case, were mere trespassers upon the defendant's possessions. . . . In *Railroad Co. v. Schurmeier*, 7 Wall. 272,

the question in controversy was whether the plaintiff's patent was limited by the main shore or extended to the outside of the island. The supreme court of Minnesota held that by the law of Minnesota, land bounded by a navigable river extended to low-water mark at least, if not to the thread of the river, and that the plaintiff's title therefore extended to the water's edge at low-water mark and included the island, and gave judgment for the plaintiffs: *Schurmeier v. St. Paul etc. R. R. Co.*, 10 Minn. 82; 88 Am. Dec. 59. This court affirmed the judgment, saying the express decision of the supreme court of the state was, *et cetera*. . . . In *Yates v. Milwaukee*, 10 Wall. 497, the point adjudged ⁴⁸⁸ was, that the mere declaration of the city council that the wharf already built and owned by the plaintiff was a nuisance did not make it such or subject it to be removed by the authority of the city. It was recognized in the opinion that by the law of Wisconsin, established by the decisions of its supreme court, the title of the owner of land bounded by a navigable river extended to the center of the stream, subject, of course, to the public right of navigation, and the only decision of that court which this court considered itself not bound to follow was *Yates v. Judd*, 18 Wis. 119, upon the question of fact whether certain evidence was sufficient to prove a dedication to the public. The later judgments of this court clearly establish that the title and rights of riparian or littoral proprietors in the soil below high-water mark of navigable waters are governed by the local laws of the several states, subject, of course, to the rights granted to the United States by the constitution."

If the three cases cited did not call for the laying down of a general rule independently of local law or usage in the states, as was held in the *Shively* case, the doctrine laid down in the *Illinois Central* case could not be predicted upon those cases. Moreover, we regard the rule established by the common law as the safer and better doctrine, and as each state has the right to determine for itself the title and rights of riparian owners within its border, we regard it a better policy for all concerned to adhere to the common-law rule rather than follow the doctrine laid down in the *Illinois Central* case. Moreover, the learned justice who delivered the opinion of the court in the *Illinois Central* case, in *Weber v. Harbor Commrs.*, 18 Wall. 57, practically concedes the correctness of the doctrine laid down in the *Shively* case. Mr. Justice Field, in delivering the opinion of the court, while recognizing the correctness of the

doctrine that a riparian proprietor whose land is bounded by a navigable stream has the right of access to the navigable part of the stream in ⁴⁸⁹ front of his land, and to construct a wharf or pier into the stream, subject to such general rules and regulations as the legislature may prescribe for the protection of the public, said: "In the absence of such legislation or usage, however, the common-law rule would govern the rights of the proprietor, at least in those states where the common-law obtains. By that law the title to the shore of the sea and of the arms of the sea, and in the soil under tide waters, is in England in the crown and in this country in the state. Any erection thereon without license is therefore deemed an encroachment upon the property of the sovereign, or, as it is termed in the language of the law, a purpresture, which he may remove at pleasure, whether it tends to obstruct navigation or otherwise."

Cases from other states have been cited by the appellant and appellees as sustaining their respective views of riparian rights, but it would extend this opinion to too great a length to enter upon a review of those cases. Moreover, local laws, customs, and usages enter so largely into the decisions of the courts in the different states that such decisions cannot, as a general rule, control as precedents here. But if the right to wharf out in aid of navigation existed, as held in the Illinois Central case, the rule thus established could have no application here, as the piers erected by the appellant in this case were not constructed in aid of navigation. That is not claimed or pretended from anything appearing in the record.

It is, however, insisted that owners of land bordering on Lake Michigan have the right, as riparian owners, to wharf out in order to protect the shore of their lands from erosion. If a right of this character exists, it is one not recognized by the common law. As we understand the common law, any structure placed upon the land of the state below or beyond the water's edge in the waters of the lake is a purpresture, and may be abated in a proceeding instituted on behalf of the people. A shore-owner may, no doubt, erect on his own land such structures as ⁴⁹⁰ may be necessary to protect his land from erosion, provided such structures do not interfere with navigation, but he has no right to intrude upon the lands of the state unless authorized by the state. Tyler in his work on boundaries, page 95, states the doctrine of protection in the following language: "There can be no doubt that by the law of England encroachments cannot be made upon the property of the crown or its

grantee, but if an embankment which is lawfully made on a man's own land cause a silting up of sand and mud, whereby soil is gradually gained from the sea, the owner of the embankment would appear to be entitled to this increase, upon the principle laid down in respect to alluvion and reliction. An encroachment upon the king, or upon part of the demesne lands, or on the highways, public rivers, harbors, or common streets, is called a *purpresture*. This word frequently occurs in the judicial reports of both this country and England, and invariably signifies an encroachment of this kind. . . . A man may raise an embankment on his own property to prevent the encroachments of the sea, although the fact of his doing so may be to cause the water to beat with violence against the adjoining lands, thereby rendering it necessary for the adjoining land owner to enlarge or strengthen his defenses." Wood on Nuisances, section 494, says: "Every proprietor of land exposed to the inroads of the sea may erect on his own land groynes or other reasonable defenses for the protection of his land from the inroads of the sea. . . . But a man has no right to do more than is necessary for his defense, and to make improvements at the expense of his neighbor." Gould on Waters, section 160, says: "The owners of lands exposed to the inroads of the sea or of inland waters may erect walls and embankments to prevent the wearing away of the land or to protect it from overflow. . . . If a sea wall or embankment is erected in tide waters, beyond the limits of the owner's land, it is doubtless illegal at common-law, as being a *purpresture*, ⁴⁹¹ since it does not appear that littoral proprietors are authorized, as against the crown or without its sanction, to erect even defenses against the sea below highwater mark."

Reliance is, however, placed by appellant in *King v. Commissioner of Sewers*, 8 Barn. & C. 355. Expressions may be found in that case that seem to sustain the view of appellant, but upon an examination it will be found that what was said was not necessary to a decision of the case or applicable to the facts involved therein, and we do not regard the expressions used in deciding the case as authority on the question: See Coulson and Forbes on Law of Waters, 32. It may be conceded that under the doctrine of protection a shore-owner may erect structures on his own land for protection against erosion, but, as we understand the law, he has no right to enter upon the lands of the state and erect thereon such structures, and when he undertakes to do so he is a trespasser. The state, hold-

ing the submerged lands of the lake in trust for the people of the state, would be false to its trust should it permit shore-owners to encroach on the public domain and gradually appropriate such property to their own use. Here, in the erection of the structures complained of in the information, there has been a clear violation of the law, and no reason occurs to us why the structures should not be abated on the application of the people.

The decree in this case was in favor of the complainants, but, after a careful consideration of the whole record, we do not think it goes far enough. We think the cross-errors of appellees are well assigned. The decree will therefore be reversed and the cause remanded on the cross-errors, with directions to the circuit court to enter a decree according to the prayer of the information, in conformity to the views here expressed.

WATERS—RIGHTS OVER LAND UNDER THE GREAT LAKES.—The ownership of, and dominion and sovereignty over, lands covered by fresh water in the Great Lakes, belong to the respective states in which they are found: See monographic note to *People v. Kirk*, 53 Am. St. Rep. 292, on the title to land covered by tidal and other navigable waters; and they hold the fee in trust for the public in the same way that the title to soil under tide waters is held: Note to *People v. Kirk*, 53 Am. St. Rep. 293.

WATERS, NAVIGABLE—GREAT LAKES—RIPARIAN RIGHTS.—Riparian proprietors on the great American lakes own only to the water's edge, but they have a right of access to the deep or navigable waters in front of their lands: See monographic note to *Miller v. Mendenhall*, 19 Am. St. Rep. 230, 231, on the rights of land-owners in navigable waters fronting their lands, and in the lands under such waters; and compare *Hedges v. West Shore R. R. Co.*, 150 N. Y. 150; 55 Am. St. Rep. 660.

Purprestures, What are, and Remedies for their Abatement.*

Purprestures—What Constitute.—A purpresture exists where one encloses or makes several to himself that which ought to be common to many: *People v. Park etc. R. R. Co.*, 76 Cal. 156, 160. As said by Cooley, C. J., in *Attorney General v. Ewart Booming Co.*, 34 Mich. 462, 472: "A purpresture may be defined as an enclosure by a private party of a part of that which belongs to and ought to be open and free to the enjoyment of the public at large. The appropriation by an individual of a part of a public common may, therefore, be a purpresture, and, as it would constitute an invasion of a public right, it would be proper that proceedings for its abatement should be taken on behalf of the state. An unauthorized enclosure of a part of a highway may also be a purpresture and a

*Rights of landowners in navigable waters fronting their lands, and in the lands under such waters: 19 Am. St. Rep. 226-235.

Of the title to land covered by tidal and the navigable waters: 53 Am. St. Rep. 289-300.

Navigable waters, remedies for obstruction of: 57 Am. St. Rep. 693.

public wrong, whether the highway be one by land or by water": See, also, *Mayor v. Jaques*, 30 Ga. 506, 512. There is no difference between a highway on land and on water: *Attorney General v. Terry*, L. R. 9 Ch. App. 423, 431. To constitute a purpresture the public use must be abridged or injured: *Grand Rapids v. Powers*, 89 Mich. 94; 28 Am. St. Rep. 276. According to authority, a purpresture may, therefore, be defined to be an unauthorized encroachment upon, and appropriation of, land or waters which are common and public. In England, it means an encroachment upon the king, as upon part of his demesne lands, or upon rights and easements held by the crown for the public. In this country, it means a similar encroachment upon the state, and the intrusion may be made upon highways, public rivers, forts, streets, public squares, and other public lands, bridges, quays, and other public accommodations: *Moore v. Jackson*, 2 Abb. N. C. 211, 214; *Commissioners v. Long*, Parsons' Cas. 143. In England, every building or wharf erected, without license, below high-water mark, where the soil is the king's, is a purpresture, and may, at the suit of the king, either be demolished, or be seized and rented for his benefit, if it is not a nuisance to navigation: See authorities cited in *Shively v. Bowlby*, 152 U. S. 1, 13. It has been said that a purpresture is per se a public nuisance: *Davis v. Mayor*, 14 N. Y. 506; 67 Am. Dec. 186; *People v. Vanderbilt*, 26 N. Y. 287; 28 N. Y. 396; 84 Am. Dec. 351; but, while this may be technically correct, as a matter of law it is not necessarily a public nuisance in fact for a public nuisance must be something which subjects the public to some degree of inconvenience or annoyance, and a purpresture may exist without putting the public to any inconvenience whatever. "Such might be the case," says Cooley, C. J., in *Attorney General v. Evart Booming Co.*, 34 Mich. 462, 473, "where part of a common highway is inclosed, provided the appropriation is confined to a part never made use of for purposes to which the highway is devoted. A highway usually includes within its limits more than is ever made use of for public purposes; but, as it is set apart for public use, provided there shall be occasion, the appropriation by an individual is unlawful, though it occasions no present inconvenience to any one, and it may be abated because the result of its being persisted in might be to obscure and, possibly, in the end, to defeat the public right altogether, and thus preclude enjoyment by the public in case the use of that which was inclosed should ever be needed for highway purposes. On the other hand, the appropriation of a part of that which belongs to the public may sometimes not be unlawful, not only because it may be made under circumstances raising an implication of assent on the part of the public authorities, but because it may be essential to the proper enjoyment of the public right. Such a case may be found in the extension of a wharf into navigable waters. Wharves are essential; and while the state may limit their construction to the line of navigability, this is seldom done except under very peculiar circumstances."

A purpresture may be both a purpresture and a public nuisance: *Commissioners v. Long*, 1 Pars. Cas. 143. Thus, an unlawful inclosure of public free school lands is both a purpresture and a public nuisance: *State v. Goodnight*, 70 Tex. 682; so with an unlawful inclosure of government lands: *United States v. Brighton Ranch Co.*, 25 Fed. Rep. 465; 26 Fed. Rep. 218; and rafts of timber, continuously moored on any part of a navigable river, which is a public highway: *Moore v. Jackson*, 2 Abb. N. C. 211. A railroad track unlawfully constructed in a public park, the title of which is held in trust for the use of the public, is a purpresture, and if it unlawfully obstructs the free passage or use, in the customary manner, of such park by the public, it is a nuisance: *People v. Park etc. R. R. Co.*, 76 Cal. 156. The sinking of a crib or pier in the waters of the Hudson river, outside of the bulkhead and pier lines for the port of New York is a purpresture and nuisance, whether it produces any injury or not: *People v. Vanderbilt*, 26 N. Y. 287; 28 N. Y. 396; 84 Am. Dec. 351. So that part of a wharf which, without authority of law, projects into navigable water in a harbor beyond the bulkhead line established by the state, is an obstruction to commerce, a purpresture, and technically a public nuisance: *The Idlewild*, 64 Fed. Rep. 603; and the creation of a purpresture on a public highway or street, unauthorized by the legislature, is, as a matter of law, a public nuisance, where it obstructs the free and uninterrupted passage of the public: *Smith v. McDowell*, 148 Ill. 51. An awning which makes a permanent encroachment on a street is a purpresture and nuisance: *Hibbard v. Chicago*, 55 Ill. App. 470, affirmed in same case, 173 Ill. 91.

While a purpresture and public nuisance may co-exist, it is clear that there is a wide difference between the two, and that either may exist alone without the other: *People v. Vanderbilt*, 26 N. Y. 287, 293; 28 N. Y. 396; 84 Am. Dec. 351; *People v. Jessup*, 28 N. Y. App. Div. 524; *Commissioners v. Long*, 1 Pars. Cas. 143. This difference, however, has not always been recognized by the courts in applying remedies, and this failure has led to some confusion in the authorities, for it must be observed that a purpresture will support an action irrespective of any damage that may accrue, while in an action to remove a nuisance which is not a purpresture, a nuisance in fact must in all cases be shown to exist: *People v. Vanderbilt*, 26 N. Y. 287, 293; 28 N. Y. 396; 84 Am. Dec. 351.

The right to build and maintain wharves, piers, and landing places, on a navigable stream, or other navigable water, out to a point where such water is practically navigable, provided it does not interfere with navigation, is a well-established incident to riparian ownership: Note to *Prior v. Swartz*, 36 Am. St. Rep. 337; monographic notes to *Miller v. Mendenhall*, 19 Am. St. Rep. 231, 232, on the rights of land-owners in navigable waters fronting their lands, and in the lands under such waters: *People v. Kirk*, 53 Am. St. Rep. 294. Thus, in *People v. Mould*, 37 N. Y. App. Div. 35, where a riparian owner on the Hudson river, without a grant from

the state of New York, built a pier in the shoal water adjoining his premises to reach the navigable portion of the stream, it was held that the state could not, without showing a public necessity therefor, compel the removal of the pier, where the structure did not affect navigation, or any public right or interest, and was not shown to be an actual nuisance. This case overruled *People v. Mould*, 24 Misc. Rep. 287, 52 N. Y. Supp. 1032, an action to remove the purpresture, in which it was held that the erection of wharves and landing places by the owners of the adjacent upland on the soil of the state under tide water constitutes a purpresture which may be abated at the action of the attorney general. It was not denied, however, in *People v. Mould*, 37 N. Y. App. Div. 35, that the wharf or pier was built by the owner at the risk of interference by the state; that his right to build the pier was subject to the superior right of the state; that if the state required the land for any legitimate purpose it was entitled to its possession; and that he took the risk of interference on the part of the state if his pier in any way should interfere with or endanger the rights or interests of the general public. It will be observed that the structure erected by the defendant was not in a harbor or navigable portion of the river, but was built in the shoal water near the shore, to enable the defendant to reach the navigable part of the river; and the case was one in which the state arbitrarily asked to have the defendant's pier removed without claiming any injury whatever therefrom.

Such cases, however, are to be distinguished from those in which a structure, like a wharf or pier, is built in a harbor or navigable part of a river and necessarily interferes, or may interfere, with navigation. In such cases, the riparian owner has no rights to assert, such as the necessity of reaching navigable water, and any such erection in a harbor or navigable river without a license is, therefore, deemed an encroachment upon the property of the sovereign, or, as it is termed in the language of the law, a purpresture, which he may remove at pleasure, whether it tends to obstruct navigation or not: *Weber v. Board of Harbor Commrs.*, 18 Wall. 57, 65; *Knickerbocker Ice Co. v. Shultz*, 116 N. Y. 382, 387; *The Idlewild*, 64 Fed. Rep. 603, 605. This question has received close attention in a comparatively recent English case wherein the earlier authorities are cited and discussed: *See Attorney General v. Terry*, L. R. 9 Ch. App. 423. This case is authority for the proposition that, if a wharf-owner drives piles into the bed of a river, and proceeds to extend the wharf so as to occupy three feet out of a breadth of about sixty feet available for navigation, such structure is an obstruction which may be restrained at the suit of a municipal corporation empowered by act of parliament to remove obstructions. An owner of land bordering on a public navigable river has no right to erect on the bed of the river, for the benefit of his own trade, any structure, whether it will actually obstruct navigation or not; and its erection cannot be justified on the ground of benefit to his own trade, for that is too remote to be held for the advantage of the public generally: *Attorney General v.*

Terry, L. R. 9 Ch. App. 423, disapproving *Rex v. Russell*, 6 Barn. & C. 566.

A railroad unlawfully constructed in the Golden Gate Park, of San Francisco, is a purpresture, for the title to that park is in the city and county of San Francisco, in trust for the use of the public: *People v. Park etc. R. R. Co.*, 76 Cal. 156. But the use of a street in a city for a railroad track, in such a manner as not to abridge or obstruct the right of passage and repassage for other purposes, is not such an exclusive appropriation of it as to amount to a purpresture, or a nuisance: *Drake v. Hudson River R. R. Co.*, 7 Barb. 508, 548.

An encroachment upon a public street is a purpresture, and a city has no right to grant away, by ordinance, a strip of land five feet in width and eighty-five feet in length, for an area and stairways in connection with the basement of a building to be erected upon the adjacent lot flush with the lot line, as such area will constitute a purpresture: *Smith v. McDowell*, 148 Ill. 51. An unauthorized encroachment, by private persons, upon the streets of the city of Washington is a purpresture: *United States v. Cole*, 7 Mackey, 504, showing that authority to make projections from the building line of a street or avenue in front of a private holding in a city, does not confer authority to make projections from something which cannot be considered a building line.

A riparian owner cannot appropriate any part of a navigable stream, which is a public highway, by erections or obstructions of a continuous character. He cannot continuously moor rafts of timber in front of his land, for that constitutes an illegal encroachment or purpresture: *Moore v. Jackson*, 2 Abb. N. C. 211. So, cribs or piers placed in a harbor may be condemned as unlawful purprestures where they necessarily interfere with navigation, and produce, or may produce, an injury to the public: *People v. Vanderbilt*, 26 N. Y. 287; 28 N. Y. 396; 84 Am. Dec. 351; *People v. New York etc. Ferry Co.*, 68 N. Y. 71; and the same is true of a clubhouse placed on one of such piers: *People v. New York etc. Ferry Co.*, 68 N. Y. 71. It is otherwise, however, with waters not navigable. Thus, the owner in fee of land in Michigan, adjoining the "Rapids," so called, in Grand river, which are not navigable for any purpose, may construct anything he pleases between his shoreline and the thread of the stream, unless it injures some other riparian proprietor, or those having the superior right to the use of the water for hydraulic purposes: *Grand Rapids v. Powers*, 89 Mich. 94; 28 Am. St. Rep. 276. And a dam across the bed of a non-navigable stream is not a purpresture: *People v. Elk River etc. Lumber Co.*, 107 Cal. 221; 48 Am. St. Rep. 125.

If a bridge over a navigable stream is built with the assent of the lawful authorities, it is not a purpresture; and, even where it is constructed without lawful authority, it seems that it is not a purpresture, although it is per se a nuisance: *People v. Jessup*, 28 N. Y. App. Div. 524. The enclosing, by private parties, of public lands is a purpresture: *United States v. Brighton Ranch Co.*,

25 Fed. Rep. 465; 26 Fed. Rep. 218; State v. Goodnight, 70 Tex. 682.

Authority to Erect Purprestures.—That which is authorized by competent legal authority cannot, in law, constitute a purpresture or a nuisance: Davis v. Mayor, 14 N. Y. 506; 67 Am. Dec. 186; Trenor v. Jackson, 46 How. Pr. 389, 395; but a city has no right to legalize the use of a highway for private purposes. It cannot, therefore, by ordinance, vacate a strip of land along and in a public street, for the sole purpose of enabling a private person to occupy such strip of the street with a permanent structure or purpresture appurtenant to his building abutting upon the street; nor has a city any right to license a permanent obstruction of any part of a street: Smith v. McDowell, 148 Ill. 51. A building, or other similar structure, erected upon a street without legislative sanction, is a nuisance, and the local municipal authorities cannot give a valid permission thus to occupy the street, without express power conferred upon them by charter or by statute: Smith v. McDowell, 148 Ill. 51; People v. Jessup, 28 N. Y. App. Div. 524; and we have not noticed any case which admits a power even in the legislature to legalize the use of a highway, whether on land or on water, for an exclusively private purpose. In fact, we understand that the right of the public to the unobstructed use of a highway is paramount to any right of property in the state: People v. Vanderbilt, 26 N. Y. 287, 296; 28 N. Y. 396; 84 Am. Dec. 351; Trenor v. Jackson, 46 How. Pr. 389. On the other hand, the legislature has no power to authorize a city to make that a purpresture or nuisance which is not so, in fact, if, by so doing, the constitutional rights of any citizen in his person or property are infringed or destroyed: Grand Rapids v. Powers, 89 Mich. 94; 89 Am. St. Rep. 276; nor does the mere declaration, by a city council, that a certain structure is an encroachment or obstruction, make it so, nor can such declaration make it a nuisance unless it, in fact, has that character: Yates v. Milwaukee, 10 Wall. 497, 505.

Remedies.—In cases of encroachments upon public rights such as upon highways, rivers, and streets of cities or towns, which create a purpresture, or cause a public nuisance, it is well settled that courts of equity have jurisdiction, though the cases in which it is exercised are not frequent, and this jurisdiction is predicated upon the broad ground of preventing irreparable injury, interminable litigation, a multiplicity of suits, and the protection of rights: State v. Dayton etc. R. R. Co., 36 Ohio St. 434, 439; Attorney General v. London, 8 Beav. 270; 1 H. L. Cas. 440, 470. The remedy, in equity, to prevent the erection of a purpresture and public nuisance in a street or highway, or in a bay or navigable river, is by injunction, on behalf of the people, sued out by the attorney general or other proper officer: People v. Vanderbilt, 26 N. Y. 287; 28 N. Y. 396; 84 Am. Dec. 351; People v. St. Louis, 5 Gilm. 351; 48 Am. Dec. 339; Mayor v. Jaques, 30 Ga. 506, 512; Commissioners v. Long, 1 Pars. Cas. 143; Smith v. McDowell, 148 Ill. 51; People v. New York etc. Ferry Co., 68 N. Y. 71; State v.

Goodnight, 70 Tex. 682; People v. Park etc. R. R. Co., 76 Cal. 156; Attorney General v. Cohoes Co., 6 Paige, 133; 29 Am. Dec. 755; Savannah etc. R. R. Co. v. Shiels, 33 Ga. 601; Dunning v. Aurora, 40 Ill. 481; Hunt v. Chicago etc. Dummy Ry. Co., 20 Ill. App. 282.

Thus, if persons build a fence partly on their own land and partly on lands belonging to the government, an action may be maintained in equity to compel, by mandatory injunction, the removal of the fence from the government land, whether the act of the parties comes within the technical definition of purpresture or that of a public nuisance; and it is immaterial that the government title is conceded, and that the right of the government to proceed by an action of ejectment to remove the parties from occupancy of any of its land is unquestioned: United States v. Brighton Ranch Co., 26 Fed. Rep. 218; 25 Fed. Rep. 465. The state is not confined to an action of trespass to try title to enforce its right to remove an enclosure around its lands: State v. Goodnight, 70 Tex. 682. So, an unauthorized encroachment, by private persons, upon the streets of the city of Washington is a public nuisance as well as a purpresture which the United States, having the legal title to the streets for the public benefit, may prevent or remove by a mandatory injunction from a court of equity: United States v. Cole, 7 Mackey, 504. In proceeding by mandatory injunction to compel the removal of fences which enclose public free school land, the defendant can be compelled to remove such fences as he has constructed on his own land, or on public land, but he cannot be compelled to remove such portions of the fencing as are on the lands of others, although he may have been a party to their erection, unless the owners of the lands are parties to the suit. If, however, he is a part owner of the lands upon which the fences are found, either as partner or cotenant, and has been instrumental in creating the nuisance, he should be compelled to abate it, although his cotenant or partner is not a party to the proceedings, if such tenant or partner is beyond the reach of the process of the court: State v. Goodnight, 70 Tex. 682, 689.

The erection or continuance of a public nuisance may be restrained upon an information in equity by the attorney general or other law officer of the commonwealth, either ex officio or upon the relation of a private person: District Attorney v. Lynn etc. R. R. Co., 16 Gray, 242; Hunt v. Chicago etc. Dummy Ry. Co., 20 Ill. App. 282. "Although in some of the earlier cases," says Bigelow, C. J., in District Attorney v. Lynn etc. R. R. Co., 16 Gray, 242, 245, "this jurisdiction was sparingly exercised, yet in recent practice it seems to have been more frequently resorted to as affording a convenient and speedy remedy. Nor are we able to see that any serious objection exists to this method of reaching and restraining a public nuisance. By it a nuisance which is threatened or in progress can be arrested, which cannot be done by proceedings at law; an injunction is more complete in its operation, because it prevents future acts as well as restrains present nuisances; and it affords a more prompt and immediate relief than could be obtained by other process. It is, therefore, a salutary

power if exercised with discretion and confined within reasonable limits." A court of equity will not interfere, by injunction, to restrain or abate anything as a public nuisance, such as obstructions in highways and the like, unless the existence of the nuisance is clearly established upon full and satisfactory evidence. If the proof is conflicting and the injury to the public uncertain or doubtful, the court will withhold its interposition: *Dunning v. Aurora*, 40 Ill. 481; *District Attorney v. Lynn etc. R. R. Co.*, 16 Gray, 242, 245; for it is clear that one who comes into court on the ground of nuisance must show it. It may be observed, too, that statutory remedies, in such cases, designating the cases to which the statute shall be applied, are not exclusive, and that the remedy by injunction is cumulative. Hence, the remedy by injunction against unlawful erections or works within tide waters flowing into a harbor, is merely cumulative, and open to the harbor commissioners in any case falling within the statute giving a special remedy for such obstructions: *Attorney General v. Woods*, 108 Mass. 436; 11 Am. Rep. 380. Public policy requires that the body, or the individuals, clothed with the power of preventing nuisances in populous towns and crowded harbors, should not be disturbed in the exercise of that power, without they clearly transcend their authority: *Hart v. Mayor*, 3 Paige, 213.

In England, it is a part of the attorney general's common-law duty to institute proceedings by information in chancery to restrain and abate public nuisances and purprestures: *Attorney General v. Richards*, 2 Anstr. 603; *Attorney General v. Shrewsbury etc. Bridge Co.*, 21 Ch. Div. 752. A model information of this kind is set out in *Attorney General v. Burrige*, 10 Price, 350.

It has been held that a nuisance in a purpresture case must be an injury to the common right of the public, and that these questions can only be tested in an action at the suit of the people: *Knickerbocker Ice Co. v. Shultz*, 116 N. Y. 382, 389; but it has been held, on the other hand, that the erection of a wall in front of a building so as to encroach several feet upon the legal width of the street, and the filling in and leveling up of the space between the building and the wall, is a public nuisance, where the city has not expressly authorized the act, and that it may be abated by a private individual who is specially injured thereby in a manner not common to the public at large: *Wolfe v. Pearson*, 114 N. C. 621, 626, 635. The court, however, did not decide that anyone may abate a public nuisance, and called special attention to the qualification that there must be special injury: See *Commissioners v. Long*, 1 Pars. Cas. 143. If proceedings to abate a purpresture and public nuisance are instituted by a private individual, the gist of his right of action is, of course, the private injury, and he must allege and prove some special damage, different in kind from that suffered by the general public: See monographic note to *South Carolina Steamboat Co. v. Wilmington etc. R. R. Co.*, 57 Am. St. Rep. 695, treating of injunction by private party in cases of public nuisance; but the public may institute proceedings for the abatement

or prevention of the nuisance, irrespective of the question of pecuniary damages: *Smith v. McDowell*, 148 Ill. 51, 68.

As a purpresture or permanent encroachment of a street or harbor is a nuisance of itself, in law, a court of equity will leave the one who erected it to his remedy at law against those who have removed it as such: *Hart v. Mayor*, 3 Paige, 213; *Hibbard v. Chicago*, 173 Ill. 91, affirming the same case, 59 Ill. App. 470. Even the fact that, at the time permission is given to erect upon a public street a permanent structure, its erection would not inconvenience the public, and that the erector expended a large sum of money in constructing it, does not give the erector a right to maintain the structure when the public authorities demand its removal, or to have the question as to whether it is an inconvenience to the public heard either by a court of equity or a court of law, for city authorities cannot grant a permanent use of its streets to private parties, as such use is a purpresture. Such a structure is a nuisance, and its removal being demanded by the municipal authorities, it may be treated as a nuisance: *Hibbard v. Chicago*, 59 Ill. App. 470, affirmed in same case, 173 Ill. 91. Where a purpresture amounts to a nuisance, a court of equity will not inquire how the public good will be affected by leaving it, but will interpose and abate it: *People v. St. Louis*, 5 Gilm. 351; 48 Am. Dec. 339.

The remedy, in equity, for the abatement and removal of a purpresture is, in accordance with the doctrine announced in the principal case, a suit brought on behalf of the people by the attorney general, or other proper officer, for that purpose, and it may be enjoined or abated whether it is injurious or not and irrespective of the question as to whether it is or is not a public nuisance: *Smith v. McDowell*, 148 Ill. 51, 54; *Attorney General v. Shrewsbury*, 21 Ch. Div. 752; *Attorney General v. Cohoes Co.*, 6 Paige, 133; 29 Am. Dec. 755; *People v. St. Louis*, 5 Gilm. 351; 48 Am. Dec. 339. The attorney general in England, or the people here, have a right to enjoin illegal acts affecting the public by whatever name they may be called. Thus, if such an act is being committed, and it interferes with a public highway or a navigable stream, an action to restrain the commission of the act may be maintained and without adducing any evidence of actual injury to the public: *Attorney General v. Shrewsbury etc. Bridge Co.*, 21 Ch. Div. 752. Neither is it necessary, when an erection in a harbor, street, or river, is itself an invasion of the public rights, that is, when it is a nuisance per se, that the fact of its being a nuisance should first be established at law, as a preliminary to the issuance of an injunction. The public is entitled to the speediest and most effectual way to prevent the threatened invasion of its rights, and if there has been a clear invasion of the common right, the unauthorized taking for private use of that which belongs to the public, as by the permanent occupation of a public street or a portion of it, an injunction will issue, at the instance of the proper officer, on behalf of the public, to prevent the creation and maintenance of the nuisance: *Smith v. McDowell*, 148 Ill. 51, 60.

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In cases where the erection or obstruction is productive of some benefit to the local community, there is sometimes manifested a disposition to justify its continuance: *People v. St. Louis*, 5 Gilm. 351; 48 Am. Dec. 339; *People v. Davidson*, 30 Cal. 379; but the courts generally have adhered inflexibly to the strict and only safe rule of the common law, that, in cases of purpresture, the public rights are to be jealously guarded and not infringed upon under any pretext, or by any specious pretense of benefit: *Moore v. Jackson*, 2 Abb. N. C. 211, 215. "Nor is the degree of the obstruction to be measured or considered. It will not avail to say there is room enough left for all the public. There is no power to abridge the natural rights of the public in the least degree; for, if the imperfect judgment of man, however august the tribunal may be, is once allowed to measure the degree of obstruction that may lawfully exist, the public would eventually find that private enterprise had usurped the prerogatives and rights which should never have been impaired": *Moore v. Jackson*, 2 Abb. N. C. 211, 215, per Sheldon, J. In this case, his honor was speaking of rafts of logs continuously moored on a navigable river, but the same thing may be said with respect to a purpresture in a street. It is, as a matter of law, a public nuisance, and, in proceedings to abate it, the matter of convenience, or that sufficient of the street remains to still accommodate the public travel, cannot be considered: *Smith v. McDowell*, 148 Ill. 51. A private person should not be permitted to make an unlawful encroachment upon public works, upon a mere opinion, although supported by oath, that it will not be injurious to the public, but the purpresture should be enjoined at the instance of the public officers who have charge of such works, especially where they believe that it will be injurious to such works: *Attorney General v. Cohoes Co.*, 6 Paige Ch. 133; 29 Am. Dec. 755.

A bill to restrain a purpresture can be maintained by a municipal corporation, particularly if there is an immediate injury to its property, as obstructions to a public highway in the municipality common to the corporators, and the citizens of the commonwealth generally: *Commissioners v. Long*, 1 Pars. Cas. 143; *Philadelphia v. Crump*, 1 Brewst. 320. In *People v. Park etc. R. R. Co.*, 76 Cal. 156, it is held that, if a purpresture in a public park, the title of which is held in trust for the public, is not a nuisance, the remedy is not by the people who are not injured, but by the holder of the legal title. Quo warranto is not a remedy for purpresture, for a judgment of ouster will not take down a structure, nor can one of seizure pass the property in it to the state: *People v. Lake Street etc. R. R. Co.*, 54 Ill. App. 348, 369. If a wharf is erected in the bay of San Francisco beyond the city front, thus creating a purpresture or encroachment, the right to recover possession is in the people, and not in the owner of the land adjoining on the city front: *Dana v. Jackson Street Wharf Co.*, 31 Cal. 118; 89 Am. Dec. 164; and the remedy is held to be ejectment, unless such wharf is a nuisance: *People v. Davidson*, 30 Cal. 379. The state may maintain ejectment where a wharf is constructed

without authority beyond low-water mark: *Coburn v. Ames*, 52 Cal. 385; 28 Am. Rep. 634. Where the public authorities seek to recover land alleged to have been reclaimed from the sea by encroachment or purpresture, and the defendant disputes the title of the public between present high and low-water mark, a court of chancery will direct issues to try that right before inquiring how far, in former times, the ancient high-water mark extended inland: *Attorney General v. Chamberlaine*, 4 Kay & J. 292.

Another remedy for a nuisance by encroaching on a public highway, whether on land or on water, is by indictment: *King v. Wright*, 3 Barn. & Adol. 681; *King v. Tindall*, 6 Ad. & E. 143; 1 Nev. & P. 719; *Commonwealth v. Church*, 1 Pa. St. 105; 44 Am. Dec. 112; *Commonwealth v. Wilkinson*, 16 Pick. 175; 26 Am. Dec. 654; monographic note to *South Carolina Steamboat Co. v. Wilmington etc. R. R. Co.*, 57 Am. St. Rep. 693, treating of indictment or information as a remedy for the unlawful obstruction of navigable waters. Thus, iron posts, from two to three inches in diameter, driven into the bed of a navigable water course, and projecting several feet above water, are a nuisance, per se, and the offense of putting them into such watercourse is indictable; and on the trial of such indictment it is not necessary to prove that actual damage or injury has been suffered by any vessel, et cetera. It is enough if the acts charged have rendered navigation less secure and expeditious: *State v. Narrows Island Club*, 100 N. C. 477; 6 Am. St. Rep. 618. So, a fruitstand, a permanent structure, materially encroaching on a sidewalk of a public street in a thickly inhabited part of a city, is an indictable nuisance, whether it essentially interferes with the comfortable enjoyment of the sidewalk or not: *State v. Berdetta*, 73 Ind. 185; 38 Am. Rep. 117. In *King v. Russell*, 6 Barn. & C. 566, the jury were directed by the judge to acquit the defendants if they thought that the abridgment of the right of passage occasioned by certain erections in the Tyne river was for a public purpose, and produced a public benefit, and if the erections were in a reasonable situation, and a reasonable space was left for the passage of vessels on the river. But this case was disapproved in *Attorney General v. Terry*, L. R. 9 Ch. App. 423, 426, and is not good law. Upon the trial of an indictment for a nuisance caused by erecting an embankment in a navigable river, near a port, a finding by the jury that the embankment is a nuisance, but that the inconvenience is counterbalanced by the public benefit arising from the alteration, amounts to a verdict of guilty, for it is no defense to such an indictment that, although the work is, in some degree, a hindrance to navigation, it is advantageous, in a greater degree, to other uses of the port: *King v. Ward*, 4 Ad. & E. 384.

MORRIS v. CAUDLE.

[178 ILLINOIS, 9.]

DEEDS—CONVEYANCE.—AN UNBORN CHILD HAS NO SUCH EXISTENCE as enables it to take a present grant of lands by deed, although *en ventre sa mere* when the deed is executed.

DEEDS—DELIVERY.—If one of the grantors in a deed merely placed it in the hands of the other for safekeeping, it cannot be held to have been delivered to a grantee who was born but afterward died while the deed was thus in the grantor's possession.

DEEDS—CONVEYANCE TO UNBORN GRANTEE.—A deed to a grantee in being and to his unborn brother or sister, delivered and recorded after the birth and death of a sister, is valid as to the grantee living at the time of the execution of the deed, but not as to such deceased grantee.

E. Beecher and Creighton & Thomas, for the appellants.

Creighton, Kramer & Kramer, and T. W. Bonham, for the appellees.

¹⁰ **CRAIG, J.** This was a bill for partition, brought by the appellants in the circuit court of Wayne county, wherein they prayed for partition of the lands described in the bill, as heirs at law of Samuel Caudle, deceased. Amy E. Caudle put in an answer to the bill, in which she denied that Samuel Caudle was the owner and seised of the lands named in the bill at the time of his death, and alleged "that on November 26, 1884, said Samuel Caudle and this defendant, who was at that time his wife, by warranty deed of the date conveyed the lands above described to the defendants Isham E. Caudle and Bertha M. Caudle, reserving unto themselves their life estates therein, which said deed was on said date duly acknowledged, and afterward, on the twenty-second day of July, 1885, filed for record in the recorder's office of the said county of Wayne, and that by reason of the said conveyance the entire estate, title, and interest which the said Samuel Caudle had prior to the date of the said conveyance in the said lands, passed into this defendant and the said Isham E. Caudle and Bertha M. Caudle." The answer further denied that the complainants in said bill and the defendants therein, except this defendant and the said Isham E. Caudle and Bertha M. Caudle, were seised in fee, as tenants in common by descent from said Samuel Caudle, of the said premises or had any interest therein, and alleged that the same belonged solely to Isham E. Caudle and Bertha M. Caudle, subject to the life estate of Amy E. Caudle. The answer of Isham E. Caudle and Bertha M. Caudle set up the same defense as that of defendant Amy E. Caudle.

¹¹ Upon the coming in of the answer the appellants filed an amended bill, in which they alleged that the deed, claimed to have been made by the said Samuel Caudle on November 26, 1884, conveying said described lands to Isham E. Caudle and Bertha M. Caudle, was never delivered to the grantees therein; that said Bertha M. Caudle was not at that time in being, but was born on the third day of January, 1890; that the said deed purported to be made to "Isham E. Caudle and his one brothers and sisters"; that he, said Isham E. Caudle, at that time had no other brothers and sisters other than the defendants and complainants in this bill, as Bertha M. Caudle, one of the defendants, was not at that time born; that the only persons said term "one brothers and sisters" could have referred to were the other defendants and the complainants in this bill, except the said Bertha M. Caudle, who was not then born and was not born until January 3, 1890, afterward; that said deed was never delivered and was never intended to be delivered to said Isham E. Caudle, or any other of the defendants or complainants in this bill. It was also set up in the amended bill that at the time of the making of said deed the said defendant Amy E. Caudle was pregnant and a short time after the making of said deed gave birth to a female child, to wit, on or about the seventh day of January, 1885; that the said child was born after the making of said deed, and was named Amy E. Caudle, but said child, Amy E. Caudle, died on or about March 11, 1885.

To the amended bill Isham and Bertha M. Caudle filed a plea, in which they set up that in May, 1896, Amy E. Caudle, as guardian, filed a petition with the Wayne county court for leave to sell said lands as the property of Isham E. Caudle and Bertha M. Caudle; that thereafter Samuel Caudle filed his intervening petition in said court, wherein he stated that he and his wife had deeded to Isham E. Caudle and his brothers and sisters the land mentioned in the petition of Amy E. Caudle, ¹² together with other lands, by which statement he intended to admit, and did admit, that he signed, sealed, acknowledged, and delivered the deed referred to in complainants' bill; that by the admissions above pleaded the said Samuel Caudle and his heirs, the complainants herein, were and are estopped from denying the execution and delivery of the deed.

From the foregoing statement of the pleadings it appears the appellants predicate their right of recovery on the ground that Samuel Caudle died seised of the lands in controversy and that they inherited from him; that the deed executed Novem-

ber 26, 1884, by Samuel Caudle and wife to "Isham E. Caudle and his one brothers and sisters" was never delivered, and hence the lands did not pass by the pretended conveyance. But appellants, from their argument filed in this court, seem to have changed their position, and they now claim that the deed of November 26, 1884, was delivered, and that the title to the land passed under that deed to Isham E. and Amy E. Caudle, an unborn child; that upon the death of Amy E. Caudle they became possessed of an undivided interest in the land as her heirs.

There is no substantial dispute between the parties in regard to the facts connected with the execution of the deed in question, nor in regard to what was said and done in regard to the delivery of the instrument. It appears from the record that Samuel Caudle, the grantor in the deed, was a man advanced in years, who had raised a large family of children, and, having lost his wife, he had married a young woman. As a result of the second marriage, one child had been born before the deed was made, another was expected to be born within four or five weeks, and others might reasonably be expected at regular periods so long as the health and vigor of the grantor continued. Having raised and educated his children by his first wife, and being desirous of making some provision for his children of the second marriage, he called upon ¹³ a justice of the peace with a view of making a will, in which he desired to devise the land in question to Isham E. Caudle, a son of the second marriage, and such other children as might thereafter be born. Upon consultation with the justice the latter told Caudle that a will might be broken. He then decided to make a deed, and directed the squire to prepare a deed conveying the land to "Isham E. Caudle and his own brothers and sisters." The justice prepared the deed as directed, but in writing the name of the grantees in the deed he used the word "one" instead of "own." After the deed was executed and acknowledged, the grantor, Caudle, took the instrument and carried it away. Upon arriving at his home he gave it to his wife, saying, "Mother, here's your deed; take care of it."

Under the facts as shown by the record the question presented is, whether the unborn child, Amy E. Caudle, took title to the land under the deed of November 26, 1884, executed by Samuel Caudle and his wife to Isham E. Caudle and his own brothers and sisters. A grantee must be in esse at the time the deed is executed, otherwise no title will pass by the deed: 9 Am. & Eng. Ency. of Law, 2d ed., 131. In Tiedeman on

Real Property, section 673, the author says: "The common law did not treat children *en ventre sa mere* as persons in esse for the purpose of holding or acquiring property. This capacity only attached upon their birth alive. Consequently, by the old common law, children born after the death of the ancestor were precluded from participating with the others in the distribution of the intestate's estate. But this harsh rule has now been generally changed by statute." There is no doubt in regard to a posthumous child being entitled to inherit property by descent under our existing laws and to also take by devise, but an unborn child has no such existence as will enable it to take a present grant of lands by deed. Indeed, in *Faloon v. Simshauser*, 130 Ill. 649, we held that in case of a grant of an immediate estate in possession the grantee must be in esse, and a deed of ¹⁴ that kind may be avoided by showing the grantee came into being subsequently to the delivery of the deed. In speaking in regard to the necessity of the existence of a grantee in a deed of conveyance Tiedeman on Real Property, section 797, says: "For the grant of an immediate estate in possession it is necessary that the grantee be in esse, and if it be shown that the grantee came into being after the conveyance it will avoid the deed."

There is another fatal objection to the deed—it was never delivered to the unborn grantee or to any person for her. As has been seen, the deed was executed November 26, 1884. The child was born January 7, 1885, and died March 11, 1885. After the deed was executed, the grantor, Caudle, took it home with him and then handed it to his wife, and it was kept in the house where he and his wife resided, under his control, until the last of July, 1885, when the wife sent it to the county seat to be recorded. If, upon the execution of the deed, Caudle had delivered it to his wife to be by her held for the grantees therein named we would not hesitate to hold that the instrument was delivered; but where one of the grantors merely places the deed in the hands of the other grantor for safekeeping, as was the case here, and the instrument is kept in the possession and under the control of the grantors, the deed cannot be held to be delivered. Some time after the death of the child the deed was placed on record, and thereafter, in May, 1896, the grantor admitted, as shown by the pleadings, that he had executed and delivered the deed. This rendered the deed valid as to the grantee Isham E. Caudle, but had no bearing as to the rights of the unborn child or any person claiming under her.

As the appellants failed to establish title to the premises in question the court properly dismissed the bill, and the decree will be affirmed.

DEED—CONVEYANCE.—A child en ventre sa mere cannot take under a deed of gift to the donor's grandchildren: *Dupree v. Dupree*, Busb. Eq. 164; 59 Am. Dec. 590. See extended note to *Harper v. Archer*, 43 Am. Dec. 474, on the question of unborn children, when they will be regarded as in being. Right of a posthumous child to recover for injury to its parent: *Nelson v. Galveston etc. Ry. Co.*, 78 Tex. 621; 22 Am. St. Rep. 81.

DEEDS—DELIVERY.—The question whether a deed has been delivered or not is one of intention. Delivery may be effected by words without acts, or by acts without words, or by both: *Dela-plain v. Grubb*, 44 W. Va. 612; 67 Am. St. Rep. 788; *Curry v. Colburn*, 99 Wis. 319; 67 Am. St. Rep. 860; *Appleman v. Appleman*, 140 Mo. 309; 62 Am. St. Rep. 732; see monographic note to *Brown v. Westerfield*, 53 Am. St. Rep. 537-556. What is a sufficient delivery by a parent to an infant child: *Hayes v. Boylan*, 141 Ill. 400; 83 Am. St. Rep. 326.

CARPENTER v. CAPITAL ELECTRIC COMPANY.

[178 ILLINOIS, 29.]

EASEMENT OF TRAVEL—ERECTION OF ELECTRIC LIGHT WIRES AND POLES.—An easement of travel over a private alley, the fee of which is in the abutting owners, confers no right to have electric light wires and poles erected therein, and over the fee of an abutting owner, without his consent.

MUNICIPAL CORPORATIONS—STREETS AND ALLEYS—RIGHT TO STRING ELECTRIC LIGHT WIRES IN.—An electric company authorized by a city to erect electric light wires and poles in the public streets and alleys has no authority to erect such poles and wires in a private alley without the consent of the owner of the fee.

EASEMENT OF TRAVEL IN PRIVATE ALLEY—ERECTION OF LIGHT WIRES AND POLES—ADDITIONAL SERVITUDE.—If an easement of travel only exists over a private alley, the fee of which is in the abutting owners, the erection of electric light wires and poles therein and over the fee of an abutting owner without his consent, for the purpose of supplying light to a private party, imposes an additional servitude, for which the owner of the fee may demand compensation.

EQUITY JURISDICTION—REMOVAL OF ELECTRIC LIGHT POLES FROM PRIVATE ALLEY.—The owner of the fee in a private alley, subject only to an easement of travel, may maintain a suit in equity to compel the removal of electric light wires and poles erected therein without his consent.

C. A. Keyes, for the appellants.

Brown, Wheeler, Brown & Hay, for the appellee.

²² **MAGRUDER, J.** The alley in the rear of the building of appellants is a private alley, created for the use of the appellants and of the owners of the two lots lying west of the lot

of the appellants. It is alleged in the bill that the easement, consisting of the use of said alley, as created by the original deeds conveying the property, was so created for the benefit of the property of the appellants, and of the two pieces of property adjoining the property of the appellants ⁸³ on the west. It is admitted in the answer that the alley was reserved, as alleged in the bill, for the benefit of the properties aforesaid, and for a right of way to and from the rear of said premises. The words contained in the deeds, to wit: "Ten feet in width on the north end to be used as an alley," taken in connection with the allegations of the bill and the admissions of the answer as above set forth, clearly indicate that the alley is a private alley. The purpose of the reservation in the deeds was not for the use of the public, but for the use of the parties to the deeds; and hence, the public acquired no right to the use of the alley; and no public easement was created therein. The fee of that portion of the alley, ten feet wide and thirty-six feet long in the rear of the building of the appellants, was in the appellants, as owners of the abutting property, subject, however, to the right of the property owners on the west to use the strip of land reserved for the purposes of an alley. In other words, the title is in the appellants, but the property owners on the west have the right of passage over the alley; and the title of appellants is burdened only with said right of passage or easement. The question then presented is, whether the appellee had the right to extend electric wires over the portion of the alley in the rear of the building of appellants, for the purpose of furnishing light to the occupants of the building lying west of the property of appellants, without the consent of the appellants.

It is conceded that the appellee company had a grant from the city to erect its poles and string its wires for the purpose of furnishing electric light along the streets and alleys of the city. But the alley here was not a public alley, over which the city had control, but was a private right of way, the use of which was confined to the appellants and the owners of the two properties, adjoining them on the west: *Garrison v. Rudd*, 19 Ill. 558. It served as a means of accommodation to a limited neighborhood ⁸⁴ for local convenience: 2 Am. & Eng. Ency. of Law, 2d ed., 159. It is also to be observed that here the electric wires passing over and above the alley were so placed for the purpose of furnishing light to private persons and not for the purpose of furnishing light to the public. It seems to be clear that the use of this alley for the purpose thus indicated imposed

a new and additional burden upon the fee owned by the appellants, subject to the easement consisting in the use of the alley. The erection and use of telegraph poles in a public highway, where the abutting landowner is the owner of the fee in the highway, constitutes a new servitude, which entitles such owner to recover damages for the additional use thus created: Board of Trade Tel. Co. v. Barnett, 107 Ill. 507, 47 Am. Rep. 453. The principle, which is applied to the erection of telegraph poles on a public highway, where the fee of the highway to the center thereof is in the abutting owner, and to the stringing of wires upon said poles over the highway, applies to a private alley like that here under consideration, where the fee of the ground is in the owner of the property abutting upon the alley. It is immaterial to inquire whether the damages are great or small. It is sufficient that the property rights of the appellants are interfered with in a manner detrimental to their interests, as the owners of the fee. The taking possession of their land forcibly and against their will comes within the constitutional inhibition that private property shall not be taken or damaged without just compensation: Board of Trade Tel. Co. v. Barnett, 107 Ill. 507, 47 Am. Rep. 453. Nor is it material that the telegraph wires are some fourteen feet above the surface of the ground. The owner of land, unless restricted by covenant or custom, has the complete control of the soil, together with the space above and below, so far as he may choose to use it: Tanner v. Volentine, 75 Ill. 624. The uncontradicted evidence tends to show that the presence of the wires in the alley would operate as a hindrance to the fire department in case it should ³⁵ become necessary to extinguish a fire in the building of the appellants, and also that the presence of the wires in the alley would have a tendency to obstruct the conveyance of freight or other material to and from the second story or upper window in the rear part of the building of appellants.

It is laid down in some of the authorities that the erection of electric poles by city authorities for the purpose of lighting the public ways and places is not a taking of private property for public use, upon the ground that the use of the streets for this purpose is in the nature of an exercise of the police power by the city. But when an electric light company erects poles or strings wires, not for the purpose of lighting public ways and places, but for the purpose of supplying light to private individuals and firms in the transaction of its own corporate and commercial business, such erection of poles and stringing of wires constitute an additional easement in the highway or pri-

vate alley for which the owner of the fee may demand compensation: *Haverford Electric Light Co. v. Hart*, 13 Pa. Co. Ct. 369; *Tiffany v. United States Illuminating Co.*, 51 N. Y. Sup. Ct. 280; *Croswell's Law Relating to Electricity*, sec. 126.

It has been held that the laying down of gaspipes or other pipes for the purpose of supplying the city and its inhabitants with light is a legitimate use of the streets, for which the abutting owner is not entitled to compensation: 2 *Dillon on Municipal Corporations*, 4th ed., sec. 691, note; *Elliott on Roads and Streets*, 305; *Chicago etc. R. R. Co. v. Street R. R. Co.*, 156 Ill. 255. And it has been said that the legal relations of electric light wires through the streets of a city must be analogous to those of gaspipes, upon the ground that both the electric light wires and the gaspipes are means of furnishing light from a central source of supply, and that if the laying of gaspipes in a city street is not an additional servitude on the land of the abutting owner, ³⁰ the same should be true of laying tubes for electric light wires, or placing posts in the ground for carrying the wires overhead: *Keasby on Electric Wires*, 86. This doctrine, however, applies only to such public streets and alleys as are under the control of the municipality, and where the light to be transmitted by the wires or pipes is for the benefit of the public, as well as of property owners along the line of the street. The doctrine, however, can have no application to such a private alley as is that in the case at bar, where the fee of the ground in the alley is in the abutting owners, and where the easement, consisting of the use of the alley, is confined to a limited number of property owners whose lands abut upon the alley. When the strip of land in question was reserved in the original deeds for the purpose of an alley, it was intended for the ordinary purposes of passage and repassage, and not for the erection of any such permanent obstruction as the stringing of wires in the manner shown in the present record.

It is said by the appellee that equity has no jurisdiction to entertain the present bill. We regard this contention as without force. Where a party has a right of way over, or an easement in, certain real estate, and the same is obstructed, equity has jurisdiction, as the injured party has no adequate remedy at law: *McCann v. Day*, 57 Ill. 101. Moreover, the injury complained of is one of a continuing or permanent nature, for which an action at law would not afford a complete and adequate remedy: *Sterling's Appeal*, 111 Pa. St. 35, 56 Am. Rep. 246.

The decree of the circuit court is reversed, and the cause is remanded to that court for further proceedings in accordance with the views herein expressed.

PRIVATE WAYS.—When a way is public or private: *Butte etc. Ry. Co. v. Montana etc. Ry. Co.*, 16 Mont. 504; 50 Am. St. Rep. 508. As to the proper use of private ways, see monographic note to *Bakeman v. Talbot*, 88 Am. Dec. 279.

EASEMENT OF TRAVEL—ADDITIONAL SERVITUDE—RIGHT TO ERECT POLES AND TO STRING WIRES IN STREET WHERE FEE IS IN ABUTTING OWNER.—The public acquires a mere right of passage over a highway; the freehold, and all the profits of the soil, belong still to the proprietor from whom the right of passage was acquired: *Western Union Tel. Co. v. Williams*, 86 Va. 696; 19 Am. St. Rep. 908. The easement of the public is the right to use and improve the street for the purposes of a highway only: *White v. Northwestern etc. R. R. Co.*, 113 N. C. 610; 37 Am. St. Rep. 639; *Allen v. Boston*, 159 Mass. 324; 38 Am. St. Rep. 423. The appropriation of a public highway to the purposes of a telegraph line is a new use: *Daily v. State*, 51 Ohio St. 348; 46 Am. St. Rep. 578. The erection of poles and stretching of wires upon a highway is an additional servitude, for which compensation must be made to the owner of the fee, and the legislature has no power to authorize the imposition of such servitude, except on condition that due compensation shall be made to the owner of lands covered by such highway: *Chesapeake etc. Tel. Co. v. Mackenzie*, 74 Md. 86; 28 Am. St. Rep. 219, and monographic note thereto on telegraph and telephone poles and wires in streets and highways and across private property. See, also, *Buffalo v. Pratt*, 131 N. Y. 293; 27 Am. St. Rep. 592. The consent of the proper officers of a county that a telegraph line be constructed and maintained upon a public highway is not binding on a landowner, who owns the fee to the highway, who, if he be not properly compensated, may maintain an action against the corporation maintaining such line: *Postal Tel. Cable Co. v. Eaton*, 170 Ill. 513; 62 Am. St. Rep. 390.

KNAPP, STOUT & Co. v. McCAFFREY.

[178 ILLINOIS, 107.]

CARRIERS—BUSINESS OF TOWING.—The owner of a steamboat engaged in the business of towing is not a common carrier, and has no specific lien as such for transportation charges upon the goods carried.

BAILMENTS—LIEN OF BAILEE—BUSINESS OF TOWING.—A carrier of goods by means of a towboat is a bailee of the goods transported, and as such has a lien thereon for his hire while they remain in his possession.

BAILMENTS.—A BAILEE'S LIEN EXTENDS to all goods delivered under one contract, although they may be delivered in different parcels and at different times, and the bailee may detain any portion of them as a lien upon the whole, even if he has delivered a part.

BAILMENTS—LIEN OF BAILEE—BUSINESS OF TOWING.—If a person engaged in towing a lumber raft divides it, and leaves part of it en route under direction of the owner, in order

to hasten the delivery of the remainder, he does not thereby lose his lien for towing upon the part left en route, which he is prevented from delivering by a purchaser from the original owner.

BAILMENTS—BAILEE'S LIEN—WAIVER.—A bailee's lien for towing a lumber raft is not waived by the fact that the bailee has not insisted upon the payment of towing charges before delivering other rafts under the same contract, which is silent as to when such charges should be paid; nor is such lien waived by merely filing a written claim for such charges against the insolvent owner of the raft when such claim expressly asserts the bailee's right to the lien and reserves the right to enforce it.

BAILMENTS—BAILEE'S LIEN—EQUITY JURISDICTION TO ENFORCE.—A bill may be maintained in equity to establish and enforce a bailee's lien on property in his possession when both his possession and his right to a lien are denied by the purchaser from the original owner, who threatens to take forcible possession.

BAILMENTS—BAILEE'S LIEN—EQUITY JURISDICTION—ESTOPPEL TO DENY.—If a bill in equity is filed to enforce a bailee's lien, and the defendant therein obtains an order giving him possession of the property upon his giving bond, he is thereby estopped from subsequently denying the jurisdiction of the court, although such order expressly stipulates that it is not to be construed as an admission of jurisdiction.

ADMIRALTY JURISDICTION—EXCLUSIVENESS.—The jurisdiction of admiralty courts to administer relief by proceedings in rem is exclusive; but such proceedings are against the property only, and not against persons.

BAILMENTS—BAILEE'S LIENS—EQUITY JURISDICTION.—If a bill in equity is filed to enforce a bailee's lien for towage charges on a lumber raft, and the defendant therein procures an order giving him possession of such raft upon his giving bond, the proceeding becomes one in personam, over which equity has jurisdiction and which is beyond the jurisdiction of an admiralty court.

Bill in equity by J. McCaffrey against the Schulenburg & Boeckeler Lumber Company and its assignees, and Knapp, Stout & Company, to establish and enforce a bailee's lien upon a half raft of lumber. The Knapp company obtained an interlocutory decree, under which it gave bond and took the raft away. After a decree by the circuit court dismissing the bill, McCaffrey appealed to the appellate court, and that court reversed the decree of the circuit court, and remanded the case, with directions to enter a decree for a specified amount in favor of McCaffrey. On April 6, 1893, the Schulenburg company and McCaffrey entered into a written agreement by which the latter was to tow lumber for the former at certain fixed prices. McCaffrey towed many rafts of lumber under the contract, and, prior to October 6, 1894, the Schulenburg company was largely indebted to McCaffrey for towing charges under such contract. On October 13, 1896, McCaffrey began to tow raft No. 10 of that year. The water being very low and the Schulenburg company being in haste for its lumber, it directed that the raft be divided into halves at Boston bay, one-half fastened there

and the remainder taken to St. Louis and delivered. These directions were followed and one-half of the raft delivered November 2, 1896. The Schulenburg company at that time paid McCaffrey twelve hundred and fifty dollars, which he applied on the amount due him for the towage of other rafts. The Schulenburg company directed that one-half of such raft be left in Boston bay until the following spring, and delivered to McCaffrey two additional lines, to be used by him in making that part of the raft more secure, and this was done before November 5, 1896. On that day the Schulenburg company sold said half of such raft to the Knapp company and on November 9, 1896, the Schulenburg company made an assignment at St. Louis for the benefit of its creditors. McCaffrey offered both to the Schulenburg company and to the Knapp company to tow said raft to St. Louis under his contract, but the Knapp company forbade his doing so.

Wise & McNulty, and Bassett & Bassett, for the appellant.

Scott & Cook, and Brock & Graham, for the appellee.

112 PER CURIAM. The opinion of the appellate court, as delivered by Mr. Justice Dibell, is, in part, as follows:

"The first question is, whether McCaffrey had a lien on the raft for his towing charges while the raft was in his possession. He had no lien by contract, for that instrument gave him none. A common carrier has, at common-law, a specific lien upon the goods carried, for his charges in transporting them (13 Am. & Eng. Ency. of Law, 580), and our statute (chapter 141) provides a means for enforcing it; but the weight of authority is, that the owner of a steamboat engaged in the business of towing is not a common carrier (Caton v. Rumney, 13 Wend. 387; Alexander v. Greene, 3 Hill, 9; Story on Bailments, sec. 496; Anderson's Law Dictionary, tit. 'Tow Boat'); and much more is this so where, as here, he tows only for a single party. Stephen thus defines bailment: 'Bailment is the delivery of goods for some purpose, upon a contract, express or implied, that after the purpose has been fulfilled they shall be redelivered to the bailor, or otherwise dealt with according to his directions, or kept till he reclaims them': 3 Am. & Eng. Ency. of Law, 2d ed., 733. The word 'goods' in this and other like definitions obviously includes every article of movable and tangible personal property. Among the purposes included within said definition of bailment is 'the hiring of the carriage of goods from one place to another for a stipulated or implied reward': Cowen's Treatise, 3d ed., 67; Story on Bailments, sec.

8. There is nothing in this definition which excludes carriage of goods by water, and that such carriage comes within the principles of bailment is evident from Story on Bailments, sections 496, 501, 504, and elsewhere. The carrier of goods has a lien thereon for his hire while he retains possession: Story on Bailments, sec. 588. This lien 'extends to all the goods delivered ¹¹³ under one contract, although they be delivered in different parcels and at different times, and the bailee may detain any portion of them as a lien upon the whole,' even if he has delivered a part: 3 Am. & Eng. Ency. of law, 2d ed., 760; Morgan v. Congdon, 4 N. Y. 552; Schmidt v. Blood, 9 Wend. 268, 24 Am. Dec. 143; McFarland v. Wheeler, 26 Wend. 467; Potts v. Railroad Co., 131 Mass. 455, 41 Am. Rep. 247; Blake v. Nicholson, 3 Maule & S. 167; Chase v. Westmore, 5 Maule & S. 180.

"Up to the time the whole raft reached Boston bay McCaffrey had a lien on each piece and parcel of lumber thereon for the carriage of the entire raft. The Schulenburg company could not change or defeat that lien by directing him to divide the raft and bring half to St. Louis first. That direction was solely for its benefit. McCaffrey was ready and willing and offered to tow the half raft to St. Louis, but was refused permission, and his right to do so was denied by the purchaser. This excused, and, indeed, prevented, his further performance. Therefore, McCaffrey had a common-law bailee's lien on said half raft while in his possession at Boston bay for the towing of the entire raft at the contract price. His claim is for three thousand seven hundred and ninety-five dollars and eighty-two cents. This sum we consider established by the proofs, except two items. . . . This leaves three thousand six hundred and forty-three dollars and seventeen cents, for which, in our opinion, complainant had a bailee's lien on said half raft while he retained possession, and which would bear interest at five per cent per annum from the date when the Knapp company forbade McCaffrey to tow said half raft to St. Louis under his contract, which was November 12 or 13, 1894.

"It is suggested there is no lien because the practice had been not to pay till after delivery. But the contract does not provide when payments shall be made, and the price agreed was therefore due when the service was rendered. Delay in enforcing payment for other rafts, which was merely of favor to the owner, could not defeat the lien. McCaffrey filed a claim against the Schulenburg company, insolvent, for nearly twenty-five thousand dollars, and included this ¹¹⁴ claim therein, and it is

argued he thereby waived his lien. But in the written claim filed he expressly asserted a lien on said half raft for these charges, and states therein that he retained the right to enforce said lien. It is not shown that said claim was ever allowed or put in judgment, and it has not been paid. The mere filing of a claim thus guarded did not release the lien.

"The main question of fact in dispute is, whether McCaffrey had possession of said half raft after he took it into Boston bay. . . . We are of opinion McCaffrey had possession of the half raft till he surrendered it under the order of the court. He therefore had everything necessary to entitle him to a bailee's lien.

"McCaffrey has no adequate remedy at law. . . . He had a right to hold the raft till his charges were paid. But his possession and his lien were both disputed. The Knapp company obviously intended to take the raft away. As it was upon the water and near the channel of the river the ropes could be cut or removed and the raft taken away by a steamer at any time, unless guarded by a force of men at much expense and in a way likely to lead to a breach of the peace. Can a bailee in possession in such case have the aid of a court of equity, or must he be left either to maintain a small army at his own expense or to let his rights be taken away from him and then sue the tortfeasor at law? McCaffrey's position was in many respects similar to that of a pledgee or chattel mortgagee, and their right to foreclose their lien in equity is well established: Dupuy v. Gibson, 36 Ill. 197; Cushman v. Hayes, 46 Ill. 145; Barchard v. Kohn, 157 Ill. 579; Charter v. Stevens, 3 Denio, 33, 45 Am. Dec. 444; Story on Bailments, sec. 348; Pomeroy's Equity Jurisprudence, secs. 164, 1231. The right to enforce a bailee's lien in equity comports with equitable principles. 1 Pomeroy's Equity Jurisprudence, section 112, mentions 'those cases in which the relief is not a general pecuniary judgment, but is a decree of money to be obtained and paid out of some particular fund or funds. The equitable remedies of this ¹¹⁵ species are many in number and various in their external forms and incidents. They assume that the creditor has, either by operation of law, or from contract, or from some acts or omissions of the debtor, a lien, charge of encumbrance upon some fund or funds belonging to the latter, either land, chattels, things in action, or even money; and the form of the remedy requires that this lien or charge should be established and then enforced, and the amount due obtained by a sale, total or partial, of the fund.' In section 171 the same author classifies 'those remedies which establish

and enforce liens and charges on property rather than rights and interests in property, by means of a judicial sale of the property itself which is affected by the lien, and a distribution of its proceeds until they satisfy the claim secured by the lien.' 2 Kent's Commentaries, page 642, says: 'A lien is in many cases like a distress at common law, and gives a party detaining the chattel the right to hold it as a pledge or security for the debt, but not to sell it. . . . I presume that satisfaction from a lien may be enforced by a bill in chancery.' Cowen's Treatise, third edition, page 337, after stating that a party detaining a chattel by virtue of his lien thereon for charges has a right to hold it but not to sell it, says: 'It is supposed that the only way in which satisfaction from a lien can be enforced is by a bill in chancery.' In 2 Redfield on Railways, section 22, paragraph 14, page 160, that author says: 'Neither the carrier, nor any other bailee having a lien, can sell the goods at common law in satisfaction of the lien. The appropriate remedy in such case is in equity.' 2 Rorer on Railroads, 1268, discussing the carrier's lien on freight for charges, and that such lien only gives the right to retain and not to sell the property, further says: 'If the carrier will sell, other than when the statute allows it, he may find a remedy and means of selling by judicial proceedings to enforce the lien.' In Gilchrist v. Railroad Co., 58 Fed. Rep. 708, the United States circuit court for Montana sustained a bill to enforce a lien. The relief ¹¹⁶ was, in part, based upon the fact that the plaintiff had a lien and had a right to have it enforced, but had no plain, speedy, and adequate remedy at law: Fox v. McGregor, 11 Barb. 41. 2 Jones on Liens, section 1038, states the contrary rule that a court of equity has no jurisdiction to enforce a common-law lien by a sale merely because there is no remedy at law, or because the retaining of possession under a passive lien involves expense or inconvenience. That author, in section 1041, recognizes Illinois as an exception, and as a state in which a court of equity has jurisdiction to enforce liens upon personal property generally: Citing Cairo etc. R. R. Co. v. Fackney, 78 Ill. 116. The court there said: 'Liens are enforceable in equity unless the law has provided for another mode. This is true of vendors' liens, equitable and other mortgages, and all statutory liens, so far as they now occur to us, except in all cases where the lien is in the nature of a pledge and possession accompanies the lien. If defendant in error had a lien he should have resorted to equity for its enforcement.' The general principle and the reason there stated sustain the present suit, while the

exception suggested by the court seems against it: See, also, *Cushman v. Hayes*, 46 Ill. 145.

"But if a mere desire on the part of the complainant to collect his debt would not give jurisdiction to a court of equity to order the property held under the lien sold to pay it, there seems here to be other sufficient reasons for applying to equity. The Schulenburg company claimed to have sold to the Knapp company, and the latter claimed to have bought. Almost immediately after the alleged sale the Schulenburg company made an assignment for the benefit of creditors. The pleadings show the assignees do not admit the sale from the Schulenburg company to the Knapp company but deny it in general terms. McCaffrey had no other effective way of determining with whom he might safely deal. Both the Schulenburg company and the Knapp company have always denied that ¹¹⁷ McCaffrey had a lien and that he ever had possession after the raft was laid up in Boston bay. Both said defendants claim that the raft was by McCaffrey delivered to the Schulenburg company when it was put into that harbor; that the Schulenburg company thereafter remained in possession of the raft till it sold to the Knapp company, and that it then put the Knapp company in possession, and that the latter thereafter remained in possession. The Knapp company declared, in its answer, its right and purpose to remove the raft, and it declared the same thing to McCaffrey before the bill was filed. The bill stated that the raft was so near the channel that when the annual June rise in the Mississippi should take place it would be likely to break up and destroy the raft unless moved further inland, and that his right to move it was in dispute, and the answer of the Knapp company makes it clear he could not have so removed it without resistance. It was his duty to protect this property while in his possession. It was valuable, and he would be responsible for any injury which could be traced to his neglect. He needed the help of a court of equity to keep him undisturbed in the control and care of the property. Such assistance could be afforded him under his prayer for general relief. It is plain from the pleadings that a large force of men was necessary to enable McCaffrey to retain the possession he had and which he was entitled to retain. We are of opinion that under all these circumstances it was proper for him to resort to a court of equity and bring all parties in interest before the court to have the questions of his possession and lien and the validity of the sale to the Knapp company, and the rights of the assignees, determined by a decree binding upon them all.

"It is said the circuit court of Mercer county had no jurisdiction because this was a maritime lien, and exclusive jurisdiction in such case is by act of Congress vested in the courts of the United States sitting in admiralty. ¹¹⁸ Can the Knapp company now raise that question in the condition of this record? On April 2, 1895, and before answer, the Knapp company filed a written petition in this case, wherein it asked the circuit court either to require McCaffrey to give a bond, with sureties in the sum of twenty-five thousand dollars, conditioned to pay the Knapp company whatever damage it might suffer if the case should be decided against McCaffrey, or else that, upon the said Knapp company giving a bond in the sum of six thousand dollars to pay McCaffrey any lien which might be established in his favor, 'then that this defendant shall have a right to take possession of said raft and remove the same to St. Louis, Missouri.' As a reason the Knapp company added: 'The defendant being in a court of equity, and believing that it is but right that this motion should be granted, prays the court to grant the same.' Thereupon the court heard said petition, and, by consent of the parties, ordered that the Knapp company file a bond in the penal sum of six thousand dollars, with sureties, conditioned to pay 'McCaffrey all sums of money for which he has a lien upon the property described herein,' and that upon the filing and approval of such bond McCaffrey 'shall surrender the property above described to the Knapp, Stout & Co. Company.' Bond was so given and the Knapp company took the raft away. The order provided with great care that no one should be prejudiced by the order—that it should not be construed to be a confession of anything by anybody, nor an admission that the court had jurisdiction, et cetera. Nevertheless, the order was much to the detriment of McCaffrey and took from him important rights. It is very earnestly argued here by the defendants that if McCaffrey had any lien it was but a passive lien entitling him to retain possession of the raft till his charges were paid, but for which he had no other remedy. But if so, his passive lien was destroyed under this order. He no longer had possession. The raft was gone. It is a fair presumption that when the Knapp company got the raft to St. Louis the lumber was distributed ¹¹⁹ in its yards and no longer traceable, and that it was impossible for the complainant to repossess himself of the raft. It is also strongly urged here by defendants that if any tribunal can enforce McCaffrey's lien it can only be done by a suit in rem in admiralty. But the res—the thing—is gone, is dispersed, and McCaffrey's remedy in

admiralty, if he ever had one, has been taken away from him under this order. True, McCaffrey consented to the order; but he was claiming a court of equity had jurisdiction, and it was in harmony with his position that the court should assume to dispose of the raft. The filing of the bill had not put the court in possession of the raft. It was the defendant, the Knapp company, that appealed to the court to permit it to give a bond and take the raft away, and it expressly based its petition upon the ground that it was in a court of equity, and that it was equitable that the court should accept a bond and order McCaffrey to surrender the raft to it. The Knapp company asked and obtained this relief from a court of equity, and practically destroyed McCaffrey's security unless his rights can be enforced in this cause. It is also true that in its motion the Knapp company denied the jurisdiction of the court, and the court in its order provided that the order should not be construed as an admission of jurisdiction; but this only puts the Knapp company in the position of denying the court's jurisdiction in one breath and in the next breath asking the court to take jurisdiction and give equitable relief in a material matter. Having asked and obtained the exercise of jurisdiction, its denial of jurisdiction at the same time was idle. We think the Knapp company should be estopped by that action from questioning the jurisdiction of the circuit court of Mercer county. As the proof shows a valid sale by the Schulenburg company to the Knapp company before the assignment, the Schulenburg company and its assignees have no further interest in the raft, and as the Knapp company is estopped from questioning the jurisdiction of the ¹²⁰ court below, that tribunal should have given McCaffrey a decree.

"Does he who, in the performance of a contract, renders services in towing a floating raft of lumber on a navigable river have a maritime lien thereon for such services? Is such a raft a proper subject for admiralty jurisdiction? Upon these questions the authorities are in conflict. The following tend to support the contention that such a raft is not within the jurisdiction of admiralty: *Tome v. Four Cribs of Lumber*, Taney, 533; *The W. H. Clark*, 5 Biss. 295; *Jones v. Coal Barges* (Grier, J.), 3 Wall. Jr. 53; *Raft of Cypress Logs*, 1 Flipp. 543; *Raft of Timber*, 2 Rob. Adm. 251; *Henry on Admiralty Jurisprudence*, sec. 52. See, also, *Gastrel v. Cypress Raft*, 2 Woods, 213; *The Hendrick Hudson*, 3 Ben. 419. The contrary doctrine, that a raft of lumber may in a proper case come within the jurisdiction of courts of admiralty, is supported by the following:

United States v. Raft of Timber, 13 Fed. Rep. 796; Muntz v. Raft of Timber, 15 Fed. Rep. 555; The F. & P. M. No. 2, 33 Fed. Rep. 511; Seabrook v. Raft of Ties, 40 Fed. Rep. 596; Salvor Wrecking Co. v. Sectional Dock Co., 3 Cent. L. J. 640, Fed. Cas. No. 12,273; Raft of Spars, 1 Abb. Adm. 485; Fifty Thousand Feet of Timber, 2 Low. 64. See, also, Nicholson v. Chapman, 2 H. Black. 254, and an obiter dictum in Rock Island Bridge, 6 Wall. 213. Perhaps the sounder argument supports the position that such a raft on a navigable river is a proper subject of admiralty jurisdiction, but where the question is left in so much doubt by the conflicting decisions of the various courts of admiralty, and the opposite view is supported by so strong authority as Chief Justice Taney and Justice Grier of the United States supreme court, the state courts should hesitate to renounce jurisdiction in a case like this, where no proceeding affecting the rights of the parties has ever been instituted in any court of admiralty.

"The jurisdiction of the courts of the United States to administer relief by proceedings in rem in admiralty is unquestionably exclusive. Such proceeding, however, is ¹²¹ against the property, only. The distinguishing and characteristic feature of such suit is, that the vessel or thing proceeded against is itself seized and impleaded as the defendant, and is judged and sentenced accordingly. It is this dominion of a suit in admiralty over the vessel or thing itself which gives to the title made under its decree validity against all the world': The Moses Taylor, 4 Wall. 411. No person is a defendant in such a suit. Parties who have real or possible interests determine for themselves whether they will appear and protect their interests. When a sale is made in such a proceeding, it is good against the whole world. No such remedy was sought here. This was a suit against persons. No one would be bound by a decree herein except those made parties. A sale, though purporting to be of the property, would really be only a sale of the interests of the defendants therein. A personal decree for the deficiency, if any, might follow. The equitable circumstances before mentioned, growing out of the sale and assignment, the denial of possession, the intention to seize the property, the duty of McCaffrey to protect it from a rise of the river, and the obstacles to so doing put in his way by the Knapp company, all furnish ground for equitable cognizance. We cannot hold that because a proceeding against the raft in admiralty might afford some relief, therefore a court of equity must keep its hands off, if equitable circumstances exist which justify its granting relief on

well-established equitable principles against persons made defendants. Moreover, if the case had any likeness to a suit in rem in admiralty when it was started, it lost that distinctive character when the Knapp company, at its own request, took the raft and left a personal bond in its place. Thereafter the suit was wholly in personam: *Johnson v. Chicago etc. Elevator Co.*, 119 U. S. 388; *Gindele v. Corrigan*, 28 Ill. App. 476; 129 Ill. 582, 16 Am. St. Rep. 292. Though the cases cited were at law, yet they are in point as to the effect of giving bond and taking away the property. By the action ¹²² of the Knapp company the raft was withdrawn from the suit, and a suit relative to liability upon a personal obligation was substituted therefor. The suit, as so changed by the act of the Knapp company, was not within the jurisdiction of a court of admiralty.

"For the reasons stated the decree of the court below will be reversed and the cause remanded to that court, with directions to enter a decree in conformity with the views herein expressed in favor of McCaffrey in the sum of three thousand six hundred and forty-three dollars and seventeen cents, with interest thereon from November 13, 1894, at five per cent per annum."

We concur in the views above expressed and adopt the same as those of this court. Accordingly, the judgment of the appellate court is affirmed.

CARRIERS—BUSINESS OF TOWING.—The authorities seem to be divided upon the question whether a towboat is a common carrier or not. Those holding, with the principal case, that such a boat is not a common carrier are: *Varble v. Bigley*, 14 Bush, 698; 29 Am. Rep. 435; *Arctic Fire Ins. Co. v. Austin*, 69 N. Y. 470; 25 Am. Rep. 221; *Pennsylvania etc. Nav. Co. v. Dandridge*, 8 Gill & J. 248; 29 Am. Dec. 543; *Leonard v. Hendrickson*, 18 Pa. St. 40; 55 Am. Dec. 587. Contra, holding that a towboat is a common carrier: *Bussey v. Mississippi etc. Co.*, 24 La. Ann. 165; 13 Am. Rep. 120; *White v. The Mary Ann*, 6 Cal. 462; 65 Am. Dec. 523.

BAILMENT—LIEN OF BAILEE.—A lien is recognized as existing in favor of any bailee for hire, upon an article or thing which has been improved or increased in value by means of the labor and skill that he has expended thereupon: *Grinnell v. Cook*, 3 Hill, 485; 38 Am. Dec. 663, and note. A lien upon personalty at common law is founded on possession, and the right to detain the property until some claim in which the lien originates is satisfied or discharged: *Miller v. Marston*, 35 Me. 153; 56 Am. Dec. 694; *Oakes v. Moore*, 24 Me. 214; 41 Am. Dec. 379.

CARRIER'S LIEN—WAIVER.—A carrier having delivered a part of a quantity of goods consigned to one person, without collecting the freight, has a lien therefor upon the part undelivered: *Potts v. New York etc. R. R. Co.*, 131 Mass. 455; 41 Am. Rep. 247; *New Haven etc. Co. v. Campbell*, 128 Mass. 104; 35 Am. Rep. 360.

ADMIRALTY—EXCLUSIVE JURISDICTION OF FEDERAL COURTS—JURISDICTION OF STATE COURTS.—The admiralty and maritime jurisdiction of the United States in rem is exclusively in the United States courts, and a state cannot confer jurisdiction

upon its courts in such cases. Liens against vessels or their cargoes may be enforced in the state courts when the proceeding to enforce them does not amount to an admiralty proceeding in rem, or otherwise conflict with the constitution of the United States: See *Atlantic Works v. Tug Glide*, 157 Mass. 525; 34 Am. St. Rep. 305, and note; *Warehouse etc. Co. v. Galvin*, 96 Wis. 523; 65 Am. St. Rep. 57, and note; *Gindele v. Corrigan*, 129 Ill. 582; 16 Am. St. Rep. 292; *Scatcherd Lumber Co. v. Rike*, 113 Ala. 555; 59 Am. St. Rep. 147.

ESTOPPEL—JUDGMENT.—One who accepts and retains the fruits of a void judgment is estopped from assailing it or denying its validity: *Arthur v. Israel*, 15 Col. 147; 22 Am. St. Rep. 381, and note.

FROST v. CHICAGO.

[178 ILLINOIS, 250.]

MUNICIPAL CORPORATIONS — ORDINANCES — WHEN UNREASONABLE.—A municipal ordinance which prohibits dealers in fruit, berries, or vegetables from covering the boxes or baskets containing them with colored netting or other material having a tendency to conceal the true color or quality of the goods offered for sale, is void as a vexatious and unreasonable interference, with, and restriction upon, the rights of dealers in certain articles of trade and commerce.

A. E. Gammage, and Stedman & Soelke, for the appellant.

H. S. Taylor, prosecuting attorney, and G. McA. Miller, for the appellee.

251 CARTER, C. J. Plaintiff in error was found guilty in the court below of violating an ordinance of the city of Chicago and fined fifteen dollars and costs. The ordinance provided:

“Sec. 1000. Colored Netting for Covering.—It shall be and is hereby made unlawful to cover any box, basket, or any other package or parcel of fruit, berries, or vegetables of any kind, with any colored netting, or any other material which has a tendency to conceal the true color or quality of any such goods which may be sold, offered for sale, or had in possession for the purpose of being sold or offered for sale. Any person who shall violate the provisions of this section shall, upon conviction, be fined not less than ten dollars or more than twenty-five dollars for each offense.”

The testimony tended to show that the defendant below sold peaches in baskets covered with red tarlatan—a perforated cloth—and that these baskets of peaches had been shipped to him from the state of Michigan put up in the same manner in which he sold them. There was some evidence to the effect that this colored netting tended to conceal the “true color or quality” of the fruit, and some to the contrary. It appears from the record that large quantities of fruit put up in this manner are

shipped and sold; that a covering of some kind is necessary to prevent loss of the fruit by pilfering and other means, and to protect it from insects; that such fruit requires ventilation, and that experience has demonstrated that a covering of netting is better than one of wood, paper or other material, because it allows free access of air, does not bruise the fruit and affords better means of inspection. The case seems to have turned below upon the color of the netting used, although there was testimony to prove that white, green, or blue netting (sometimes, ²⁵² but less frequently, used) would also conceal, to some extent, the true color or quality of the fruit. The case assumed some importance, as it appeared from the evidence that red tarlatan manufactured for the purpose has come into general use by packers and shippers of and dealers in fruit, and, counsel say, that many other cases are pending to be finally determined by the decision of the case at bar.

Some minor questions have been raised having reference to the admission or exclusion of evidence, and also to the point that as the evidence showed that plaintiff in error did not, himself, cover or cause to be covered with the colored netting the baskets of peaches which he had for sale, but merely offered them for sale as he had received them, he did not come within the ordinance. These minor questions may well be waived and the case considered on more meritorious grounds, involving the validity of the ordinance.

Nor have we thought it necessary to consider the point made by the plaintiff in error that the ordinance is not a mere local inspection law, but is an attempt to regulate interstate commerce and to restrict the sale of goods in the original packages in which they were shipped from other states, and is therefore void, but are of opinion that the objection that it is void for unreasonableness was well made and should have been sustained. We have reached the conclusion that the ordinance is a vexatious and unreasonable interference with and restriction upon the rights of dealers in certain articles of trade and commerce. The only valid basis upon which such a regulation can rest is, that its purpose is to prevent deception and imposition upon buyers of such articles as are named in the ordinance. The evidence shows, as common observation would teach, that such packages must have some covering, and shows also that tarlatan has been found the best and most suitable covering for the preservation of fruit so packed and sold; and the validity of ²⁵³ the ordinance is made to depend, and indeed its validity is defended only, upon the question of the color of the material. It

is not pretended that there is anything in red tarlatan which is deleterious to health or which imparts to the fruit any noxious material or quality, but only that it tends to impart to the fruit beneath a more wholesome tint or appearance than it would otherwise have. It is natural and not unlawful for the packer and dealer to put up and offer for sale his goods in an attractive form, and a regulation would not seem to be reasonable which would prevent the dealer in certain commodities from offering for sale his goods in packages tinted so as to correspond in some degree with the color of the goods themselves. No buyer who is ordinarily careful and intelligent is deceived by such devices of tradesmen. He may examine what he buys, and no law can protect him from the consequences arising only from his own folly. At most the colored netting would tend to conceal the true color or quality of only the top layer of the fruit in the package, leaving the same latitude for deception as in cases where no covering is used. It will be noticed that the provision in question of the ordinance does not make it unlawful to sell decayed or unwholesome fruit, or to practice deception on the public by methods employed in packing or displaying it.

From whatever view the ordinance is regarded, it is difficult to see how it can be of any public benefit whatever, and while, ordinarily, that is a question for the municipal legislature, it may be considered by the courts in determining the question of reasonableness. It is not contended by counsel that the power to pass such an ordinance is in terms conferred on the city council by any act of legislature (*Lake View v. Tate*, 130 Ill. 247), but the power to enact it is referable to the general police power of the city, and it is conceded that the question of its reasonableness is open for decision and is the subject of fair contention in the case. It was shown, and is a ²⁵⁴ matter of common knowledge, that much fruit is shipped and sold wrapped up in tissue paper and in tinfoil, and in packages and baskets covered with wood, all of which material effectually conceals the "true color and quality" of the fruit until removed. It would be as reasonable to prohibit the one as the other. Fruit dealers would be subjected to unjust and oppressive discrimination by the enforcement of such an ordinance. Being unreasonable and oppressive in character the ordinance is void, and should have been so declared by the court below.

The judgment is reversed.

MUNICIPAL CORPORATIONS — ORDINANCES — WHEN UNREASONABLE — MARKETS.—A city ordinance, to be reasonable, must tend in some degree to the accomplishment of the object for

which the corporation was created and its powers conferred. The reasonableness or unreasonableness of a city ordinance is not determined by the enormity of some offense which it seeks to prevent and punish, but by its actual operation in all cases that may be brought thereunder: *People v. Armstrong*, 73 Mich. 288, 16 Am. St. Rep. 578. See *Helena v. Dwyer*, 64 Ark. 424; 62 Am. St. Rep. 206. For the general limitations on the power of municipal corporations to pass ordinances, see extended monographic note to *Robinson v. Mayor*, 34 Am. Dec. 627-643, especially pages 633-635 on unreasonable ordinances. On the power of a municipal corporation to establish and regulate markets, see *State v. Namias*, 49 La. Ann. 618; 62 Am. St. Rep. 657; *Jacksonville v. Ledwith*, 26 Fla. 163; 23 Am. St. Rep. 558, and monographic note thereto.

DANVILLE v. DANVILLE WATER COMPANY.

[178 ILLINOIS, 299.]

CORPORATIONS—CHARTER.—The provisions of a general incorporation statute enter into and form a part of the charters of all corporations organized under it.

CORPORATIONS—EFFECT OF GENERAL INCORPORATION LAW.—If a general incorporation law reserves to the legislature the power to prescribe such regulations and provisions as it may deem advisable, a corporation organized under such law thereby agrees to submit itself to, and to be bound by such regulations and provisions as the legislature shall thereafter enact.

CORPORATIONS—REGULATION OF WATER RATES.—The legislature has the power to regulate the rates at which water shall be supplied to the public by a water company, especially when such right is reserved by the statute under which such company was incorporated.

MUNICIPAL CORPORATIONS CAN EXERCISE ONLY SUCH POWERS as are conferred upon them by their charters. All persons dealing with them must see that they have power to perform the proposed act.

MUNICIPAL CORPORATIONS—POWER TO FIX WATER RATES.—A statute empowering a city to authorize a private corporation to construct waterworks, and to contract for a supply of water for a period not to exceed thirty years, gives no power to the city to bind itself by fixing a rate which it must pay for such supply for such entire period, and an ordinance fixing the rate for the entire thirty years is void.

CONSTITUTIONAL LAW—CONSTRUCTION OF STATUTES.—Although a city has been empowered by statute to authorize a private corporation to construct waterworks and to contract for a supply of water for a period not to exceed thirty years, a subsequent statute empowering any city in which a private corporation has been or may be authorized to supply water for public use, to fix reasonable water rates, is constitutional, and an ordinance passed under the later statute reducing existing water rates and fixing them at a reasonable price is valid, although the city enacting it has, under the earlier statute, attempted, by ordinance, to fix water rates at a certain figure for the unexpired period of thirty years.

PLEADING.—A DEMURRER TO SPECIAL PLEAS which admit part of the sum claimed as an entire indebtedness cannot be carried back to an alleged defect in the complaint, which would affect the indebtedness admitted as well as denied.

G. F. Rearick, and Calhoun & Steele, for the appellant.

W. R. Lawrence, and Remy & Mann, for the appellee.

³⁰⁴ MAGRUDER, J. 1. The first question presented is this: Was ordinance No. 517, passed on January 17, 1895, a valid enactment? If this question be answered in the affirmative, then the first and second special pleas of the city presented a defense as to all of the cause of action of the water company except nineteen hundred and thirty dollars; and it was error to sustain a demurrer to such pleas. To determine the question whether the ordinance of January 17, 1895, was a valid ordinance or not, it is necessary to determine whether or not the act of June 6, 1891, referred to in the statement preceding this opinion, and under and in pursuance of which said ordinance was passed, was a valid and constitutional law, so far as it applied to city ordinances passed before its enactment, which fixed particular rates or charges for water supplies.

The ordinance of November 9, 1882, provided that the defendant in error should have the right to charge seventy-five dollars each per annum for one hundred fire hydrants for the term of thirty years, and sixty-two dollars and fifty cents each per annum for the next forty hydrants, and for all hydrants thereafter furnished in excess of one hundred and forty the rate should be fifty dollars each per annum. The ordinance of January 17, 1895, provided that the rates fixed by the ordinance of November 9, 1882, were unreasonable and excessive, and should be reduced to fifty dollars each per annum for the first one hundred and forty hydrants and forty dollars each per annum for all others. It is claimed by the defendant in error that the ordinance of November 9, 1882, fixing the larger rates or charges for a period of thirty years, was a contract between the city of Danville and the defendant ³⁰⁵ in error and that the ordinance of January 17, 1895, which provided for the reduction of these charges, was a violation of the contract, and therefore was invalid. The city justifies its act in passing the ordinance of January 17, 1895, by reference to the act of the legislature, approved June 6, 1891, which has already been referred to. That act consists of one section and provides as follows: "That the corporate authorities of any city . . . now or hereafter incorporated under any general or special law of this state, in which any individual, company, or corporation has been, or hereafter may be authorized by such city . . . to supply water to such city . . . and the inhabitants thereof, be and are hereby empowered to prescribe by ordinance maximum

rates and charges for the supply of water furnished by such individual company, or corporation to such city and the inhabitants thereof, such rates and charges to be just and reasonable. And in case the corporate authorities of any such city shall fix unjust and unreasonable rates and charges, the same may be reviewed and determined by the circuit court of the county in which such city may be." It is contended by the water company that the act of June 6, 1891, in so far as it applies to the ordinance of November 9, 1882, is an invalid and unconstitutional law.

Did the city of Danville, by the passage of the ordinance of November 9, 1882, and its acceptance by defendant in error, so bind itself to pay the annual charges for water supply as therein fixed for thirty years that the legislature was thereafter without power to pass such an act as that of June 6, 1891? In order to answer this question it will be necessary to examine the provisions of the charter of the water company, and the provisions of the statutes authorizing cities in the state to contract with reference to waterworks and water supplies.

The Danville Water Company was organized under the general incorporation act of this state approved April ~~306~~ 18, 1872, in force July 1, 1872. The charter of a corporation formed under the general incorporation act does not consist of its articles of association alone, but of such articles taken in connection with the law under which the organization takes place. The provisions of the law enter into and form a part of the charter: *People v. Chicago Gas Trust Co.*, 130 Ill. 268, 17 Am. St. Rep. 319. Therefore, the provisions of the general incorporation act must be regarded as entering into, and forming a part of, the charter of the defendant in error. Section 9 of the general incorporation act provides that: "The general assembly shall at all times have power to prescribe such regulations and provisions as it may deem advisable, which regulations and provisions shall be binding on any and all corporations formed under the provisions of this act": 1 Starr and Curtis' Annotated Statutes, 2d ed., p. 1006.

By organizing under the general incorporation act, the defendant in error agreed to submit itself to and to be bound by such regulations and provisions as the legislature should deem it advisable to make. The object of its creation was to furnish water to the city of Danville and the inhabitants thereof. The right of the legislature to regulate and provide for the rates, at which such water should be supplied, was a right reserved by

section 9. The language of section 9 is different from, and broader in its scope than, the language contained in many charters, which reserve to the state the power to repeal, alter, amend, or modify the charter itself. We apprehend, therefore, that the decisions, restricting the power of the state as to charters which are given subject to the right of the state to repeal, alter, amend, or modify them, do not apply to such broad language as is used in section 9. By the terms of section 9 it is something more than the mere right to change the charter of the corporation, which is reserved to the legislature. The authority is thereby reserved to provide the regulations and provisions, under which the corporation may proceed in ³⁰⁷ the transaction of its business. We have held that the legislature may impose duties on corporations the same as on individuals in the absence of special enactments. We have also held that the constitution of 1848 by implication reserved to the legislature the right to change or increase the liability of a shareholder in a corporation: *Illinois Cent. R. R. Co. v. Bloomington*, 76 Ill. 447; *Weidenger v. Spruance*, 101 Ill. 278; *Diversey v. Smith*, 103 Ill. 378, 42 Am. Rep. 14; *Arenz v. Weir*, 89 Ill. 25; *Butler v. Walker*, 80 Ill. 345.

It is not claimed that the defendant in error was given the privilege, by the terms of its charter, of charging any particular fixed rate for the supply of water to the city of Danville and its inhabitants. Consequently, there is nothing in the terms of the charter itself which conflicts with the power of the legislature to regulate the rates of such charges, provided such rates should be reasonable and fair.

The contention, however, is made that the ordinance of November 9, 1882, was a contract between the city and the water company, and that the water company, having proceeded to construct its waterworks and supply water to the city in accordance with the terms of that contract, the legislature had no power, even under section 9, to change the rates already fixed. The force of this contention must depend upon the question, whether or not the city itself had the power, under the statutes of the state, to make a contract to pay for water at a fixed and unalterable rate for the term of thirty years.

It is well settled that municipal bodies can only exercise such powers as are conferred upon them by their charters, and all persons dealing with them must see that the body has power to perform the proposed act: *Law v. People*, 87 Ill. 385. Beach, in his work on Public Corporations, section 554, speaking with reference to a contract between a water company and a city for

the furnishing of water by the former to the latter, says: "The city should ³⁰⁸ bind itself by such contracts only as it was authorized by statute to make. It has no power to grant exclusive privileges to put mains, pipes, and hydrants in its streets, nor can it lawfully, by contract, deny to itself the right to exercise the legislative powers vested in its council." In *Syracuse Water Co. v. Syracuse*, 116 N. Y. 167, it is said: "The municipal corporation, as such, could bind itself by such contract only as it was authorized by statute to make. It could not grant exclusive privileges especially to put mains, pipes, and hydrants in its streets, nor could it lawfully by contract deny to itself the right to exercise the legislative powers vested in its common council. . . . In dealing with municipal corporations parties are chargeable with knowledge of their powers, as they are furnished only by statute."

By an act, approved April 9, 1872, in force July 1, 1872, entitled, "An act to enable cities . . . to contract for a supply of water for public use and to levy and collect a tax to pay for water so supplied," it was provided in sections 1 and 2 as follows: 1. "That in all cities . . . where waterworks may hereafter be constructed by an incorporated company, the city . . . authorities in such cities . . . may contract with such incorporated company for a supply of water for public use for a period not exceeding thirty years; 2. Any such city . . . so contracting may levy and collect a tax on all taxable property within such city . . . to pay for the water so supplied": 1 *Starr and Curtis' Annotated Statutes*, 545. This act of April 9, 1872, conferred upon cities the power to contract with an incorporated company for a supply of water for public use for a period not exceeding thirty years. No question is made by either party to this litigation as to the validity of this act, so far as it gave the right to contract for thirty years. Counsel for the city disclaim any intention of questioning the validity of a contract to supply water for thirty years. Therefore, we pass no opinion upon this question. The contention is, that the city had ³⁰⁹ no power to make a contract to pay fixed and unalterable rates for thirty years, and not that the city did not have power to make a contract with the water company that the latter should supply water for thirty years. It is claimed, however, by the defendant in error, that when the power to contract was given, the power to contract for the rate at which the water should be furnished was also given. The language of the statute does not necessarily imply the power to make a fixed rate. The authority "to contract for a supply of water for public use

for a period not exceeding thirty years" does not necessarily imply that the price of the supply should be fixed for the entire period. The supply could be made for the entire term, but the price is to be determined from time to time, and the rates to be settled by the rules of the common law: *Carlyle v. Carlyle Water etc. Power Co.*, 52 Ill. App. 577.

The business of furnishing water to a city and its inhabitants by means of waterworks, which require the use of the public streets of the city for the laying of water pipes, is a business public in its nature, and upon which a public interest is impressed. It is well settled that parties, who carry on a business which is public in its nature, or which is impressed with a public interest, must serve all who apply on equal terms and at reasonable rates: *Wagner v. Rock Island*, 146 Ill. 139; 29 Am. & Eng. Ency. of Law, 12; *Munn v. People*, 69 Ill. 80; *Munn v. Illinois*, 94 U. S. 113. A business which is thus impressed with a public interest is subject to legislative control to the extent that it may be compelled by legislative action to furnish the supply, which it is authorized to furnish, on equal terms and at reasonable rates: *Munn v. People*, 69 Ill. 80; *Carlyle v. Carlyle Water etc. Power Co.*, 52 Ill. App. 577. "Water companies, when actually engaged in the performance of their corporate functions, are necessarily the beneficiaries of valuable privileges from the state and subserve a public purpose. They are ³¹⁰ to be classed as quasi public corporations, and are subject in their operation to the limitations and regulations which the law imposes upon such bodies, in order that the public interest may not suffer": 29 Am. & Eng. Ency. of Law, 11-13. Where a business is impressed with a public interest, the legislature has the right to fix the maximum charges: *Budd v. New York*, 143 U. S. 517; *Chicago etc. R. R. Co. v. Jones*, 149 Ill. 361, 41 Am. St. Rep. 278.

In *State v. Gas Co.*, 34 Ohio St. 572, 32 Am. Rep. 390, where a gas company was under a special charter empowered to manufacture and sell gas for the purpose of lighting the city of Columbus, and its grant was exclusive for a term of twenty years, but the charter contained no provision as to the price to be charged for gas, nor on the subject of meters, it was held that the terms upon which the corporation might be required to discharge its duties to the public were subject to legislative supervision and control, unless it clearly appeared from the terms of its charter that it was the intention to exempt it from such interference; and the court there said: "The charter in the present instance grants to the defendant the exclusive right of supplying the city

and its inhabitants with gas for a term of twenty years. . . . It is unreasonable, therefore, to infer that it was the intention of the legislature to exempt the defendant from all public control in respect to the terms, upon which it should be required to discharge its duties to the public, unless such intention is found clearly expressed in the charter. The charter expresses no such intention." In *Munn v. Illinois*, 94 U. S. 113, it was held that: "Where the owner of property devotes it to a use in which the public have an interest, he in effect grants to the public an interest in such use, and must, to the extent of that interest, submit to be controlled by the public for the common good as long as he maintains such use": See, also, *Zanesville v. Gas Light Co.*, 47 Ohio St. 1.

³¹¹ The act of April 9, 1872, is silent as to the rates to be charged for the supplying of water, and as to the mode of fixing the rates. Where the charter of a gas or water company in a city does not expressly confer on the company the right to fix its own prices, such silence cannot be construed into a grant of the franchise to fix its own rates: *Zanesville v. Gas Light Co.*, 47 Ohio St. 1. So, here, the silence of the act of April 9, 1872, as to the rates to be charged for the supply of water, does not necessarily confer upon the municipality the power to fix one established rate for the whole period during which the contract is to be run. If, however, it be doubtful whether the language of the act of April 9, 1872, does or does not confer the power upon cities to contract for a supply of water at a fixed rate for the whole period of thirty years, such doubt must be resolved in favor of the public. In *Seeger v. Mueller*, 133 Ill. 86, 94, we said: "Any ambiguity or doubt arising out of the terms used by the legislature in conferring their powers must be resolved in favor of the public. . . . No estoppel can ordinarily arise from the act of a municipal corporation or officer done in violation of or without authority of law. Every person is presumed to know the nature and extent of the powers of municipal officers, and therefore cannot be deemed to have been deceived or misled by acts done without legal authority": 29 Am. & Eng. Ency. of Law, 13; 1 Dillon on Municipal Corporations, sec. 91, note.

But, even if it be admitted that the language of the act of April 9, 1872, is doubtful in the respect thus indicated, this doubt ceases to exist when that act is construed in connection with the act of the legislature upon the same subject, passed on the next day, to wit, April 10, 1872. In section 1 of article 10 of the city and village act, approved April 10, 1872, in force July 1, 1872, it is provided as follows: "The city council

shall have the power to provide for a supply of water by the construction and regulation of waterworks, ³¹² and to borrow money therefor, and to authorize any person or private corporation to construct and maintain the same at such rates as may be fixed by ordinance, and for a period not exceeding thirty years": 1 Starr and Curtis' Annotated Statutes, 508. The acts of April 9, 1872, and the city and village act of April 10, 1872, both passed at the same session of the legislature, and relating to the same matter, so far as section 1 of article 10 above quoted is concerned, are in *pari materia* and should be construed together: *South Park Commrs. v. First Nat. Bank of Chicago*, 177 Ill. 234. Said section 1 authorizes the city council to empower a private corporation to construct and maintain waterworks at such rates as may be fixed by ordinance. The meaning of this language is, not that the waterworks are to be maintained at such established rate as may be fixed by one ordinance for a period not exceeding thirty years. The clause, "for a period not exceeding thirty years," qualifies the words, "construct and maintain the same," but does not qualify the words, "at such rates as may be fixed by ordinance." In other words, the city council may authorize a private corporation to construct and maintain waterworks for a period not exceeding thirty years, and they may authorize a private corporation to construct and maintain the waterworks at such rates as may from time to time be fixed by ordinance. The evident meaning of section 1 is, that there was to be reserved to the city council the power to fix the rates by ordinance at such figures as should be fair and reasonable. If the rates were to be fixed by ordinance, they could only be fixed by such ordinance as was legal and whose passage was within the power of the council. A legislative body cannot part with its powers by any proceeding, so as not to be able to continue the exercise of such powers. It has no authority even by contract to control and embarrass its legislative powers and duties: *Greenhood on Public Policy*, 317; *Cooley's Constitutional Limitations*, 206; 15 *Am. & Eng. Ency. of Law*, 1045; ³¹³ 1 *Dillon on Municipal Corporations*, sec. 443. What might be proper for a city this year might not be proper the next year. It is impossible to determine with absolute or even tolerable certainty what changes a few years might work in the character and reasonableness of rates to be charged for water supply. No contract is reasonable by which the governing authority abdicates any of its legislative powers, and precludes itself from meeting, in a proper way, emergencies or occasions that may arise. "These powers are conferred in order

to be exercised again and again, as may be found needful or politic, and those who hold them in trust to-day are vested with no discretion to circumscribe their limits or diminish their efficiency, but must transmit them unimpaired to their successors. This is one of the fundamental maxims of governments; and it is impossible that free government with restrictions for the protection of individual or municipal rights could long exist without its recognition": *Gale v. Kalamazoo*, 23 Mich. 354; 9 Am. Rep. 80; *Millikin v. County of Edgar*, 142 Ill. 528.

The acts of April 9 and April 10, 1872, above referred to, cannot be construed as authorizing the city of Danville to make a contract to pay a fixed rate for a supply of water to the city for a period of thirty years without violating the principle that a legislative body, like a common council, whose members are elected for only two years, cannot restrict and curtail the legislative powers of succeeding common councils, and without violating the further principle that the legislature has the right to regulate and control the rates of charges made by a corporation, whose business is impressed with a public use. In *East St. Louis v. East St. Louis etc. Co.*, 98 Ill. 415, 38 Am. Rep. 97, a doubt was expressed as to whether such a contract as the defendant in error here seeks to sustain was not invalid as unnecessarily tying up the hands of the city council for too great a length of time. In *Des Moines v. Water Works Co.*, 95 Iowa, 357, where an ordinance in relation to the furnishing of water to the city by a private ³¹⁴ corporation was under consideration, it was intimated that a contract with the city for rates to be charged for water according to one unalterable standard for forty years would be invalid. The price to be paid for water should be left to be determined from time to time, inasmuch as the growth of the city will enable the company to furnish water at much less cost than when the waterworks were first established.

In *Spring Valley Water Works v. Schottler*, 110 U. S. 347, it appeared that a general law was enacted by the legislature of California for the formation of corporations for supplying cities, counties, and towns with water, which provided that the rates to be charged for water should be fixed by a board of commissioners, to be appointed in part by the corporations, and in part by the municipal authorities; and that the constitution and laws of the state were subsequently changed, so as to take away from corporations which had been organized and put into operation under the old constitution and laws the power to name members of the boards of commissioners, and so as to place in municipal authorities the sole power of fixing rates for water;

and it was there held that these changes violated no provision of the federal constitution, objection having been made, not to any improper prices fixed by the officers, but to their power to fix prices at all, the court saying: "That it is within the power of the government to regulate the prices at which water should be sold by one who enjoys a virtual monopoly of the sale we do not doubt."

In view of the considerations thus presented, we are of the opinion that the act of June 6, 1891, was not an invalid and unconstitutional law, and that the legislature had the right to confer the power to fix maximum rates upon cities in which private corporations had already been authorized to supply water, as well as cities which were to be so authorized after the passage of the act. It follows that the ordinance of January 17, 1895, was a ³¹⁵ valid ordinance. It is to be remembered that the amount which the company seeks to recover in this suit is for water furnished after the ordinance of January 17, 1895, was passed, and after the company received the notice provided for in that ordinance.

2. As to the point that the demurrer should have been carried back to the declaration, we think that the motion to carry the demurrer back was properly overruled by the court below. We do not deem it necessary to discuss the question whether the contract here under consideration amounted to an indebtedness or not; nor whether the declaration should have averred that provision was made for the collection of a direct annual tax to meet that indebtedness as it fell due. We pass no opinion upon these questions. The city in its pleas admitted that it owed nineteen hundred and thirty dollars of the two thousand six hundred and twenty dollars and sixty-two cents claimed by the water company. The defense set up in these pleas is a defense made only to the excess of the amount claimed over the sum of nineteen hundred and thirty dollars. But the whole amount claimed was one indebtedness. If the declaration was defective in not averring that there had been, before or at the time of making the contract, a provision for the collection of a direct annual tax, it was defective in not making such averment as to the nineteen hundred and thirty dollars as well as to the rest of the amount claimed. The defendant is estopped by its pleas from denying the validity of the indebtedness to the extent of nineteen hundred and thirty dollars. It could not admit an indebtedness to that amount, and in the same breath insist upon an objection to the declaration which attacked the validity of the indebtedness so admitted. For this reason, we do

not regard it necessary to consider the points raised with reference to the action of the court in overruling the motion to carry the demurrer back to the declaration. What has already been said sustains the objection of the city to so much of the indebtedness as it complains of. It is, therefore, unnecessary to consider the other points made.

³¹⁶ We are of the opinion that the court below erred in sustaining the demurrers to the first and second special pleas of the city, the plaintiff in error here, and in rendering judgment for the whole amount claimed against the city.

Accordingly, the judgment of the circuit court is reversed, and the cause is remanded to that court for further proceedings in accordance with the views herein expressed.

JUSTICES PHILLIPS, CRAIG, AND CARTWRIGHT dissented, and Mr. Justice Phillips said that under the statutes quoted in the principal opinion "the state invested the municipality with power to make and contract for a supply of water for a period of thirty years, and it would be difficult to comprehend the meaning of terms authorizing a contract to be made for a supply of water to be furnished without including therein the right to fix the price at which it should be so furnished. This power conferred by the legislature sanctions a particular act and authorizes it to be done. Where a contract is made to accomplish the act thus sanctioned it must be held valid. The power of the state in regulating, governing, and conferring power on municipalities is supreme, but where it confers a power with reference to a contract, and that power is once exercised, it is subject, like other legislative powers, to the authority of the state and federal constitutions, and when it invests a corporation which derives its power from the state with the power to make a contract, and that power is exercised, the legislature is thereafter concluded from annulling or rendering invalid such contract. Such a contract is only subject to judicial construction, and is sacred from interference by the legislative power. Such a contract made by a municipality under the power conferred by a state legislature cannot be impaired, and has thrown around it the positive restrictions of the federal and state constitutions: *Citizens' Water Co. v. Bridgeport etc. Co.*, 55 Conn. 1; *Rockland Water Works Co. v. Camden*, 80 Me. 544; *New Orleans Water Works Co. v. Rivers*, 115 U. S. 674; *St. Tammany's Water Works Co. v. New Orleans Water Works Co.*, 120 U. S. 64. The necessary construction of the statutes heretofore quoted is, that they conferred the power to contract for a supply of water and fix the price thereof for a period of thirty years. . . . It was not error to sustain the demurrer to the first and second pleas. The contention that the declaration does not set forth a binding promise, because it contains no averment that before or at the time of making the contract a provision for the collection of a tax to meet payments as they might fall due was pro-

vided for, or that no appropriation had been made before or at the time of making the contract, cannot be sustained. The constitutional prohibition against going into debt beyond the amount limited by the constitution does not prevent the making of contracts for supplying an article of daily consumption at a stipulated price, to be paid for at stated intervals after delivery, and which was paid for by annual appropriations levied and collected for that purpose. That does not create an indebtedness within the meaning of the constitution: *East St. Louis v. East St. Louis etc. Co.*, 98 Ill. 415; 38 Am. Rep. 97. The sufficiency of the declaration in stating the cause of action must be held well pleaded when it violates no provision of the ordinances of the city or the constitution and laws of the state of Illinois, and if the city has the power to make a contract for a period of thirty years under the legislation of the state, and that legislation is not unconstitutional, then it must be held that the declaration states a cause of action, and the power having been conferred upon municipalities to enter into contracts for such a length of time for an article of daily consumption, it is not the incurring of an indebtedness which requires an appropriation to be made providing for the whole period of thirty years, as to so hold would place a restriction on the power of municipalities to contract, and would obstruct public wants, retard improvements, and not be consonant with the spirit and meaning of the act. It was not error for the court to refuse to carry the demurrer back to the declaration, in my opinion."

IN THE SUBSEQUENT CASE of *Rogers Park Water Co. v. Fergus*, 178 Ill. 571, it was held that a municipal ordinance granting a private corporation the right to construct a waterworks system and to operate it for thirty years, and fixing the rates to be charged for that period, does not confer any contract right to impose the rate as thus fixed for the full period; but is merely a declaration that such rates are reasonable at the time when the ordinance was enacted. The city is not bound to recognize such rates as reasonable for the full period, and has power, under section 1 of article 10 of the city and village act (Illinois Rev. Stats. 1874, p. 240), quoted in the principal case, *supra*, to fix water rates so as to make them reasonable at any time, or from time to time as changed conditions, such as the annexation of a village to a city, may affect the reasonableness of the water rates formerly established. Upon a reduction or change in water rates made by a city under an ordinance, an inhabitant thereof may, by mandamus, compel the water company furnishing the city with water to furnish him with water at the changed rates, provided they are reasonable.

CORPORATIONS—CHARTER.—The provisions of a general law under which a corporation is formed or organized, to exercise ordinary corporate powers, enter into and form a part of its charter: *North Point Irr. Co. v. Utah etc. Canal Co.*, 16 Utah, 246; 67 Am. St. Rep. 607; *People v. Chicago etc. Trust Co.*, 130 Ill. 268; 17 Am. St. Rep. 319.

CORPORATIONS — POWERS — THIRD PARTIES DEALING WITH.—Corporations possess such powers and such powers only as the law of their creation confers upon them: *Franklin Nat. Bank v. Whitehead*, 149 Ind. 560; 63 Am. St. Rep. 302. The agents and officers of a municipal corporation cannot bind it by any contract which is beyond its powers, and all persons dealing with it or them

must, at their peril, ascertain the extent of its powers: *Winchester v. Redmond*, 93 Va. 711; 57 Am. St. Rep. 822.

MUNICIPAL CORPORATIONS—POWER TO ENACT ORDINANCES.—The legislature may delegate to municipal corporations power to adopt and enforce by-laws and ordinances on matters of special local importance, though general statutes exist relating to the same subjects: *State v. Fourcade*, 45 La. Ann. 717; 40 Am. St. Rep. 249. A municipal ordinance which conflicts with the general law of the state is a nullity and of no authority: *Katzenberger v. Lawo*, 90 Tenn. 235; 25 Am. St. Rep. 681; *Burg v. Chicago etc. Ry. Co.*, 90 Iowa, 106; 48 Am. St. Rep. 419. But municipal ordinances expressly authorized by specific and definite legislative authority are upheld, unless in conflict with the constitution: *Phillips v. Denver*, 19 Colo. 179; 41 Am. St. Rep. 230.

PLEADING—DEMURRER.—A demurrer to a plea in abatement does not open previous pleadings; the objection raised by the plea goes to the abatement of the writ, and not to the sufficiency of the declaration: *Crawford v. Slade*, 9 Ala. 887; 44 Am. Dec. 463.

ILLINOIS STEEL COMPANY v. BAUMAN.

[178 ILLINOIS, 351.]

MASTER AND SERVANT—ASSUMPTION OF RISKS.—An employé does not assume all the risks of a service in which he may be engaged, but he assumes such risks only as are ordinary, obvious, or known and incidental to his employment.

MASTER AND SERVANT—ASSUMPTION OF RISKS.—A person employed in a steel mill to cool molten metal by pouring water upon molds, does not, as a matter of law, assume the risk of an explosion occasioned by the intentional act of another employé in purposely permitting slag to pass into the molds in large quantities known to be dangerous.

MASTER AND SERVANT—FELLOW-SERVANTS.—If the business of an employer is divided into separate departments, a laborer in one department is not necessarily a fellow-servant with a laborer in another and separate department, though both are servants of the same master.

MASTER AND SERVANT—FELLOW-SERVANTS.—In order to constitute fellow workmen fellow-servants, it is not sufficient that they are serving the same master. It is essential that they shall, at the time of the injury complained of, be actually co-operating with each other in the particular business in hand in the same line of employment, or that their duties be such as to bring them into habitual association, so that they may exercise a mutual influence upon each other, promotive of proper caution.

MASTER AND SERVANT—FELLOW-SERVANTS—QUESTION FOR JURY.—If servants of the same master are not stationed in the same building or within sight or hearing of each other, and the usual duties of their respective employments do not bring them into habitual or even temporary association with each other, it is properly left to the jury to decide whether or not they are fellow-servants.

Gamsey & Knox, W. D. Haynie, and E. H. Gary, for the appellant.

J. W. D'Arcy and G. S. House, for the appellee.

³⁵¹ BOGGS, J. The appellee obtained a judgment against the appellant company in the circuit court of Will county in an action on the case for damages sustained by reason of personal injuries received while in the employ of the company. This is an appeal from a judgment of the appellate ³⁵² court for the second district affirming that of the circuit court.

The sufficiency of the declaration was not challenged by demurrer, but the plea of not guilty was interposed. At the close of the evidence for the appellee, the appellant company moved the court to exclude the evidence, and to instruct the jury impaneled to try the issues in the case to return a verdict that it was not guilty. The court denied the motion, and the company saved exceptions. The cause was then submitted to the jury upon the evidence produced in behalf of appellee. But one instruction was given, and that at the instance of the appellee. It defined the relation of fellow-servant, and it is not urged the definition given is in anywise objectionable. No complaint is made of rulings of the court as to the admissibility of evidence. The record, therefore, presents but a single question—whether the circuit court erred in overruling the motion of appellant to exclude the testimony and peremptorily direct a verdict in its favor.

It appeared in the testimony the appellant company, at the time appellee was injured, was engaged in manufacturing steel from iron ore, and maintained a large plant at Joliet, comprising a number of buildings and structures. One of the buildings was known as the “converting room” or “mill.” In the converting room of this “mill” were two large vessels, in which melted iron was converted into steel by the Bessemer process. After the process of conversion has been completed, the product, in molten condition, is drawn from the vessels into a large receptacle termed a “ladle,” from which it is drawn, through an opening in the bottom of the ladle, into iron molds. The capacity of the ladle is equal to that of six of the molds. These molds, in groups of six in number, are brought into the converting room upon cars and made to pass under the ladle. The ladle is provided with a tube in the bottom thereof, to allow the melted metal to run from it into the molds. The tube is opened and ³⁵³ closed by means of a lever operated by an employé called a “pourer.” A substance called “slag” is always present in the metal in the ladle. It is lighter than the metal, and most usually rises to the top. If slag is permitted to enter the molds it is likely to cause an explosion when the molds are cooled for the purpose of removing their contents. It is the duty of the

pourer to so manipulate the lever as to stop the flow from the ladle the moment he sees, from its color, that slag is beginning to enter the molds. The admission of slag into a mold in a quantity equal to the depth of one-half an inch within the mold would likely cause an explosion when the mold is cooled and uncapped. It is the duty of the pourer to exercise care to prevent slag from entering the molds, but it is apparent that exercise of ordinary care in this regard will not always avail to wholly prevent the escape of slag from the ladle into the molds. The slag being usually at the top of the metal within the ladle will not make its appearance until the contents of the ladle are wellnigh exhausted, and its presence is therefore to be expected when the last one of the six molds is being filled. As soon as the slag commences to pass from the ladle it is the duty of the pourer to shut it off from the molds and to cause it to be emptied from the ladle into a receptacle called a "butt," which is provided for the purpose of receiving and holding it. When the contents of the ladle proper to be received in the molds has been emptied therein the molds are closed by a covering called a "cap," and the cars upon which they are loaded are moved out of the converting room upon a track which leads to another building, where the contents of the molds, after they have cooled and hardened, are removed from the molds by a process called "stripping." The product is then called "ingots" or "billets" of steel. After passing out of the converting mill, but before reaching the department of appellant's plant where the molds are stripped from the billets, the cars containing the ³⁵⁴ molds are stopped at a platform erected beside the track, for the purpose of preparing the ingots or billets for the final process of stripping the molds from them. This is accomplished by chilling the molds with water from a hose and removing the caps. On the occasion when the appellee was injured he was stationed on that platform and engaged as an employé of the appellant company in throwing water from the hose upon the molds and removing the caps therefrom. One James Bartley was, on the same occasion, employed as pourer of the metal from the ladle to the molds in the converting room. It appeared that though Bartley knew that if slag was allowed to pass into the mold, even in such small quantity as one-half of one inch in thickness, it would almost inevitably cause the mold to explode when uncapped, he purposely allowed slag to flow from the ladle into the last or sixth of a group of molds in such quantity that it filled said mold to the extent of one foot in thickness of the slag. It further appeared that when that mold was stopped at the platform where the appellee was

stationed it fell to the appellee to chill and uncap the same, and in so doing the mold exploded with great force and violence, whereby a large quantity of the molten metal was thrown upon the head, shoulders, arms, and other parts of the person of the appellee, severely burning and injuring him.

It is urged by the appellant company that explosions of the molds constitute one of the usual and ordinary perils of the employment of those engaged in the work of cooling and uncapping the molds, and is therefore assumed by one accepting such employment, and, further, that the pourer bore the relation of fellow-servant to one so engaged; and for these reasons it is urged the court should have excluded the evidence from the jury and directed a peremptory verdict of not guilty.

It appeared from the evidence that, notwithstanding the exercise of ordinary care by the pourer to prevent ³⁵⁵ the passage of slag into the molds, some slag would at times find its way from the ladle into a mold, and that explosions would at times probably occur. It was not, however, reasonably to be apprehended that the pourer would fail to detect the presence of any considerable quantity of slag, and that therefore explosions would but infrequently occur, if at all, and would, in any event, be but slight in character and not likely to be followed by any serious results. "An employ   does not assume all the risks of a service in which he may be engaged, but he assumes only ordinary, obvious or known risks": Wood on Master and Servant, 385. The servant assumes only such risks as are incident to his employment, or as are usual or ordinary, and which remain so incident after the master has taken reasonable care to prevent them: Chicago etc. R. R. Co. v. House, 172 Ill. 601. A servant assumes risks of known dangers—such as are so obvious that knowledge of their existence may be fairly presumed; but the law does not imply that he has any notice of dangers not obvious to the senses, and arising out of extraordinary circumstances: Pittsburg Bridge Co. v. Walker, 170 Ill. 550. Appellee, it may be conceded, assumed all of the ordinary, obvious or known risks of the service in which he was engaged. The danger arising from explosions, which were liable to happen from the unavoidable escape of small quantities of slag from the ladle into the molds, it may also be conceded was one of the ordinary and known risks, and, as such, was assumed; but it cannot be said that an explosion occasioned by the intentional act of a pourer in purposely permitting slag to pass into the molds in a quantity known to be dangerous is, as a matter of law, one of the ordinary, usual, and known risks of his employment. Whether

it is so is a question of fact—not of law. The evidence justified the submission of the question to the jury as a question of fact.

³⁵⁶ The court having correctly defined to the jury the relation of fellow-servant, it only remains to determine whether the evidence justified the submission of that question to the jury as a question of fact. Appellee and the pourer, Bartley, were employes of the same master and were engaged in the promotion of the general enterprise of the master. But we recognize the rule that if the business of the employer is divided into separate departments a laborer in one department is not necessarily a fellow-servant with a laborer in another and separate department, though both are servants of the same master. In order that workmen be fellow-servants within the rule which obtains in this state, it is not sufficient they are serving the same master, but it is essential they shall, at the time of the injury complained of, be actually co-operating with each other in the particular business in hand in the same line of employment, or that their duties are such as to bring them into habitual association, so that they may exercise a mutual influence upon each other promotive of proper caution. This has been declared so often by this court to be the rule it is unnecessary any of the numerous decisions should be cited. The evidence tended to show that Bartley was employed in one department of appellant's plant, denominated the converting room or mill, which was devoted to a particular branch of its business—i. e., converting iron into steel. The process of conversion left the steel in a molten condition in the molds hereinbefore mentioned. It maintained another department of its business which was devoted to the work of removing the steel from the molds, called "stripping" the molds. The evidence further tended to show the first step in the process of stripping was performed by appellee. The converting mill and the employes therein were under the control of a superintendent, and the appellee was subject to the control of another and different principal servant, called the "yard foreman." The further tendencies of the evidence ³⁵⁷ were, the pourer and the appellee were not stationed in the same building or within sight or hearing of each other, and that the usual duties of their respective employments did not bring them into habitual or even temporary association. In this state of the proof, whether the appellee and the pourer were directly co-operating in a particular business in the same line of employment, or whether their usual duties brought them into habitual consociation so that they might exercise an influence, each upon

the other, promotive of proper caution, was a question of fact for the jury.

The errors assigned are not well taken, and the judgment must be and is affirmed.

MASTER AND SERVANT—ASSUMPTION OF RISKS.—A person, when he enters the service of another, assumes only such risks and dangers as are usually incident thereto: *Settle v. St. Louis etc. R. R. Co.*, 127 Mo. 336; 48 Am. St. Rep. 633; *Chicago etc. Ry. Co. v. Gillison*, 173 Ill. 264; 64 Am. St. Rep. 117.

MASTER AND SERVANT—ASSUMPTION OF RISKS—FELLOW-SERVANTS.—Fellow-servants are those who are so far working together as to be practically co-operating, and who have an opportunity to control, or influence the conduct of, and who have no superiority over, one another: *Flannegan v. Chesapeake etc. Ry. Co.*, 40 W. Va. 436; 52 Am. St. Rep. 896; *Lingartner v. Illinois Steel Co.*, 94 Wis. 70; 59 Am. St. Rep. 859. One is not a fellow-servant who has no participation in duties the neglect of which contributed to the injury complained of, but whose duties belong to a distinct department: *Gillenwater v. Madison etc. R. R. Co.*, 5 Ind. 339; 61 Am. Dec. 101. The doctrine that a servant cannot recover of a master for the consequences of a fellow-servant's negligence is not applicable to a case where the respective situations of the servants allow no opportunity for the exertion of a mutual influence upon each other's carefulness: *Cooper v. Mullins*, 30 Ga. 146; 76 Am. Dec. 638. The master is not liable, as a general rule, to one servant for an injury resulting from the negligence of a fellow-servant. Exceptions to the rule are as follows: 1. Where the injury results from exposing the servant to risks not arising out of his contract of service or employment; 2. Where the negligent servant, whatever his grade or title, exercises supervision or control over the injured servant, they are not fellow-servants in a common employment, and the principal must answer for the negligent acts of the former, whereby the latter was injured without fault on his part; 3. Where the principal undertakes to run dangerous machinery with insufficient help, and the servant is thereby injured: *Jones v. Old Dominion Cotton Mills*, 82 Va. 140; 3 Am. St. Rep. 92; *Anderson v. Bennett*, 16 Or. 515; 8 Am. St. Rep. 311, and note.

MASTER AND SERVANT—FELLOW-SERVANTS—QUESTION FOR JURY.—Cases in which the question as to whether one employé was a fellow-servant of another has been left to the jury: *Theleman v. Moeller*, 73 Iowa, 108; 5 Am. St. Rep. 663; *Mullan v. Philadelphia etc. S. S. Co.*, 78 Pa. St. 25; 21 Am. Rep. 2.

CHICAGO v. MANHATTAN CEMENT COMPANY.

[178 ILLINOIS, 372.]

CONSTITUTIONAL LAW—MOB LAW—LIABILITY.—A statute providing that cities and counties shall be liable to an action for three-fourths of the damages sustained by a property-owner by reason of the destruction of, or injury to, property real or personal, not in transit, by any mob or rioters composed of twelve or more persons, is constitutional and valid as a police enactment or regulation.

CONSTITUTIONAL LAW—MOB LAW.—A statute providing that cities and counties may be held liable for damages sustained by a property-owner by reason of the destruction of, or injury to,

property real or personal, not in transit, by any mob, is constitutional and valid, and does not create a debt against cities or counties, nor amount to a donation to private corporations, but merely gives the property-owner a right of recovery upon proving all the facts prescribed by the act as necessary to fix the liability of the city or county.

CONSTITUTIONAL LAW—MOB LAW—CONSTITUTIONAL LIMIT OF INDEBTEDNESS.—Although a city is indebted beyond the constitutional limit, that fact has no bearing upon the constitutionality, nor does it affect the validity, of a statute making such city liable for injury to, or the destruction of, property within its limits by mobs or rioters.

CONSTITUTIONAL LAW—QUESTIONS NOT CONSIDERED IN DETERMINING CONSTITUTIONALITY.—Neither the wisdom of a law, nor the hardships which it may impose upon municipalities without any fault or neglect of duty upon their part, are matters for discussion or decision in passing upon its constitutionality.

CONSTITUTIONAL LAW.—EVERY INTENDMENT is made in favor of the constitutionality of a statute, and, to render it void, it must be clearly violative of the plain provisions of the organic law.

C. S. Thornton, corporation counsel, and F. J. Sutherland, for the appellant.

G. Willard, J. J. Brooks, and C. V. Gwin, for the appellee.

375 WILKIN, J. Appellee brought its action on the case in the circuit court of Cook county, against the city of Chicago, to recover three-fourths of the value of a quantity of cement alleged to have been destroyed in consequence of a mob or riot in the city July 6, 1894. By agreement of parties a jury was waived, and both matters of law and fact were tried by the court. The finding being for the plaintiff, judgment was rendered in its favor for one hundred and fifty dollars and costs of the suit. The city prosecutes this appeal.

The action is based upon the statute entitled, "An act to indemnify the owners of property for damages occasioned by mobs and riots," in force July 1, 1887: Laws 1887, p. 237. The first section of that act provides "that whenever any building, or other real or personal property except property in transit, shall be destroyed or injured in consequence of any mob or riot composed of twelve or more persons, the city, or if not in the city, then the county in which such property was destroyed, shall be liable to an action by or in behalf of the party whose property was thus destroyed or injured, for three-fourths of the damages sustained by reason thereof." Section 2 authorizes the bringing of a suit in any appropriate form of action, and provides that "whenever any final judgment shall be secured against

any such city or county in any such action, the same shall be paid in due course, as in case of other judgments." By section 3 no recovery can be had if the loss is the result of the carelessness, neglect, or wrongful act of the plaintiff, nor unless ³⁷⁶ such party shall have used all reasonable diligence to prevent the loss. Section 4 preserves the right of action against the parties engaged in the mob or riot or in any manner participating in the same, and gives the city or county paying the damages a lien upon any judgment so obtained against such individual. Section 5 gives the city or county an action over against any person or persons engaged or in any manner participating in the mob or riot. By section 6 no action shall be maintained under the act unless notice of the claim shall have been given within twenty days, and the action brought within twelve months after the loss or damage occurred.

Plaintiff, by its declaration, alleged all the facts made necessary by these several sections to entitle it to recover. The trial was upon a stipulation of facts between the parties, by which the defendant agreed that all the facts alleged in the declaration were true, and the plaintiff, on its part, admitted that at the time of the destruction of the property the city was indebted beyond the constitutional limit of five per centum on the value of its taxable property, and could lawfully obtain no funds for employing more firemen or policemen, or which could be expended for the purpose of protecting the plaintiff's property; that the funds which it had or could obtain were expended for the necessary running expenses of the city government, including the maintenance of the police and fire departments; also, that at the time of the destruction of the property, marshals appointed by the circuit court of the United States and soldiers of the regular army and state militia were present, engaged in protecting all public and private property within the city; that the city has now, and had at the time of the destruction of said property, no funds which, under the constitution and laws of the state, can be used to pay a judgment in the action, if one should be rendered against it.

The only question at issue upon the trial was the constitutionality of the statute declared upon, and the ³⁷⁷ court, in its rulings upon propositions of law submitted by counsel for the respective parties, decided in favor of the validity of the act. The correctness of that ruling is the only point presented for our decision.

Statutes similar to ours have been in force in England, as well as in several of the states in this country, for many years,

and have uniformly been upheld by the courts. The constitutional right of legislatures to enact such laws under our form of government has been frequently challenged in courts of last resort, and our attention is called to no case denying that authority. The principle upon which these laws are held to be within the general scope of legislative power is stated in *County of Allegheny v. Gibson*, 90 Pa. St. 397, 35 Am. Rep. 670, as follows: Speaking of the course of the ancient English law on the subject it is said: "Formerly, as we have seen, a person robbed had his remedy against any inhabitant of the hundred—that is to say, the inhabitants were jointly and severally liable. Then the law was so changed that damages recovered against an individual could be assessed against all the inhabitants, so as to compel contribution. Afterward, it was still further modified so as to give the right of action against the hundred. The principle upon which this legislation rested was, that every political subdivision of the state should be responsible for the public peace and the preservation of private property, and that this end could be best subserved by making each individual member of the community surety for the good behavior of his neighbor and for that of each stranger temporarily sojourning among them. The effect was to make each citizen a detective, and on the alert to prevent, as well as to detect and punish, crime. . . . It was evidently a police regulation, based upon grounds of public policy, and in force without regard to the hardships of particular cases." And referring to the Pennsylvania act, which is very similar to that under consideration, it is further said: "Our act of 1841 is also a police regulation and rests ³⁷⁸ upon like grounds of public policy. Under our political system the state grants a portion of its sovereignty to certain municipalities. It clothes them with certain of its powers, and exacts from them in return the performance of certain duties. Among the powers granted is that of maintaining a police force. Among the duties exacted is that of preserving the public peace. There is an implied contract between the state and every municipality upon which it bestows a portion of its sovereignty, that such municipality shall preserve the public peace and maintain good order within its borders. The state lends its aid when the local authorities are overborne and a call for assistance is made in the manner pointed out by law. But it is entirely within the power of the sovereign to make such communities responsible for the preservation of order. The privileges conferred must be taken with such burdens as the law-making power chooses to annex thereto."

In *Darlington v. Mayor*, 31 N. Y. 164, 88 Am. Dec. 248, the

court of appeals, having under consideration the statute of that state, passed in 1855, making counties and cities liable for property destroyed in consequence of mobs, said: "It cannot be doubted but that the general purposes of the law are within the scope of legislative authority. The legislature has plenary power in respect to all subjects of civil government which they are not prohibited from exercising by the constitution of the United States or by some provision or arrangement of the constitution of this state. This act proposes to subject the people of the several local divisions of the state, consisting of counties and cities, to the payment of damages to property in consequence of any riot or mob within the county or city. The policy upon which the act is framed may be supposed to be to make good at the public expense the losses of those who may be so unfortunate as, without their own fault, to be injured in their property by acts of lawless violence of a particular kind which it ³⁷⁹ is the general duty of the government to prevent; and further, and principally, we may suppose, to make it the interest of every person liable to contribute to the public expense to discourage lawlessness and violence and maintain the empire of the laws established to preserve public quiet and social order. These ends are plainly within the purposes of civil government, and, indeed, it is to maintain them that governments are instituted, and the means provided by this act seem to be reasonably adapted to the purposes in view."

Except that of the state of Maryland, all of the statutes of this character, so far as we can ascertain, like our own, fix the liability of the municipality without reference to its ability or exercise of diligence to prevent the destruction, and that feature has not been considered, by any of the courts passing upon the question, as an objection to their validity. In *County of Allegheny v. Gibson*, 90 Pa. St. 397, 35 Am. Rep. 670, it was said: "It may seem a harsh rule to hold a community responsible for the effects of mob violence, which, apparently at least, they had no power to prevent, yet not more so than to hold every inhabitant of the English hundred liable for a robbery of which he knew nothing and had no means of arresting. In both cases it is a police regulation. It is based upon the theory that with proper vigilance the act might and ought to have been prevented." The following authorities either directly pass upon and sustain like statutes or recognize their validity and give force to them: 2 Dillon on Municipal Corporations, sec. 959; *Davidson v. Mayor*, 27 How. Pr. 342; *Luke v. Brooklyn*, 43 Barb. 54; *In re Pennsylvania Hall*, 5 Pa. St. 204; *Underhill v. Manchester*, 45 N. H. 214; *Williams v. New Orleans*, 23 La. Ann. 507; *Chadbourn v.*

Newcastle, 48 N. H. 196; Atchison v. Twine, 9 Kan. 350; Bringtham v. Bristol, 65 Me. 426; 20 Am. Rep. 711; Clear Lake etc. Co. v. Lake County, 45 Cal. 90.

In *Marion County v. Lear*, 108 Ill. 343, the question being as to the constitutionality of the statute requiring ³⁸⁰ counties to pay sheriffs' fees in criminal cases where the defendants are acquitted, and to make up any deficiency in their salaries, we said, after holding that the passage of the law was an exercise of the police power: "Whether the burden of enforcing police regulations in the absence of express constitutional restriction—and none such is here claimed—shall be borne by the state at large or be devolved upon the local municipality is a mere question of public policy, upon which the determination of the general assembly is conclusive. A county is a public corporation, which exists only for public purposes connected with the administration of the state government, and it and its revenues are alike, where no express constitutional restriction is found to the contrary, subject to legislative control": See, also, *Harris v. Board of Supervisors*, 105 Ill. 445; 44 Am. Rep. 808.

But counsel for the city assert that in none of the authorities cited as upholding the constitutionality of these mob or riot statutes were constitutional provisions in force like those contained in our constitution of 1870. It is not and cannot be denied that the legislature of this state has full power to enact all laws pertaining to the civil government of the state not prohibited by the federal or state constitutions. The constitution itself confers that power, and as said in *Firemen's Ben. Assn. v. Lounsbury*, 21 Ill. 511, 74 Am. Dec. 115 (speaking of the constitution of 1848, similar in that regard to our present constitution): "The general grant of legislative power found in the constitution confers upon the general assembly all legislative power and authorizes the lawmakers to pass any laws and do any acts which are embraced in the broad and general word 'legislation,' as known and defined in the English language," et cetera. "The question of legislative power, and its extent, depends on the limitations contained in the constitution. When a state is created, it is vested with complete sovereign power unless restricted by constitutional limitation. By section 1, article 4, of ³⁸¹ our constitution, full, unlimited, and uncontrolled legislative power is conferred and may be exercised unless limited by other provisions of that instrument or by the federal constitution": *Harris v. Board of Supervisors*, 105 Ill. 445; 44 Am. Rep. 808.

It is not claimed that the statute in question is in any way violative of the constitution of the United States. The question then must be, Has the city, by its counsel, succeeded in pointing

out any provision of the constitution of this state which restricts, limits, or prohibits the enactment of this law? The attempt to do so is by setting up the following sections of article 9, and the separate section prohibiting donations by municipal corporations to private corporations. These sections are as follows:

"Sec. 9. The general assembly may vest the corporate authority of cities, towns, and villages with power to make local improvements by special assessment or by special taxation of contiguous property, or otherwise. For all other corporate purposes, all municipal corporations may be vested with authority to assess and collect taxes, but such taxes shall be uniform in respect to persons and property within the jurisdiction of the body imposing the same.

"Sec. 10. The general assembly shall not impose taxes upon municipal corporations, or the inhabitants or property thereof, for corporate purposes, but shall require that all the taxable property within the limits of municipal corporations shall be taxed for the payment of debts contracted under authority of law, such taxes to be uniform in respect to persons and property within the jurisdiction of the body imposing the same. Private property shall not be liable to be taken or sold for the payment of the corporate debts of a municipal corporation.

"Sec. 12. No county, city, township, school district, or other municipal corporation shall be allowed to become indebted, in any manner or for any purpose, to an amount, including existing indebtedness, in the aggregate exceeding five per centum on the value of the taxable property ³⁸² therein, to be ascertained by the last assessment for state and county taxes previous to the incurring of such indebtedness."

Separate section: "No county, city, town, township, or other municipality shall ever become subscriber to the capital stock of any railroad or private corporation or make donation to or loan its credit in aid of such corporation."

Counsel for the city say in their argument (meaning, no doubt, sections 9 and 10): "These sections prohibit any increase of indebtedness of cities, direct or indirect, present, future, or contingent, by or through any subsequent legislation; and, to be specific, prohibit any legislation which shall directly impose a debt or create a condition of affairs which will be likely to produce a debt, thus prohibiting the legislature from accomplishing the result by indirect methods, which it is in terms prohibited from doing by direct provisions. In other words, the legislature is prohibited by these sections of the constitution from enacting any law which shall, in and of itself, provide or create a present

debt or put into existence or motion any condition of affairs which will render it possible or probable that a municipal debt may thereby be created, such a law being in contravention alike both of the terms and of the spirit of the constitution."

If this proposition had been limited to indebtedness for local or corporate purposes, within the proper meaning of the term, it might, at least for the purposes of this decision, be conceded. In *Marshall v. Silliman*, 61 Ill. 218, the question "whether the legislature can create a debt against a municipal corporation for municipal purposes and subject it to a tax for its payment without its consent" was disposed of in the following language: "Our new constitution expressly prohibits this for the future, and the decisions of this court substantially hold that could not be done under the constitution of 1848," citing and quoting from *Harward v. St. Clair Drainage Co.*, 51 Ill. 388 130; *People v. Mayor*, 51 Ill. 17; 2 Am. Rep. 278; *Hessler v. Drainage Commrs.*, 53 Ill. 105; *Lovington v. Wider*, 53 Ill. 302. The cases of *Cairo etc. R. R. Co. v. Sparta*, 77 Ill. 505, *Urdike v. Wright*, 81 Ill. 49, and *Choisser v. People*, 140 Ill. 21, simply follow the preceding cases in holding that debts for merely corporate purposes cannot be created against municipal corporations by the legislature, under our constitution, without their consent.

If it should be admitted that this act does create debts and impose taxes for their payment upon cities and counties without their consent—a proposition in our opinion untenable—still, unless it can be further successfully maintained that such debts are for local purposes—merely, and only for corporate purposes—the foregoing sections of the constitution, as heretofore construed do not prohibit or limit the power of the legislature to enact the statute. In *People v. Mayor*, 51 Ill. 17, 2 Am. Rep. 278, Chief Justice Breese, construing section 5 of article 9 of the constitution of 1848, and referring to *Harward v. St. Clair Drainage Co.*, 51 Ill. 130, said: "To what extent it is to be construed as a limitation upon the power of local taxation directly by the legislature itself was not necessary in that case, nor is it in this, to decide. However strong the argument in favor of so construing it, there nevertheless may be cases where the legislature, without the consent of the corporate authorities, might impose taxes local in their character if required by the general good government of the state, because such taxes would not be merely and only for corporate purposes—as, if one of the cities of the state should be insurgent, requiring the interposition of the military power, it will not be denied the state, on quelling the insurrection, could impose taxes upon the city to defray the expense of a

resort to military power. So if the police department of a city should fail to furnish reasonable security to life and property, the state undoubtedly might provide such force and assess the city for the expense; but the tax authorized ³⁸⁴ by the act in question is for a purpose purely local and corporate, having no other element about it, and the commissioners appointed by it are in no sense corporate authorities of the city of Chicago." This language clearly indicates that it was not intended by any of the decisions cited to hold that the legislature might not create a debt against cities or counties and provide for the collection of the same, where it was done under a proper exercise of the police power, and hence they are in no way in conflict with what was decided in 108 Illinois and 105 Illinois.

In his work on Taxation, page 686, treating of the subject of local taxation under legislative compulsion, Judge Cooley, enumerating the cases in which such taxes are lawful, says: "Mobs and riots—Another similar case is, where a municipal corporation is compelled, by means of taxation, to make compensation for losses sustained within its limits at the hands of mobs and rioters. It has been thought from very early times that that political division of the county which failed to exert its authority for the effectual suppression of disorder, by means whereof innocent parties suffer from lawlessness and violence within its boundaries, might justly be required to make good the losses, and that its diligence in maintaining the empire of the laws would be quickened by the requirement. Such legislation is, in effect, only a part of the state police system, under which the municipal divisions are severally looked to for the preservation of the public peace within their respective limits. And, speaking generally, it may be affirmed that in any case in which compulsory taxation is found necessary in order to compel a municipal corporation or political division of the state to perform properly and justly any of its duties as an agency in the state government, or to fulfill any obligation, legal, or equitable, resting upon it, in consequence of any corporate action, the state has ample power to direct and levy such compulsory taxation, and the people ³⁸⁵ to be taxed have no absolute right to a voice in determining whether it shall be levied, except as they may be heard through their representatives in the legislature of the state." The same author says, in his work on Constitutional Limitations, page 283: "The legislature has undoubted power to compel the municipal bodies to perform their functions as local governments, under their charters, and to recognize, meet, and discharge the duties and obligations properly resting upon them

as such, whether they be legal or merely equitable or moral, and, for this purpose, it may require them to exercise the power of taxation whenever and wherever it may be deemed necessary or expedient."

Keeping in mind that the passage of this and similar laws is for the better government of the state—is a mere police regulation—sections 9 and 10 of the constitution in no way limit the power of the general assembly to enact them. There is still less reason for the contention that section 12 of the constitution is such a limitation. By no possible construction can it be held to create a debt against municipal corporations of any particular amount, much less of an amount exceeding the constitutional limit. We certainly cannot be asked to assume that every county and city in the state would be compelled to become indebted, by its enforcement, to an amount, including existing indebtedness, exceeding five per centum on the value of its taxable property, in order to justify a holding against the validity of the act. Whether or not the city of Chicago was, at the bringing of this suit, indebted beyond that amount is wholly immaterial in determining the constitutionality of the law. That question could only arise, if at all, upon a proceeding to collect the judgment.

But aside from the foregoing considerations, as already intimated, we do not think the act, in any proper sense, creates a debt against cities and counties. It does no more than provide that under certain circumstances ³³⁶ they shall be liable to owners for property destroyed by mobs and riots. Owners seeking to recover for such loss must, as in any other case, make out their cause of action by alleging and proving all the facts prescribed by the several sections of the act. This right of action is no more a debt against a city or a county than is the right of recovery against such municipality for any other wrong or injury. The New York constitution provided that on the final passage in either house of the legislature of every act which imposes, continues, or revives a tax, et cetera, three-fifths of all the members should be necessary to constitute a quorum. In *Darlington v. Mayor*, 31 N.Y.164, 88 Am. Dec. 248, it was insisted the mob act of that state imposed a tax, and that the constitutional quorum was not present when it passed. Denio, chief justice, rendering the opinion of the court, said: "The act of 1855 does not impose a tax of any kind, either state or municipal. Its provisions may, and doubtless will, lead to the necessity of local taxation; and the same thing may be said of every act of legislation under which an expenditure for general or local purposes may, in any

contingency, be required. If a local tax in a city or village is within the scope of the section, it will be sufficient to have the requisite quorum present when the tax shall come to be voted. The act does not create a debt or claim. If no person should suffer damage by riot or mob, no money would be required and no debt or charge would ever be created, and until such an event shall occur no debt or claim will be called into existence." Under the Illinois statute there must not only be a loss by mob or riot, but the owner must have been free from fault and given the required notice, et cetera, before money can be required or a debt or charge created.

What has been said disposes of the contention that the act violates the separate section quoted above. The statute does not make or provide for making a donation to any one.

387 Neither the wisdom of this law nor the hardships which it may impose upon municipalities without any fault or neglect of duty upon their part are matters for discussion or decision in passing upon its constitutionality. These are questions for the legislature, and not for the courts. The oft-repeated rule is, "that to render a statute unconstitutional it must be clearly violative of the plain provisions of the constitution. All doubts and uncertainties arising, either from the language of the constitution or the law, must be resolved in favor of the validity of the statute. Every intendment is in favor of the constitutionality of enactments of the legislature."

After giving the question here involved the careful consideration its importance deserves, we are of opinion that no sufficient reason is shown for holding the act in question unconstitutional. The judgment of the circuit court will accordingly be affirmed.

CONSTITUTIONAL LAW—MOB LAW—LEGISLATIVE CONTROL OF MUNICIPAL PROPERTY.—At common law, a municipality is not liable to a person whose property has been injured by a mob within its limits: *Prather v. Lexington*, 13 B. Mon. 559; 56 Am. Dec. 585, and note. An act subjecting counties and cities to liability for damages to property by mobs and riots within such counties and cities is within the general scope of legislative authority, and is not obnoxious to the constitutional provision that no one shall be deprived of his property without due process of law: *Darlington v. Mayor*, 31 N. Y. 164; 88 Am. Dec. 248, and monographic note thereto. On the general question of the authority of the legislature of a state to direct a municipality to make any payment out of its funds, see *Conlin v. Board of Supervisors*, 99 Cal. 17; 37 Am. St. Rep. 17; *Mount Hope Cemetery v. Boston*, 158 Mass. 509; 35 Am. St. Rep. 515, and the extended note thereto.

CONSTITUTIONAL LAW—CONSTITUTIONAL LIMIT OF INDEBTEDNESS.—The moment an indebtedness is voluntarily created in any manner or for any purpose with no money or means in

the treasury, nor current revenues collected, or in the process of collection, for the payment of the same, that moment such debt must be considered in determining whether such municipality has or has not exceeded the constitutional limitation of indebtedness: *Earles v. Wells*, 94 Wis. 285; 59 Am. St. Rep. 886; see monographic note to *Beard v. Hopkinsville*, 44 Am. St. Rep. 229-243.

CONSTITUTIONAL LAW.—A law will not be declared unconstitutional unless it is clearly and palpably in violation of the constitution: *Hanna v. Young*, 84 Md. 179; 57 Am. St. Rep. 396; *State v. Tibbets*, 52 Neb. 228; 66 Am. St. Rep. 492.

MCGREGOR v. REID.

[178 ILLINOIS, 464.]

APPELLATE PRACTICE.—An appellate court cannot weigh and determine, from conflicting testimony, what the truth is, in passing upon the question of law presented by an instruction directing a verdict.

MASTER AND SERVANT—ELEVATOR ACCIDENT—NEGLIGENCE.—The fact that elevator cables are put in by independent contractors does not exempt the owner of the elevator from liability for injury to his servant caused by the falling of the elevator, arising from the pulling out of the cables, if the elevator is equipped with safety devices to keep it from falling and the master is guilty of negligence in not keeping them in working order.

NEGLIGENCE—ELEVATOR ACCIDENT—PROXIMATE CAUSE.—If the pulling out of elevator cables and the defective condition of a safety device operate together, and neither alone would have caused the elevator to fall, and if the pulling out of the cables is attributable to the negligence of a third person, and still the elevator would not have fallen without the negligence of its owner in regard to keeping the safety device in working order, the latter is liable.

TRIAL.—THE CREDIBILITY OF WITNESSES, THE WEIGHT OF TESTIMONY, and the drawing of inferences of fact from facts proven, are all questions for the jury, and not for the court to decide.

MASTER AND SERVANT—NEGLIGENCE—QUESTION OF FACT.—Whether the owner knows of the defective condition of the safety devices upon his elevator used by his servant, and whether it had been in this defective condition long enough before an accident for him, by the exercise of ordinary care and diligence, to have discovered it, are questions of fact for the jury to determine, and not for the court to declare as matters of law.

NEGLIGENCE.—INSPECTION OF ELEVATORS by city officers and indemnity companies at certain times does not, as a matter of law, exempt the owners of such elevators from all liability for the defective condition of the safety devices on them, especially when such devices are not tested as to their condition at any time.

MASTER AND SERVANT—ELEVATOR ACCIDENT—ASSUMPTION OF RISKS.—A servant employed by the owner of a building and elevator to receive goods in the basement and to carry them to an upper floor on such elevator, but not to operate the latter, does not assume the risk of injury arising from the negligence of the master in failing to keep the safety devices on the elevator in good working order, especially when such servant has no knowledge of the danger attending the use of the elevator, and does not have charge of it at the time of the accident.

Wing & Chadbourne, for the appellant.

Walker & Eddy, for the appellee.

⁴⁶⁵ CARTER, C. J. The appellee, a corporation, carried on the business of a wholesale grocer in a four-story building, and operated two freight elevators to carry its goods from one floor to another. Appellant was a porter employed by appellee to receive goods into the basement and take them up to the several floors on one of these elevators, ⁴⁶⁶ but not to operate the elevator, that duty being performed by another employé. On November 15, 1894, appellant, in performance of his duties, placed a truck containing half a dozen cases of catsup on the elevator, got on himself, and with this freight was taken up to the third floor, when the wire cables by which the elevator was suspended and drawn pulled out of their sockets at the top of the elevator frame, and the "dogs," a safety appliance attached to the elevator and designed to set and press into the sides of the shaft and thus prevent the elevator from falling in such emergencies, failed to set, or at least perform its functions, and the elevator fell to the basement, greatly injuring the appellant. Appellant brought this action in the superior court. The judge instructed the jury to find the defendant not guilty, and the appellate court has affirmed the judgment rendered on the verdict.

There were five counts in the declaration, in one or more of which the defendant was charged with negligence in this, that instead of having and keeping the said elevator in a reasonably safe condition, as it was its duty to do, it carelessly permitted the cables to be and remain so improperly and insecurely fastened to the elevator that they pulled out, and the elevator fell and injured the plaintiff. In others it was charged, in addition, that the "dogs," a safety appliance, was not of sufficient strength to hold the elevator; and in others that this safety appliance was out of order, and for that reason failed to set and keep the elevator from falling. It was also alleged that the plaintiff was using due care for his own safety and was ignorant of these defects, and that the defendant knew of them or by the use of ordinary care and diligence could have known of them. The evidence was clear, and even undisputed, that the cables were insecurely fastened in their sockets at the top of the elevator. New cables had been put in but little more than six months before the accident, and it was shown that ⁴⁶⁷ they pulled out because when they were put in they were not properly and securely fastened. It was also shown that the safety appliance was of a kind the best and most approved in use, and if

properly adjusted and in good order would automatically have so set and pressed into the sides of the shaft, or slides there, as to securely hold the elevator and prevent its falling more than a few inches. The freight carried at the time was of much less weight than was often carried and the capacity of the elevator permitted.

The ground upon which the instruction was given, and upon which it is defended here, was and is that there was no evidence upon which the jury, acting reasonably within the rules of law, could base a verdict against the appellee, and which would have been sufficient, in law, to support such a verdict if it had been found. If the proposition be true that there was no such evidence, the instruction was properly given, otherwise not. In considering this question, we start with the assumption that the defects in the machinery complained of did in fact exist, for as to defects in the fastenings of the cables, they were not only proved but not controverted; and as to the "dogs," or safety appliance, the evidence tended strongly to show that if kept in good order it would with reasonable certainty have held the elevator and prevented it from falling. An expert witness, Jallings, testified that with such a safety device in good order on the elevator it would have dropped only about an inch and three-quarters; that in putting in elevators he had repeatedly, at high elevations, cut the cables to let the elevator drop while he was standing on it, and thus demonstrated the all but absolute safety of these "dogs" as a safety appliance. The witness Anderson testified that he operated this elevator from 1890 until near the time of the accident, in 1894, was there when it was inspected from time to time by the city inspectors and by others procured by appellee, and that no test of the safety device ⁴³⁸ was ever made; that the inspectors merely looked under the elevator; that he often cleaned this appliance, and noticed that there was too much play for the teeth of the "dogs" to take hold; that the play was about an inch and a half, and that the teeth designed to catch and hold the elevator in case it should drop would not reach far enough to accomplish the purpose; that he noticed that a year before the accident and told some other employé of it, but did not tell the appellee. This evidence was controverted, and the witness Wright, on cross-examination, testified that the play was not more than from one-eighth to a quarter of an inch, and counsel for appellee argue, with considerable force—if such an argument could be considered on the question of law at issue—that Anderson's testimony is refuted

and overcome by the other evidence in the case. It must be apparent, however, from repeated decisions of this court, that we cannot weigh and determine, from conflicting testimony, what the truth is in passing upon the question of law presented by an instruction directing a verdict. The jury might have believed Anderson, and found that the safety appliance was not in good working order, that it would not catch, that there was too much play, and that appellee knew of it, or that it was in that condition for so long a time before the accident that appellee, by the use of ordinary diligence, could have ascertained and removed the defect; that although the elevator and this device were frequently inspected, it was never tested to learn whether the "dogs" would prevent the elevator from falling or not, until after the accident, when, as it appears, it was tested, and it was found it would not arrest the fall of the elevator, but would do so after some repairs were made, the nature of which the evidence does not disclose.

Counsel for appellee say that during the trial the court and counsel on both sides examined the elevator and found it as stated by Wright, and not as stated by Anderson, ⁴⁶⁹ and that the testimony shows there had been no change in the respect mentioned. We have not been referred to anything in the record, and have been unable to find anything, showing such an examination, or its results. It is therefore unnecessary to consider that contention of appellee, or what effect it should have if based upon the record.

The evidence offered on the part of the defendant below tended very strongly to show that the appellee used due diligence in employing competent mechanics to put in the new cables in a proper manner, but it is proved very clearly they did not do their work properly, but left the fastenings insecure and unsafe. The evidence tends to prove that this work was done and the materials furnished under a contract with the appellee by these mechanics, who were contractors in an independent business, and not by the servants of the appellee or under its superintendence. In such a case appellee contends that the law is that it is not liable for the mere negligence of the contractors in doing the work; that their negligence, unknown to it, is not to be imputed to it, but that it, having used due care in their selection to do the work and furnish proper materials, can no more be held for their mistakes or carelessness of which it had no knowledge than for hidden and unknown defects in implements or machinery which might be furnished by it after using proper care in their

selection, and cites *Devlin v. Smith*, 89 N. Y. 470, 25 Am. Rep. 173, *Ardesco Oil Co. v. Gilson*, 63 Pa. St. 150, *Cooley on Torts*, 557, and other authorities. It must be observed, however, that this question is not sufficient to dispose of the case, but the issues involved the alleged negligence of appellee in allowing the safety appliance to become and remain out of working order and in such a condition that it would not perform its functions of catching and holding the elevator after the ends of the cables had pulled out of their sockets. It is not disputed that such a device is necessary for the safety of persons ascending ⁴⁷⁰ and descending in elevators, and in the case at bar it is, of course, manifest that had this safety device performed its office appellant would not have been injured. It was the falling of the elevator that caused the injury, and it was caused to fall not alone by the pulling out of the cables from their attachments to the elevator frame, but also by the defective condition of the safety device, which prevented it from taking hold of the sides of the elevator shaft and holding the elevator in place. Appellant's declaration is sufficient to sustain a finding based on either defect, or on both combined. It is manifest, therefore, that if he failed to prove a cause of action arising from the defect in the cable fastenings alone, he might still recover if he established the necessary allegations of negligence in his declaration respecting the defective condition of the safety appliance, or of both combined.

Appellee insists that the pulling out of the cable ends from their fastenings was the proximate cause of the injury, and that no recovery can be had for what is supposed to be the remote cause of the accident—the defective condition of the safety device. But this position is clearly untenable. The two causes operated together, and neither, alone, would have caused the elevator to fall, and if the pulling out of the cables was attributed to an accident or to the negligence of a third person, and still the elevator would not have fallen without the negligence of appellee, appellee would be liable, for both causes, operating proximately at the same time, caused the injury: 16 Am. & Eng. Ency. of Law, 44. And we have held that “where a party is injured by the concurring negligence of two different parties, each and both are liable, and they may be sued jointly or separately”: *Carterville v. Cook*, 129 Ill. 152, 16 Am. St. Rep. 248, and cases there cited. Appellee is not liable, however, on the facts proved, as a common carrier of passengers, as contended by appellant, but, if at all, only for its failure to use that degree of care which the law required that it, as master, ⁴⁷¹ should exer-

cise in providing a safe means of transit for appellant, as its servant, from one to another of the several floors of its building, to and from which it was necessary for him to pass in the performance of his duties: *McDonough v. Lanpher*, 55 Minn. 501; 43 Am. St. Rep. 541.

The question, then, raised by the instruction to the jury to find for the defendant is, Was there any evidence before the jury tending to prove that appellee had failed in this duty, as alleged in the declaration or in some count thereof? In answering this question the evidence must be considered not only in its application to the defective cable fastenings, but to the defective condition of the safety appliance as well, and all that the evidence tends to prove, and all just inferences to be drawn from it in appellant's favor, must be conceded to him: *Bartelott v. International Bank*, 119 Ill. 259; *Collar v. Patterson*, 137 Ill. 403; *Offutt v. World's Columbian Exposition*, 175 Ill. 472.

Under the rule that evidence most favorable to appellant must be taken as true, this embraces the testimony of Anderson, so strongly combatted by appellee's counsel, and which the court could neither deny nor ignore in passing upon the instruction. The credibility of the witnesses, the weight of the testimony, the drawing of the inferences of fact from facts proved, were all questions of fact for the jury to pass upon, and not for the court to decide. Thus, it appeared that the safety device was out of order from the fact (in connection with the testimony of Jallings) that the elevator fell. It was a question for the jury whether or not the appellee knew this, or whether or not it had been in this defective condition long enough for the appellee, by the use of ordinary care and diligence, to have discovered it, and it was not for the court to say, as a matter of law, that an inspection twice a year by city officers and four times a year by an agent of the indemnity company was sufficient to discharge appellee from all responsibility for its defective ⁴⁷² condition. These were evidentiary facts, which should have been submitted, with all other evidence bearing upon the questions at issue, to the jury. It might be that appellee was satisfied if the indemnity company was satisfied; but this would not change its relation to its employes, nor its duty to provide them with ordinarily safe places, appliances, and means in, by, and with which to perform the tasks which had been allotted to them in their employment. This duty was commensurate with the dangers incident to the service, and if it required a high degree of care, by making frequent examinations

and applying frequent tests, to keep the "dogs," or safety device attached to the elevator, in working order and in a safe condition, so as to make the use of the elevator reasonably safe, it was the duty of the appellee to make such examinations and apply such tests. Nor would the assumption by appellant of such dangers as were incident to his service relieve appellee from its duties in the respects mentioned. He did not have charge of the elevator, nor, as appears from the evidence in the record, was it any part of his duty to give it any care or attention. Nor does it appear that he had any knowledge of the dangers attending its use or of the appliance attached to keep it from falling. At all events, whatever might have been the verdict of the jury, had the case been submitted, we are satisfied the court erred in directing a verdict and that the appellate court erred in affirming the judgment.

The judgments of the appellate and superior courts are both reversed, and the case is remanded to the superior court for further proceedings not inconsistent with the views we have expressed.

APPELLATE PRACTICE.—A peremptory instruction to find for the defendant, when asked as one of a series, does not authorize an appellate court to review the facts: *Hartford Deposit Co. v. Solitt*, 172 Ill. 222; 64 Am. St. Rep. 35.

MASTER AND SERVANT—ELEVATOR ACCIDENT—NEGLIGENCE.—If one leases premises, and the landlord covenants to keep them in repair, but the lessee's employé is injured by their becoming out of repair, the master is primarily liable to his servant: *Olson v. Schultz*, 67 Minn. 494; 64 Am. St. Rep. 437. The owner of an elevator is not excluded from the degree of care and diligence otherwise exacted of him by the fact that the elevator in use was constructed by a competent and skilled manufacturer, from whom it was purchased. Such manufacturer is a mere agent and servant in the construction of the elevator, for whose want of care the owner of the elevator becomes responsible. The obligation of care and foresight rests on the person using the elevator, and he cannot shift it from himself to another person: *Treadwell v. Whittier*, 80 Cal. 575; 13 Am. St. Rep. 175.

NEGLIGENCE—PROXIMATE CAUSE.—The proximate cause of an injury may, in general, be stated to be that act or omission which immediately causes or fails to prevent the injury; an act or omission occurring or concurring with another which, had it not happened, the injury would not have been inflicted, notwithstanding the latter: *Railroad v. Kelly*, 91 Tenn. 699; 30 Am. St. Rep. 902; *Reid v. Evansville etc. R. R. Co.*, 10 Ind. App. 385; 53 Am. St. Rep. 391.

TRIAL—CREDIBILITY OF WITNESSES—WEIGHT OF EVIDENCE—WHEN NEGLIGENCE A QUESTION OF FACT.—The question of the credibility of a witness is one for the jury: *Joy v. Diefendorf*, 130 N. Y. 6; 27 Am. St. Rep. 484; *Diehl v. Rodgers*, 169 Pa. St. 316; 47 Am. St. Rep. 908. The weight to be given evidence is also a question for the jury: *West Chicago Street Ry. Co. v. Mueller*, 165 Ill. 499; 56 Am. St. Rep. 263; *Springfield v. State*, 96 Ala. 81; 38 Am. St. Rep. 85. Whether due care and prudence required the examination of the cable of a passenger elevator in order

to ascertain its condition as to safety is not a question of expert evidence, but is for the jury to determine: *Goodsell v. Taylor*, 41 Minn. 207; 16 Am. St. Rep. 700; *Ryder v. Kinsey*, 62 Minn. 85; 54 Am. St. Rep. 623.

MASTER AND SERVANT—ELEVATOR ACCIDENT—ASSUMPTION OF RISKS.—If it is no part of the duty of an employé to take goods up and down on an elevator, the dangers attending that work are not incidental to his employment, nor assumed by him by virtue of his contract of service, although he understands how to run such elevator and has used it a number of times: *Dallemand v. Saalfeldt*, 175 Ill. 310; 67 Am. St. Rep. 214.

CASES
IN THE
APPELLATE COURT
OF
INDIANA.

DUTTON v. ENSLEY.

[21 INDIANA APPEALS, 46.]

FIXTURES—HOUSE BUILT ON LAND OF ANOTHER.— If the owner of land executes a mortgage thereon and builds a house by mistake on the land of another, and, after knowledge of his mistake, sells and conveys the land under false representations that the house is on the land conveyed, he cannot, after foreclosure of the mortgage, and removal of the house onto the land purchased at such foreclosure sale, maintain an action for its conversion.

FIXTURES.—A HOUSE BUILT BY MISTAKE on the land of another becomes a fixture thereon, and follows the tenure of the soil whereon it stands.

FIXTURES—DWELLING-HOUSE.—The manner in which a dwelling-house is placed on and attached to blocks as a foundation has no bearing in determining the question as to whether it is to be regarded as personal property or a fixture.

H. A. Steis and M. M. Hathaway, for the appellant.

J. C. Nye, for the appellee.

⁴⁶ **WILEY, J.** Appellee was plaintiff below, and sued appellant for the alleged wrongful conversion of a certain frame dwelling-house. The issue was joined by a general denial, trial by the court, special finding of facts made, conclusions of law thereon, and judgment for appellee. The court found that appellee, on ⁴⁷ the ninth day of October, 1889, was the owner of the west half of the southeast quarter of section 7, township 30, range 2 west, in Pulaski county, Indiana; that on said day she executed a mortgage on said land, her husband joining her, to the state of Indiana, to secure a school fund loan for \$—; that with a part of the money so borrowed appellee, in 1887, built the

house in controversy, but by mistake built it on land of one Morrison, which was adjoining her land above described; that on September 23, 1889, appellee conveyed said land by warranty deed, her husband joining, to George T. Bouslog; that on the same day said Bouslog conveyed said land to appellee's husband; that on May 16, 1891, William Ensley, the appellee joining with him as his wife, conveyed by warranty deed said land to Edwin J. Short; that when said land was sold to said Short, the agent of the Ensleys showed said house as a part of the improvements on said land, but nothing was said as to what land said house was upon; that on July 17, 1891, said Short and wife conveyed said real estate to one Butterfield; that said building was set on blocks about eighteen inches high, but was not made fast to said blocks; that when appellee erected said building she supposed she was putting it on her own land, as above described, and did not learn to the contrary until after she moved into it; that she did not know for about fifteen months that said building was on the Morrison land; that about five months after she learned that said house was situated on Morrison's land she and her husband moved away, but employed persons to look after it for her; that the interest on said loan being in default, said land was sold by the auditor in March, 1893, and bid in by one Benson for three hundred and fifty-five dollars and ninety cents, the amount then due; that said auditor conveyed said land by deed to said Benson; that before the commencement of this action said ⁴⁸ Benson conveyed said land by quitclaim to appellant; that in the fall of 1893, appellant, without appellee's permission, removed said house, and converted it to his own use; that it was of the value of fifty dollars; that in May, 1891, said William Ensley and appellee, his wife, placed said real estate in the hands of one Hey, as agent, for sale; that they described the improvements thereon, including the house in controversy, and that when said real estate was sold to said Short said house was taken into account as a part of the improvements thereon; that prior to the commencement of this action, appellee did not make any demand on appellant for the return of said house, or payment for the same; and that when said house was built it was placed where it was by mistake. As a conclusion of law, the court stated that appellee was entitled to recover of appellant fifty dollars, and rendered judgment accordingly. Appellant's motion for a new trial was overruled.

The errors assigned are: 1. Overruling the motion for a new trial; and 2. That the court erred in its conclusion of law.

For a correct disposition of the controlling question in the case, we need only consider the assignment of error, calling in question the conclusion of law as stated by the court. From the finding of facts it is clear that appellee and her husband knew, before they placed the land in the hands of their agent for sale, that the house in controversy was not on the land owned by them, or either of them, but was on the land of Morrison. Notwithstanding this fact, they represented to their agent that the house was on this land—was a part of the improvements thereon; that it was so represented to Short, the purchaser, and taken into account in the sale to him. It thus appears that while the house was not on the land owned by appellee ⁴⁹ and afterward by her husband, they parted with the title, and upon their representations the house was taken into account as a part of the improvements of the real estate, and considered in arriving at the value thereof, and that they received the benefit of it. This was such a fraud on the purchaser that appellee cannot now be heard to complain. By her representations, or being a party to the representations made by her husband, whatever title she had to the house, if any, she parted with, and she is now estopped from asserting title.

But there is another reason why appellee is not entitled to recover under the facts found, and that is it is not shown that she was the owner of the dwelling-house in question, or that she was entitled to the possession thereof. The findings show beyond all question that appellee erected the house on the real estate of Morrison, and that she intended that it should be a permanent fixture, and that it was to be used for a residence. The manner in which the house was placed on and attached to blocks can have no bearing in determining the question as to whether it must be regarded as personal or real property. The modern authorities no longer adhere to the doctrine that physical annexation is the proper criterion by which to determine whether a fixture is real or personal property: *Atchison etc. Ry. Co. v. Morgan*, 42 Kan. 23; 16 Am. St. Rep. 471; *Meigs' Appeal*, 62 Pa. St. 28; 1 Am. Rep. 372. In the case of *Binkley v. Forkner*, 117 Ind. 176, the court said: "The united application of these requisites is regarded as the true criterion on an immovable fixture: 1. Real or constructive annexation of the article in question to the freehold; 2. Appropriation or adaptation to the use or purpose of that part of the realty with which it is connected; 3. The intention of the ⁵⁰ party making the annexation to make the article a permanent accession to the freehold."

This court, in *Parker Land etc. Co. v. Reddick*, 18 Ind. App. 616, by Robinson, J., quoted approvingly the rule laid down in *Binkley v. Forkner*, 117 Ind. 176, and cited many authorities in support of it. We still adhere to that doctrine. Nor can the fact that appellee built the house on Morrison's land by mistake, measured by the subsequent facts in the case, and the acts of appellee, change, modify, or abrogate the rule. In *Seymour v. Watson*, 5 Blackf. 555, 36 Am. Dec. 556, it was held that, where a fence was built by mistake on adjoining lands, where the party building the fence supposed he was building on his own land for the purpose of inclosing it, that the fence so built became realty and passed with the land. In that case it was said: "It is a general principle that all permanent buildings follow the tenure of the soil on which they are erected": See, also, *Hamilton v. Huntley*, 78 Ind. 521; 41 Am. Rep. 593. The house in question became a fixture to the freehold of Morrison. Under the findings, there is no fact found which would change its character, and it clearly appears that appellee has not shown that she was either the owner or entitled to the possession, and hence she has shown no right to recover. The judgment is reversed, with instructions to the court below to restate its conclusions of law, and render judgment for appellant.

FIXTURES—HOUSE BUILT ON LAND OF ANOTHER.—Where a railroad company digs a well, puts in a pump and boiler, and erects a boiler-house for the sole use of operating its road, under the belief that it is occupying its own land, and discovers its mistake after several years of occupation, the structures do not become fixtures, but may be removed by the company without paying the owner of the land therefor: *Atchison etc. R. R. Co. v. Morgan*, 42 Kan. 23; 16 Am. St. Rep. 471. The general rule is, however, that a house erected on the land of another becomes a part of the realty: *Kingsley v. McFarland*, 82 Me. 231; 17 Am. St. Rep. 473. This is true, even though the structure was built with a view of enforcing an adverse right in the land: *Campbell v. Roddy*, 44 N. J. Eq. 244; 6 Am. St. Rep. 889. If a house is built by a vendee in possession under an oral contract, and the vendor breaks his contract, the vendee may recover his house in an action of replevin: *Waters v. Reuber*, 16 Neb. 99; 49 Am. Rep. 710. If, on the other hand, the vendee fails to fulfill his contract, any buildings erected by him are deemed fixtures, and he cannot recover their possession: *Hinkley etc. Iron Co. v. Black*, 70 Me. 473; 35 Am. Rep. 346.

FIXTURES—CHARACTER OF HOUSE BUILT.—A house is not personalty, though separate and distinct from the ground on which it stands: *Gilliam v. Bird*, 8 Ired. Law, 280; 49 Am. Dec. 379. As holding that the character of the attachment to the realty may have weight in determining whether a structure is a fixture or not, see *Carlin v. Ritter*, 68 Md. 478; 6 Am. St. Rep. 467, where it was held that a wooden structure or building merely resting by its own weight on flat stones laid upon the surface of the ground, and having no other foundation, is not a fixture. On the question as to what are fixtures, see monographic note to *Gray v. Holdship*, 17 Am. Dec. 686-696.

MEYER v. GREEN.

[21 INDIANA APPEALS, 188.]

PAYMENT—CHECK AS.—If a debtor sends to his creditor a check for part of a liquidated sum due such creditor, reciting in the check that it is in full of all demands, the acceptance of the check by the creditor does not discharge the entire debt.

SALES—BREACH OF WARRANTY—MEASURE OF DAMAGES.—If there is a breach of warranty in the sale of goods, the measure of damages is the difference between the value of the articles sold and those delivered at the time and place of delivery, and such difference must be found by the jury, or a special verdict is not sufficient to support a judgment for damages.

NEW TRIAL.—FAILURE TO FIND MATERIAL FACTS is construed as a finding against the party upon whom rests the burden of proving them, and is no ground for a venire de novo.

R. C. Bell and N. D. Doughman, for the appellants.

W. B. Breen and J. Morris, Jr., for the appellee.

¹³⁹ HENLEY, C. J. This action was upon an account for goods sold by appellee to appellants. The goods so sold consisted of a certain number of hats. Appellants answered in five paragraphs, and also filed a cross-complaint of one paragraph. The first paragraph of answer was a general denial; the second, a plea of payment; the third, accord and satisfaction; the fourth and fifth, failure of consideration. The cross-complaint is founded upon an alleged breach of warranty. The lower court sustained a demurrer to the third and fourth paragraphs of answer, and overruled a demurrer to the fifth paragraph of answer and to the cross-complaint. The cause was tried by a jury. At the request of appellee, the court ordered the jury to return a special verdict. The special verdict is in the form required by the act of 1895. Both parties to the action moved for judgment upon the special verdict. Appellee's motion was sustained; that of appellants overruled. The action of the lower court in sustaining appellee's demurrer to the third paragraph of answer, and in overruling appellants' motion for judgment upon the special verdict, are the questions discussed by appellants' counsel. The third paragraph of answer, to which the lower court sustained a demurrer, was, omitting the formal parts, as follows: "Comes now the defendants, and for their amended third paragraph of answer allege and say, that on the fourth day of April, 1896, the defendants delivered to plaintiffs, and plaintiffs received in full satisfaction and discharge of their cause of action in their complaint alleged, the following check, which ¹⁴⁰ is in words and figures as follows:

"Ft. Wayne, Ind., April 4, 1896.

"First National Bank of Fort Wayne:

"Pay to Robert S. Green, receiver Gove & Hooper Co., or order, eighty-four 60-100 dollars, in full for invoice, Jany. 22, '96.
WM. MEYER & BRO."

"Wherefore the defendants demand judgment."

The question arising upon this paragraph of answer is: Did the delivery to, and the acceptance by appellee, of this check, as set out in the answer, satisfy appellants' claim? In other words, does it amount to an accord and satisfaction? The amount due from appellants was an ascertained sum, a liquidated amount, and it was held in a recent case decided by this court that where a debtor sent to his creditor a check for a part of a liquidated sum due the creditor, reciting in the check that it was in full of all demands, that the acceptance of the check by the creditor did not discharge the entire debt: *Hodges v. Truax*, 19 Ind. App. 651.

The exact question is decided in the case of *Curran v. Rummell*, 118 Mass. 482. In that case the plaintiffs received from one Bond, acting for the defendant, the following letter: "Gentlemen: In the matter of the Rummell estate, we are getting it into such shape that we can see the end now. It will pay a dividend of nineteen cents on the dollar. As I suppose you would like to close it, I inclose my check for eleven dollars and eighty-nine cents in settlement of your account." Inclosed in the letter was a bank check for eleven dollars and eighty-nine cents, dated July 3, 1873, payable to the plaintiff's order. The plaintiff used the check in the ordinary course of business. The question presented to the court for decision was expressed in the agreed statement of facts as follows: "If receiving and retaining this check, under the circumstances stated, is such a settlement of the right of action that they cannot recover the residue of ¹⁴¹ the debt, then judgment is to be entered for the defendant; otherwise for the plaintiffs, upon their declaration." The court, in deciding the case, says: "The facts agreed do not bar the plaintiffs' right to recover on both counts in their declaration, because an agreement to accept, in satisfaction of an ascertained debt, a sum less than the full amount due, is not sufficient, unless it be founded on some additional consideration, such as the payment of money or transfer of property, or some new responsibility incurred by a third party, or where the agreement constitutes part of a composition deed among creditors, binding upon all: *Perkins v. Lockwood*, 100 Mass. 249; 1 Am. Rep. 103. The

case fails to show any such new consideration offered to the plaintiffs, and accepted by them as the consideration of an agreement to accept less than the amount of their debt. The letter inclosing the check 'in settlement' implies that the money was realized out of Rummell's estate only. . . . They [plaintiffs] were not bound to treat it [the check] other than as a part payment by the debtor, to be applied in reduction of the debt only": See, also, Pottlitzer v. Wesson, 8 Ind. App. 472. It is not necessary for us to discuss whether or not this rule is founded in good reason. It is the rule at common law, and has been followed, with one or two exceptions, by all the courts of this country. We think the lower court properly sustained the demurrer to the third paragraph of answer.

The special verdict is insufficient to support a judgment in favor of appellants, because the court cannot determine from the special verdict that the appellants suffered any damage. If there was a warranty in the sale of the hats and a breach of it, the measure of damages would be the difference between the articles sold and those delivered at the time and place of delivery. This the special verdict fails to show: Bushman v. Taylor, ¹⁴² 2 Ind. App. 12; 50 Am. St. Rep. 228; Ridgley v. Mooney, 16 Ind. App. 362. The motion for a venire de novo was properly overruled. The failure to find material facts will be construed as a finding against the party upon whom rested the burden of proving such facts and is no cause for a venire de novo. We find no error in the record.

Judgment affirmed.

SALES—DAMAGES FOR BREACH OF WARRANTY.—In actions to recover for false representations, deceit, or breach of warranty in sales of personalty or realty, the measure of damages is the difference between the actual value of the property at the time of the purchase, and its value if the property had been what it was represented to be: Gustafson v. Rustemeyer, 70 Conn. 125; 66 Am. St. Rep. 92.

NEW TRIAL—FAILURE TO MAKE FINDINGS.—The failure of the jury to find upon all the issues is not a defect appearing upon the face of the verdict for which a venire de novo will be awarded: Adams v. Main, 3 Ind. App. 232; 50 Am. St. Rep. 266.

Checks, Acceptance of as Payment in Full.

Undoubtedly, the great weight of authority supports the proposition that if a demand is unliquidated, or if its liquidation is doubtful, the acceptance of a part thereof, tendered by check and an agreement contained therein or accompanying it to cancel the entire debt furnishes a new consideration, founded in the compromise, which will support an accord and satisfaction. If such offer is made upon condition that it be taken in full of all demands, the party to whom

it is made has no alternative but to refuse it, or to accept it upon such condition, and if he takes it and cashes the check or deposits it as cash, no protest or declaration made by him at the time, or subsequently, can affect the case: *Nassoly v. Tomlinson*, 148 N. Y. 326; 51 Am. St. Rep. 695; *Dentmann v. Kilpatrick*, 46 Mo. App. 624; *Bull v. Bull*, 43 Conn. 455; *Fensler v. Prather*, 43 Ind. 119-122; *Wells v. Morrison*, 91 Ind. 51; *Hutton v. Stoddart*, 83 Ind. 539; *Donohue v. Woodbury*, 6 Cush. 148; 52 Am. Dec. 777.

The doctrine running through the cases is, that where a party makes an offer by check of a certain sum to settle a claim, when the sum in controversy is open and unliquidated, or honestly believed by him to be so, and attaches to his offer the condition that the check, if taken at all, must be received in full, or in satisfaction, or in settlement of, the claim in dispute, if the other party accepts the check he takes it subject to the condition which the other party attached to it, and it operates as a satisfaction of the claim, notwithstanding the creditor does not intend it to have such effect, and so declares when he receives the money: *Connecticut River Lumber Co. v. Brown*, 68 Vt. 239.

A creditor to whom a check is sent, reciting that it is in full payment of a claim, the amount of which is in dispute, cannot receive it, without the assent of the debtor, in part payment only, but his receipt and use of the check constitute a full satisfaction of the claim: *Ostrander v. Scott*, 161 Ill. 339; *Brown v. Symes*, 83 Hun, 159; *Vorhis v. Elias* (N. Y., Feb. 20, 1899), 56 N. Y. Supp. 134; *King v. Dorman* (N. Y., Jan. 30, 1899), 55 N. Y. Supp. 876; *Hills v. Sommer*, 53 Hun, 392. If a debtor sends a draft to his creditor, stating it to be in full payment of his account to date, and the latter retains and uses the draft, but declines to accept it as full payment, and the debtor thereupon demands that it be taken as payment in full, or returned at once, and the creditor fails to return the draft, or its proceeds, and repeats his demand for a balance alleged to be due, there is an accord and satisfaction, and the claim is canceled, and no protest, declaration, or denial of the creditor can change the result: *Freiberg v. Moffett*, 91 Hun, 17. If there is a dispute about the amount of a claim, and the debtor sends the creditor a check for the sum conceded by the former to be due, with an unsigned receipt "in full," and a letter requesting the signing and return of the receipt, the offer of payment must be regarded as made upon the condition of its acceptance in entire satisfaction of the debt, and if the creditor retains the check and receipt, and, after claiming a larger sum due, indorses and collects the check, such acceptance imports an election to be bound by the conditions on which it was offered, and constitutes an accord and satisfaction, which is not affected by the creditor's afterward sending the debtor a receipt "on account," unless such receipt is consented to by the latter: *Nassoly v. Tomlinson*, 148 N. Y. 326; 51 Am. St. Rep. 695. The above decision is founded on that of *Fuller v. Kemp*, 138 N.

Y. 231, wherein it was held, that if a debtor offers his creditor a certain sum of money by check in full satisfaction of an unliquidated demand, and he accepts and retains the check and obtains the money thereon, his claim is thereby canceled, and no protest, declaration, or denial on his part, so long as the condition is claimed by the debtor, can vary the result. In *Reynolds v. Empire Lumber Co.*, 85 Hun, 470, it appeared that a debtor sent to his creditor a check for a sum in full of what he claimed to be due. The creditor refused to accept the check in full payment of the account, claiming a balance due above the amount of the check. The creditor finally notified the debtor that he credited him with the amount of the check on account, not recognizing it a full settlement, and it was held that, although the amount due on the account might be larger than the amount of the check, yet the creditor, by using the check, accepted it, in full payment of the claim in dispute between the parties. Retention and collection by a vendor of goods of the vendee's checks for the proceeds arising from their sale, under the former's direction, after the latter had notified him of his refusal to accept them, operate as a full settlement of the claim, when the checks state on their face that they are intended in full payment, and the vendor writes that he will keep the checks on account and hold the vendee liable for the amount of the purchase price: *Wisner v. Schopp* (N. Y., Nov. 22, 1898), 54 N. Y. Supp. 543. *Lister's Agricultural Works v. Pender*, 74 Md. 15, was an action to recover for the balance of a term of alleged employment, the salary of which would have been received if the plaintiff had been allowed to remain in the service of the defendant until the expiration of the term, and it appeared that after the discharge of the plaintiff, a settlement was had, and the plaintiff received the defendant's check, dated February 14, 1899, expressing on its face that it was in full to that date for expenses and salary to March 1, 1899. Thereupon plaintiff gave defendant a receipt for the amount of the check, expressing on the face of the receipt that it was in payment of salary to March 1st, and expenses to date, and the defendant testified that the settlement was final. It was held error to refuse to instruct the jury that if the payment thus made was accepted by plaintiff as payment in full for his services and all claims upon the defendant, then such settlement operated as an accord and satisfaction, and plaintiff was not entitled to recover: *Lister's Agricultural Works v. Pender*, 74 Md. 15.

If an employé is paid semi-monthly in checks, each reciting that it is payment in full for services to date, and upon the termination of his employment he accepts a check similarly worded for the balance of his salary, giving therefor a receipt in full, he cannot avoid the effect of the settlement, and recover for alleged extra services, by showing that he signed such receipt without reading it, on being told that, if he did not sign it, he would get nothing at all: *Golden v. Bartlett Illuminating Co.*, 114 Mich. 625.

In *Krauser v. McCurdy*, 174 Pa. St. 174, it appeared, in an action to recover wages, that plaintiff had accepted a check showing on its face that it was in full of all demands. The defendant admitted that he had drawn the check to pay for some personal property purchased from plaintiff, and that he did not know at the time of the existence of the claim for wages, and it was held that the effect of the check as a settlement between the parties was a question of fact for the jury, and not a question of law for the court.

A check inclosed for the amount claimed to be due, in a letter stating that "we claim this to be in full settlement of account, but admit that you do not allow the claim," does not amount to an accord and satisfaction, or full settlement, although the check is received and cashed and credit therefor given on the account: *Van Dyke v. Wilder*, 66 Vt. 579.

Liquidated Demands.—There is great controversy among the authorities as to whether a check reciting that it is sent as payment in full of a liquidated demand, when the amount of the check is less than the sum claimed to be due, if accepted by the creditor, and cashed, has effect to liquidate the whole claim, or only to pay it pro tanto.

In *Fuller v. Kemp*, 138 N. Y. 231-237, the court said: "Where the demand is liquidated, and the liability of the debtor is not in good faith disputed, a different rule has been applied. In such cases the acceptance of a less sum than is the creditor's due does not discharge the debt, even if a receipt in full is given. The element of consideration is lacking, and the obligation of the debtor to pay the entire debt is not satisfied. In accordance with this rule it has been held that the payment of part of a debt or demand by check will in no case discharge the whole of a liquidated claim, without a release of the residue. To constitute an accord and satisfaction, the payment must be accepted as such, and the mere retention by the creditor of money to which he is entitled absolutely does not amount to an accord and satisfaction, although tendered or transmitted to him by check as payment in full of the demand: *Duluth Chamber of Commerce v. Knowlton*, 42 Minn. 229; *Marion v. Heimbach*, 62 Minn. 214. If a debtor sends a draft to his creditor covering the undisputed part of his claim, with the suggestion that it be accepted in full settlement, and with the statement, "for if returned to us we shall not trouble to send to you again," such creditor can apply the draft to the undisputed indebtedness, and sue for the balance alleged to be due: *De Kalb Implement Works v. White*, 59 Ill. App. 171. If the amount of the debt is fixed and certain, the payment of a lesser sum by check is not a satisfaction of the whole, unless a release is given: *Flaningham v. Hogue*, 59 Ill. App. 315; *McIntosh v. Johnson*, 51 Neb. 33. If the payer of a note sends the payee a check for part of the sum due, stating in such check that it is "in full of all notes and obligations to date," and accompanies it with a letter stating that he makes such tender for

several reasons, giving them, the acceptance of the check acknowledging the receipt thereof, on account, does not operate to discharge the entire debt: *Hodges v. Truax*, 19 Ind. App. 651. In *Curran v. Rummell*, 118 Mass. 482, a debtor sent a check to his creditor for less than a certain sum due, expressly stating that such check was sent in full settlement of account. The creditor used the check in the ordinary course of business, and the court said, in deciding the case, that "the facts agreed upon do not bar the plaintiff's right to recover, because an agreement to accept, in satisfaction of an ascertained debt, a sum less than the full amount due, is not sufficient, unless it is founded on an additional consideration, such as the payment of money or transfer of property, or some new responsibility incurred by a third party, or where the agreement constitutes part of a composition deed among creditors, binding upon all. In *Tompkins v. Hill*, 145 Mass. 379, it appeared that "the plaintiff had a claim against the defendant for one-third of the net profits of an enterprise in which they were jointly engaged. He sent a letter requesting the defendant to render an account. The defendant, in reply, sent a letter inclosing an account, in which he credited the plaintiff with one-third of the profits, and charged him with an item of two hundred and sixty dollars, claimed to be due for the defendant's services, and also inclosing a check for the balance of the account thus stated. The plaintiff credited the check to the defendant on account, but he did not agree to accept it in satisfaction of his claim. On the contrary, he forthwith demanded payment of the amount of two hundred and sixty dollars of the defendant, and, upon his refusal to pay, at once, brought suit. The case stands, in legal effect, the same as if the defendant had presented his account and check in a personal interview, and the plaintiff had refused to agree to the account, or to accept the check in full satisfaction. It shows no agreement to compromise, and no accord and satisfaction, and the plaintiff is entitled to recover the balance due him": *Tompkins v. Hill*, 145 Mass. 379.

In some jurisdictions the rule prevails that if an offer of money is made to a creditor by check, though less than the sum actually due, upon certain terms and conditions, and the party to whom the offer is made accepts the check, cashes it, and takes the money, though without words of assent, the acceptance is an assent de facto, and he is bound by it. The acceptance of the money involves the acceptance of the condition, and under such circumstances the assent of the creditor to the terms proposed by the debtor will be implied, and no words of protest even can affect this result, no matter whether the claim is liquidated or unliquidated. In such case, the creditor cannot treat the check as a payment pro tanto and recover the balance as due on the original claim: *Anderson v. Standard Granite Co.*, 92 Me. 429; post, p. 522; *Kerr v. Sanders*, 122 N. C. 635. Thus, if an employé is discharged and receives and cashes a check for a certain amount, the check stating that it is

"in full for services," though for less than is claimed as due, he cannot recover more, notwithstanding the fact that he attempts to qualify his acceptance of the proceeds of the check by writing across it, above his signature, the words, "Accepted for one month's services." No matter whether the debt is liquidated or contingent and uncertain, if a draft for part thereof is sent by letter, and both draft and letter state that such amount is in full settlement of the debt, the creditor, by collecting the draft, and retaining the money, is held to have accepted the compromise offered: *Petit v. Woodlief*, 115 N. C. 120. If certain notes belonging to a person have been sold by him to another by the latter's check for a smaller amount than that due on the notes, the check stating that it is in "payment and satisfaction of the notes," such transaction constitutes a perfect accord and satisfaction: *Rockwell v. Taylor*, 41 Conn. 55.

STATE v. HERRING.

[21 INDIANA APPEALS, 157.]

CRIMINAL LAW—VENUE OF CRIME.—If an act is committed in one county, from which injurious effects follow in another, and such effects constitute a criminal offense under the statute, a prosecution of the offender may be in either of such counties.

CRIMINAL LAW—VENUE OF CRIME.—If sewage is deposited in a stream in one county, in violation of a statute making such act a crime, a prosecution of the offender therefor may be maintained in an adjoining county, into which such sewage is carried by the current of the stream and there deposited, to the damage of the inhabitants thereof. In such case, the prosecution may be maintained in either county under a statute providing that "when a public offense is committed partly in one county and partly in another, or when the acts or effects constituting, or requisite to, the consummation of the offense, occur in two or more counties, jurisdiction is in either county."

W. A. Ketcham, attorney general, J. N. Tillett, W. C. Bailey, C. A. Cole, M. Moores, A. E. Dickey, and W. M. Aydelotte, for the state.

O. H. Bogue, for the appellee.

157 WILEY, J. The appellee was indicted in the Miami circuit court for maintaining a public nuisance. The venue was changed to the Cass circuit court, where a motion was made to quash each count of the indictment. The motion was overruled as to the first, and sustained as to the second, count. The state excepted to the ruling of the court in sustaining the motion to quash the second count, and thereupon the prosecuting attorney entered a nolle prosequi as to the first.

Appellant has assigned as error the sustaining of appellee's

motion to quash the second count of the indictment, and that is the only question presented by this appeal. The second count of the indictment, omitting the formal parts, is as follows: "That Paul Herring, on the tenth day of August, 1895, at the county of Miami and state of Indiana, did then and there unlawfully cause and suffer certain offal, filth, and noisome substances, the exact composition of which is to this grand jury unknown, to be collected and ¹⁵⁸ to remain in a certain place, to wit, in the Wabash river, a stream of water flowing in and through the county of Wabash, in said state, and thence and through the said county of Miami, by discharging into said Wabash river, in said county of Wabash, certain noisome and filthy offal and sewage from a certain factory situated in said Wabash county, and operated and controlled by the said Paul Herring, and permitting and suffering the same to be carried by the current of said Wabash river into the said county of Miami, and there to be collected and remain, to the damage and prejudice of the public, et cetera."

Counsel for the state assert that the indictment is based upon the provisions of section 2154 of Burns' Revised Statutes of 1894 (Horner's Rev. Stats. 1897, sec. 2066), which is as follows: "Whoever erects, continues, uses, or maintains any building, structure, or place for the exercise of any trade, employment, or business, or for the keeping or feeding of any animal, which, by occasioning noxious exhalations or noisome and offensive smells, becomes injurious to the health, comfort, or property of individuals or the public; or causes or suffers any offal, filth, or noisome substance to be collected or to remain in any place, to the damage or prejudice of others or the public; or obstructs or impedes, without legal authority, the passage of any navigable river, harbor, or collection of waters; or unlawfully diverts any stream of water from its natural course or state, to the injury of others; or obstructs or encumbers, by fences, buildings, structures, or otherwise, any public grounds; or erects, continues, or maintains any obstruction to the full use of property, so as to injure the property of another or to essentially interfere with the comfortable enjoyment of life, shall be fined, et cetera."

Counsel, both for the appellant and appellee, have ¹⁵⁹ presented and discussed but one question, and that is the question of jurisdiction. It is contended by appellee that the indictment shows upon its face that the offense charged against him, if any, was committed in the county of Wabash, and for that reason the Miami circuit court had no jurisdiction of his person.

On the other hand, the appellant contends that, under the averments of the indictment, appellee was triable in either county, as it is averred that the "noisome and filthy offal and sewage," which he caused to be discharged into the river in Wabash county, was permitted by him to be carried by the current of the river into Miami county, and there to be collected and remain, to the damage and prejudice of the public. It is evident that this is not a prosecution under section 2169 of Burns' Revised Statutes of 1894 (Horner's Rev. Stats. 1897, sec. 2075), for befouling a stream of running water, "of which any use is or may be made for domestic purposes," and, as the state has selected the statute above quoted as the basis of its prosecution, it must be bound thereby. The question of jurisdiction in this state is fixed and defined by statute, and for the purpose of determining whether the Miami circuit court was clothed with jurisdiction to hear and determine the question here presented, under the facts charged, it is pertinent for us to refer to and consider some of the statutes fixing and defining jurisdiction. Section 1643 of Burns' Revised Statutes of 1894 (Horner's Rev. Stats. 1897, sec. 1574), is as follows: "Every person committing an offense against the laws of this state is liable to be punished therefor in the county having jurisdiction." The word "jurisdiction," as here used, must be construed as referring to the jurisdiction of the person or the county in which the offense was committed, and not the subject matter of the offense, for it must be conceded that each ¹⁶⁰ county in the state has equal and like jurisdiction as to the subject matter of all crimes and offenses. Section 1649 of Burns' Revised Statutes of 1894 (Horner's Rev. Stats. 1897, sec. 1580), is as follows: "When a public offense has been committed partly in one county and partly in another, or the act or effects constituting or requisite to the consummation of the offense occur in two or more counties, the jurisdiction is in either county." Section 1650 of Burns' Revised Statutes of 1894 (Horner's Rev. Stats. 1897, sec. 1581), provides that: "When property taken in one county by burglary, robbery, larceny, or embezzlement has been brought into another county, the jurisdiction is in either county." Section 1654 of Burns' Revised Statutes of 1894 (Horner's Rev. Stats. 1897, sec. 1585), provides that: "When a public offense has been committed on the boundary of two or more counties, or so near to the line that it is uncertain on which side thereof the offense was committed, the jurisdiction is in either county." There are other statutory provisions on the subject of jurisdiction, but, as

they have no practical application to the question here involved, it is unnecessary to refer to them.

Counsel for appellant, in their brief say: "It certainly requires no violent stretch of the imagination to conceive of many cases where sewage might be discharged into a stream of water in one county, and produce no offensive or injurious effect in that county, but might produce such effect lower down the stream, in an adjoining county, . . . as, in this case, the water of the river is used for drinking and domestic purposes by the entire population of a city of eight or ten thousand inhabitants in the lower county, but is put to no such use in the county of Wabash. We take it that the fact that the waterworks system of the city of Peru draws its water supply from the Wabash river would be a circumstance sufficient to render that an actionable ¹⁶¹ pollution of the water of such river in Miami county, which might be entirely harmless in Wabash county, where the river water is not so used." As to this proposition we have nothing to do, for such question is not presented by the indictment before us. This is not a prosecution under the statute for befouling a stream of running water "for which any use is or may be made for domestic purposes"; and, when counsel say that the entire water supply for domestic use for the city of Peru is drawn from the Wabash river, they go entirely outside the record. The case of the State v. Taylor, 29 Ind. 517, cited by appellant, is not in point, for there the indictment was for befouling a running spring, near a public highway, from which many persons, travelers and others, were in the habit of drinking. There was no jurisdictional question apparent on the face of the indictment, or raised by plea.

This brings us to the sole and only question: Where an act is done in one county, from which injurious effects follow in another county, and such effects constitute an offense under the statute, will a prosecution lie in the latter county? Or, in other words, could the offender be prosecuted in either county? We must keep in mind that this is a prosecution for committing and maintaining a nuisance. Our statute has defined a nuisance as follows: "Whatever is injurious to health, or indecent, or offensive to the senses, or an obstruction to the free use of property, so as essentially to interfere with the comfortable enjoyment of life or property, is a nuisance, and the subject of an action." Section 290 of Burns' Revised Statutes 1894 (Horner's Rev. Stats. 1897, sec. 289). From this definition, the averments of the indictment clearly charge the commission of

a nuisance. The cause which produced ¹⁶³ the effect had its origin, or was put in motion, according to the indictment, in Wabash county, and its resulting injury and prejudice to the public had its culmination in Miami county.

It would seem that under the provisions of section 1649 of Burns' Revised Statutes of 1894 (Horner's Rev. Stats. 1897, sec. 1580), in such case the jurisdiction would be in either county. In *Archer v. State*, 106 Ind. 426, it was held that where there was a conspiracy to commit murder in one county, and the victim was seized in such county, and taken into another, and killed, the jurisdiction was in either county. Mr. Bishop, in his work on Criminal Law, seventh edition, section 116, says: "In reason and according to the better authorities, when a crime is really committed a part in one country and part in another, the tribunals in either may properly punish it; provided, that what is done in the country which takes jurisdiction is a substantial act of wrong, and not merely some incidental thing, innocent in itself." In *Archer v. State*, 106 Ind. 426, the court said: "There was not only preparation in Martin county to commit the specific crime finally consummated in Orange, but there was an overt act forming a material part of the crime committed in the former county, and the parties would be indictable at common law in that county. . . . The acts done by the appellant and his associates were, we repeat, a part of the crime; they were material, and they were substantial wrongs, so that it would seem that, at common law, jurisdiction would vest in the county where those acts were committed. We are not, however, to decide this case upon the rules of the common law, but upon the provisions of our statute, which reads thus: 'When a public offense has been committed partly in one county and partly in another, or the act or effects constituting or requisite to the consummation of the ¹⁶³ offense occur in two or more counties, the jurisdiction is in either county.' " Continuing, the court further said: "In the case before us, we regard the assault upon the deceased in Martin county as an essential part of the crime and 'as an act requisite to its consummation,' and we do not doubt that the legislature had power to provide for the punishment of the crime either in the county where it was commenced, or in the county where the last act was done. This power is often necessary, in order to prevent an absolute failure of justice; nor is its existence doubtful, for it has ever been the law, illustrated and declared by a great number of cases, that a crime committed

partly in one jurisdiction and partly in another may be punished in either jurisdiction." *Hauk v. State*, 148 Ind. 238, is also strongly in point. There an attempt was made to commit an abortion in Fountain county, and the crime was consummated in Montgomery county, by a miscarriage and death. From that case we quote the following: "The inquiry then is, What are the essential elements which are required to exist or be present in order to constitute the offense defined by section 1996 of Burns' Revised Statutes of 1895 (Rev. Stats. 1881, sec. 1894), upon which this prosecution is based, and did any of these elements or material parts exist, or occur in Montgomery county, as shown by the averments in the indictment? It is evident, we think, that the crime charged against appellant does not alone consist of merely prescribing for or administering the drug, medicine, or substance to either the pregnant or supposed pregnant woman, with the intent to procure a miscarriage, or by using some instrument or other means with a like intent. Miscarriage or death of the woman must result as a consequence of the unlawful antecedent act or acts done or perpetrated by the accused with the ¹⁶⁴ intent to procure the abortion, or no crime under the statute is committed. Miscarriage or death, as the case may be, crowns the offense, and constitutes a material part thereof. The indictment charges that Grace McClamrock, the woman upon whom the alleged crime was perpetrated, in consequence of the use of the instrument and substance, miscarried and died in Montgomery county. Either of these facts is a material part of the offense, which, when combined with those averred to have occurred in Fountain county, constitute the crime in its entirety. It must follow, then, that, under the cases cited, the offense charged was partly committed in each of the counties mentioned, and in accordance with section 1649 of Burns' Revised Statutes of 1894 (Rev. Stats. 1881, sec. 1580), jurisdiction was lodged in the circuit court of either, and the appellant, therefore, was rightfully indicted and tried in Montgomery county." In Wisconsin, there is a statute which provides that where a mortal wound is given in one county, and in consequence thereof death ensues in another county, prosecution therefor will lie in either county. In *State v. Pauley*, 12 Wis. *537 (599), a mortal wound was given in one county, the victim died in another, and it was there held that the proper court in either county, which first took cognizance of the crime, would retain exclusive jurisdiction. In that case the defendant was indicted for shooting one Clark, in Clark county,

and the indictment showed that he died in Grant county. The Grant circuit court assumed jurisdiction, and tried the case. From the opinion we quote the following: "The offense of manslaughter did not consist of the mere shooting and wounding of the deceased. On the contrary, the causing of his death was the most material element of the offense, and this did not take place there. The blow was struck in one county, and its effect was produced ¹⁶⁵ in another." And so it was held, under a statute very similar to ours, that the prosecution would lie in either county. In *Ruckman v. Green*, 9 Hun, 225, it was held that an action would lie in New York for an injury to lands situated in said state, though the business which occasioned the injury and constituted the nuisance was carried on upon lands situated in New Jersey. In *Barden v. Crocker*, 10 Pick. 383, the supreme court of Massachusetts held that where an injury to a fishery was occasioned in one county by an obstruction to the passage of the fish, erected in another county, the owner of the fishery could bring his action for damages in either county. In *Thompson v. Crocker*, 9 Pick. 59, it was held that an action would lie for damages to a mill, by the erection of a dam, in a county other than the one in which the mill was situated. In volume 4 of *American and English Encyclopedia of Law*, page 736, it is said: "Where a crime is composed of several elements, and a material one exists in either one of the counties, the courts of either county may rightfully take jurisdiction of the entire crime." It was held in New York, that a statute declaring that one committing burglary and larceny in one county may be indicted, tried, and convicted in the county to which he carried the stolen property, was valid, and that a prosecution would lie in the latter county. In this state, under section 1650, *supra*, it is the settled law that if property taken in one county by burglary, robbery, or larceny or embezzlement, has been brought into another county, the jurisdiction to try the offender is in either county: *Hutchinson v. State*, 62 Ind. 556; *Beaty v. State*, 82 Ind. 228.

It seems to us that upon the authorities cited, and the principles therein declared, the question now before us is very easy of solution. The indictment charges that the appellee in the county of ¹⁶⁷ Miami "did unlawfully cause and suffer certain offal, filth and noisome substances . . . to be collected and remain, . . . in the Wabash river, a stream of water flowing through the county of Wabash, . . . and into and through the said county of Miami, by discharging into said Wabash river

in said county of Wabash certain noisome and filthy offal and sewage from a certain factory situated in said Wabash county, and operated and controlled by the said Paul Herring, and permitting and suffering the same to be carried by the current of said Wabash river into the county of Miami, and there to be collected and remain, to the damage and prejudice of the public, et cetera." Referring to the statute upon which the indictment is founded, so much of it as is applicable to the offense charged is as follows: "Whoever causes or suffers any offal, filth, or noisome substance to be collected, or to remain in any place to the damage or prejudice of others or the public, shall be fined, et cetera."

It clearly appears from the indictment that the initial step, or element in the offense charged against appellee, was committed in Wabash county, by discharging into the Wabash river, in said county, the filthy and noisome substance named. He then suffered it to be carried down the river by the current, and permitted it to be collected and remain in Miami county, to the damage and prejudice of the public. Under this charge, we must hold that discharging the offensive substance into the river in Wabash county was an essential part of the crime, and as "an act requisite to its consummation," without which the offense could not have occurred. Hence it comes within the provision of section 1649 of Burns' Revised Statutes of 1894 (Horner's Rev. Stats. 1897, sec. 1580), and may be punished in the county where it had its origin, or in the county ¹⁶⁷ where the last act was done, or where it was consummated. So far as the record shows, the Miami circuit court first took cognizance of the offense, and assumed jurisdiction. It was authorized to do so by the express provision of the statute cited, and it follows that the court erred in sustaining appellee's motion to quash. The judgment is reversed, with instructions to the court below to overrule appellee's motion to quash the second count of the indictment.

IN THE SUBSEQUENT CASE of State v. Wabash Paper Co., 21 Ind. App. 167, in deciding the same question presented in the principal case, the court said: "This disposes of all the questions raised by appellee and presented by the record. In addition, however, to what was said in the case of State v. Herring, 21 Ind. App. 157, ante, p. 351, we desire to make some additional observations. Counsel for the state have cited to us some authorities which greatly strengthen the doctrine announced therein. In Iowa, there is a statute which in every respect is like section 1649 of Burns' Revised Statutes of 1894, and which reads as follows: 'When a public offense is committed partly in one county and partly in another, or when the acts

or effects constituting or requisite to the consummation of the offense occur in two or more counties, jurisdiction is in either county.' In the case of *State v. Smith*, 82 Iowa, 423, 48 N. W. Rep. 727, the supreme court of Iowa held, under section 4519, which provides that 'when a public offense is committed in part in one county and part within another, or when the acts or effects constituting or requisite to the consummation of the offense occur in two or more counties, jurisdiction is in either county,' that where acts of defilement were committed in one county, and the injury resulted to residents of another, the prosecution was properly brought in the latter. In the case from which we have just quoted, upon an examination, we find the facts to be in all essential respects identical to those of the case now before us. In that case the indictment charged the defendant with having deposited filth, offal, et cetera, in Linn creek, in Marshall county, Iowa, and suffered them to flow down the Iowa river, through Taina county, and causing an injury in the latter county, in which county the defendant was indicted. After quoting the above statute, the supreme court of Iowa says: 'This provision of the statute appears to us to be decisive of the question of jurisdiction. It is plain that just such offenses as this are contemplated and provided for by this act.' Garrett on Nuisances, page 342, construing a similar English statute, takes a like view, and says: 'And it may be further noticed, that under 7 George IV, chapter 64, section 12, where a misdemeanor is begun in one county and completed in another, the venue may be laid in either county, an enactment which, it is submitted, would apply to many cases of nuisance, such as pollution of air and running water.' The supreme court of Arkansas, in the case of *State v. Chapin*, 17 Ark. 561, 65 Am. Dec. 452, states the rule as follows: 'It is not necessary in all cases that a man should be actually present in this state to make him amenable to our laws for a crime committed here. If the crime is the immediate result of his act, he may be made to answer for it in our courts, though actually absent from the state at the time he does the act, because he is constructively present, or present in contemplation of law. For example, if a man standing beyond our boundary line, in Texas, were, by firing a gun, or propelling any other implement of death, to kill a person in Arkansas, he would be guilty of murder here, and answerable to our laws, because the crime is regarded as being committed where the shot took effect.' "

CRIMINAL LAW—VENUE OF CRIME.—A criminal act begun in one state and completed in another renders the person who does the act liable to indictment in the latter state; so one who, while in one state, aims and fires a pistol at another, who at the time is in another state, commits the offense in the latter state of "shooting at another": *Simpson v. State*, 92 Ga. 41; 44 Am. St. Rep. 75, and monographic note thereto. A statute authorizing a prosecution for murder to be had in the county where the fatal blow was struck, although the victim died out of the state, is valid: *Green v. State*, 66 Ala. 40; 41 Am. Rep. 744. See, also, *United States v. Guiteau*, 1 Mackey, 498; 47 Am. Rep. 247. But where a mortal wound is unlawfully inflicted in a fort of the United States, and the victim dies out of the fort, the state courts have no jurisdiction, although the state statutes should profess to give jurisdiction: *State v. Kelly*, 76 Me. 331; 49 Am. Rep. 620. It has been held that a statute was valid which provided that offenses committed within one hundred rods of the dividing line between two counties might be prosecuted and punished in either: *State v. Stewart*, 60 Wis. 587; 50 Am. Rep. 388. The contrary is held in West Virginia: *State v. Lowe*, 21 W. Va. 783; 45 Am. Rep. 570. See, further, on the general question of venue in criminal cases, *State v. McCoy*, 8 Rob. (La.) 545; 41 Am. Dec. 301.

EMSHWILER v. TYNER.

[21 INDIANA APPEALS, 347.]

LOTTERIES—SALE OF REAL ESTATE BY LOT.—If parties enter into a written agreement to purchase certain parcels of land at a specified price per parcel, such parcels to be distributed to the several purchasers in such manner as they may thereafter agree upon, the agreement is valid, but is rendered invalid and unenforceable as tainted with the vice of a lottery if the purchasers and the vendor subsequently meet and agree that the parcels shall be distributed to them by lot, under the direction of the vendor, and such distribution is then made.

CONTRACTS.—IF VALID AND ILLEGAL CONSIDERATIONS in the same contract are susceptible of division, that part of the consideration which is legal may be enforced.

PLEADING—SUFFICIENCY OF ANSWER.—Each paragraph of an answer must respond to the entire complaint, or to so much of the cause of action as it purports to answer, and if it purports to be in bar of the entire cause of action stated in the complaint, but answers only a part thereof, it is insufficient and subject to demurrer.

A. M. Waltz, J. S. Dailey, A. Simmons, and F. C. Dailey, for the appellant.

E. Cole, J. A. Hindman, E. Pierce, and J. A. Bonham, for the appellee.

348 WILEY, J. The only question for review in this appeal is the action of the court in overruling appellant's demurrer to appellee's second paragraph of answer. The decedent in his lifetime commenced the action, but while it was pending he died, and his administrator was substituted as plaintiff below. The complaint was originally in one paragraph, but after decedent's death, and the substitution of his administrator, an additional paragraph of complaint was filed. The two paragraphs are founded upon a written contract between appellee and the decedent, which contract is made an exhibit. It is not necessary to set out the complaint in detail, but that the pertinency of the facts averred in the third paragraph of answer may clearly appear, it is important that we show the material matters embraced in the contract. The contract sued upon is signed by the decedent as party of the first part, and appellee and others, parties of the second part, and by its terms the decedent agreed to locate a canning factory **349** upon certain real estate in Blackford county, Indiana. That said factory was to have a capacity of twenty thousand cans per day, and was to employ one hundred and fifty persons. That it was to be completed and ready for operation for the canning season of 1895, and decedent

was to organize a company for conducting the business, to be known as the "Blackford Canning Company." By the terms of the contract the decedent was to plat into seventy-four lots, a certain tract of land, each lot to be fifty feet wide and one hundred and twenty feet long. That each of the persons signing said contract agreed by its terms to take one of said lots, and three shares of paid-up "unassessable" stock of said company of the par value of twenty-five dollars each, and to pay for one of said lots and the three shares of stock one hundred and fifty dollars. The contract further provided that the manner of the distribution of the lots should be determined by the purchasers, and that decedent would convey to such purchasers their respective lots, when distributed, by a deed, with covenants of warranty, and furnish each of said purchasers with an abstract of title, and issue to each of them three shares of said stock. The contract also provided that the said one hundred and fifty dollars should be paid in six equal payments of twenty-five dollars, each subscriber to execute his several notes for the amount, payable in three, six, nine, fifteen, and eighteen months, at six per cent interest, said notes to be given when said company was duly organized. The complaint avers in detail all the conditions of the contract, and that decedent complied with all the conditions and stipulations to be performed by him.

The third paragraph of answer avers that in December, 1895, various subscribers to said contract and enterprise, and said decedent, met together for the purpose of determining how and in what manner the said seventy-four lots were to be awarded, and distributed; ³⁵⁰ that the decedent at said meeting directed that said lots be awarded and distributed by placing the numbers of the lots severally upon slips of paper, and placing said slips in a hat, and then by placing the names of the various subscribers severally upon slips of paper, and then placing them in another hat; that thereupon one of the subscribers present was to be blindfolded, and while thus blindfolded he was to draw simultaneously from the two hats a name and a number of a lot, until all the names and numbers were drawn; that in each instance the lot whose number was drawn when a name was drawn was to be awarded to the subscriber whose name was so drawn, and was to constitute the selection of the lot to be conveyed to him; that said lots were so awarded to each subscriber; that appellee was not notified to meet; that he was not present at such drawing and awarding, either in person or by agent; that he did not in any manner exercise his choice, will, or judg-

ment in the selection of a lot, and did not participate in said drawing or in awarding said lots; that said seventy-four lots were of unequal values; that a large portion of the land so platted had been used for a brickyard; that dirt had been excavated therefrom; that huge excavations four or five feet in depth were made therein, so that said lots were mudholes, ravines, and lagoons, and were thereby rendered worthless and of no value. That some of the said lots were on high ground and worth one hundred and fifty dollars, while lot No. 7 so awarded to appellee was of no value. The answer then avers that by reason of the facts therein stated, "said lots were of unequal value, and the manner in which said lots were distributed, including the one awarded this defendant, and by reason of the facts aforesaid, the said contract and the manner of its attempted execution was and is a ³⁵¹ scheme of chance, and a lottery," is fraudulent and against public policy and void." It is apparent from this paragraph of answer that the pleader proceeded upon the theory that the contract, in the first instance, is void, because it is tainted with the scheme of a lottery, or chance. This court has recently passed upon this exact question, in *Washington Glass Co. v. Mosbaugh*, 19 Ind. App. 105, where it was held that a contract of similar tenor was not void on the ground urged, and we still adhere to such holding. But the facts in that case and those charged in the third paragraph of appellee's answer in the case now before us are not at all similar. The contract sued upon here does not contain any provision relating to the awarding and distribution of the lots by lottery or chance, but like the case of *Washington Glass Co. v. Mosbaugh*, 19 Ind. App. 105, leaves the manner of such distribution to be determined and agreed upon by the subscribers; and hence, under the authority of that case, the contract, in the first instance, and on its face, is enforceable. If, then, the contract as originally entered into was not subject to the objection urged by appellee, the question for us now to determine is, Do the averments of the answer, descriptive of the plan and the manner of the distribution of the lots, render the enforcement of the contract against appellee void? The answer avers that various subscribers and decedent met for the purpose of determining how and in what manner the lots were to be awarded, and that the decedent, at said meeting, directed the manner of the distribution. We need not repeat the allegations of the answer, but it is sufficient to say that the plan devised by the decedent, participated in by him and the

subscribers present, was a scheme tainted with the vice of lottery; in other words, it was a scheme of chance, where the will ³⁵² and judgment, both of the decedent and subscribers, was in no sense exercised. Appellee did not participate in the distribution, and was not present. In *Washington Glass Co. v. Mosbaugh*, 19 Ind. App. 105, appellant was not a party to the distribution, and in the complaint in that case, it was alleged: "That in making said selection of lots by said drawing, plaintiff neither participated therein, nor counseled or advised the same." In that case, also, appellee was a party to the agreement between the subscribers, was present at and participated in the drawing of lots, and took possession of the lot apportioned to him. So that it is clear that the question to be here decided rests upon very different facts than the case to which we have just referred. The fact that appellant directed and participated in the drawing and distributing of the lots in this case, brings it, we think, within the rule announced in *Lynch v. Rosenthal*, 144 Ind. 86; 55 Am. St. Rep. 168. There the contract was, in its essential features, similar to the contract here sued on. There was, however, this distinction: there the contract itself provided that the lots should be awarded by "lot" to each respective subscriber, and it was held that it could not be enforced, as being against public policy and good morals. It was there held that contracts tainted with the vice of lottery schemes are not enforceable, and it was said: "That such contracts are against public policy and that those who have entered into them shall have no relief, in the courts, to enforce those that are executory or to recover that which has passed under such as have been executed, is without doubt": Citing many authorities, to which we refer. Continuing, the court said: "We find, therefore, that both the contract and the manner of attempting to comply with its terms were against public policy and void. . . . It is enough to say ³⁵³ that one who asks equity must present clean hands in which to receive it. Here the appellant, from the beginning, had unclean hands. He originated, carried forward, and in this suit sought to enforce a vicious contract. He is in no position to ask that equity estop his ally from exposing the vice of that contract, the enforcement of which public morals forbid." This language conveys no uncertain meaning, and from it it is plain that neither the law nor courts will lend their aid to enforce contracts tainted with the vice of a lottery, and which are against public policy, good morals and a quickened conscience.

As we have said, the contract before us, in its conception, was not subject to the infirmity of the contract in *Lynch v. Rosenthal*, 144 Ind. 86, 55 Am. St. Rep. 168, but in the manner of its execution, which was directed and participated in by appellant, it was inoculated with a like vice; and, under the authorities, appellant, coming into court with unclean hands, and asking the enforcement of a contract which he himself has made obnoxious to public policy and good morals, is in no position to ask the court to enforce its execution. We are unable to distinguish the difference, in principle, between a contract void *ab initio*, and one made so, after its execution, by the very party under whose provisions he seeks to secure its benefits. It must follow from the authorities and what we have said that the third paragraph of answer, in so far as it seeks to avoid the allegations of the complaint relating to the sale and transfer of the real estate awarded to appellee, constitutes a complete bar; but said paragraph was not good as a complete defense to appellant's cause of action, and it was error to overrule the demurrer thereto.

The third paragraph of answer purports to answer ³⁵⁴ the whole complaint, when at most it is only a partial answer, and, under the unvarying rule in this state, for that reason it is not good. The contract declared on binds appellee to pay appellant one hundred and fifty dollars for one lot and three shares of the stock of the Blackford Canning Company, of the par value of twenty-five dollars each, so that it appears from the contract that seventy-five dollars of the consideration running to appellee was three shares of said stock, valued at twenty-five dollars per share. The contract binds appellant to issue and deliver to appellee said shares of stock, and the complaint avers that said shares of stock were duly issued in the name and tendered to appellee before the commencement of the action. That part of the contract by which appellee subscribed for and bound himself to pay seventy-five dollars for three shares of stock in said canning company was not vitiated by appellant's conduct and acts relating to the distribution and awarding of the lots, and may be enforced. It is the recognized law in this and other states that where valid and illegal considerations in the same contract are susceptible of division—i. e., where the legal can be clearly distinguished from the illegal—that part of the consideration which is legal may be enforced: See *Pierce v. Pierce*, 17 Ind. App. 107, and authorities there cited. As the third paragraph of answer purports to answer the whole complaint,

and is only a partial answer, the demurrer should have been sustained. Each paragraph of an answer must respond to the entire complaint, or to so much of the cause of action as it purports to answer; and if it purports to be in bar of the entire cause of action stated in the complaint, but answers only a part thereof, it is insufficient: *Walter A. Wood etc. Co. v. Niehause*, 8 Ind. App. 502; *Dunn v. Barton*, 2 Ind. App. 444; *State v. Parrish* 335 1 Ind. App. 441; *Orb v. Coapstick*, 136 Ind. 313; *Messick v. Midland Ry. Co.*, 128 Ind. 81.

The judgment is reversed, with directions to the court below to sustain appellant's demurrer to the third paragraph of the answer, and for further proceedings not inconsistent with this opinion.

LOTTERIES—SALE OF REAL ESTATE BY LOT.—A scheme by which a number of lots of unequal value are sold at a uniform price, and others are given away, the purchasers to determine by lot the particular lot to be awarded to each respectively, and also to determine by some agreement among themselves the manner of awarding the prize lots, is a lottery scheme contrary to public policy, and all agreements for carrying it into effect are void: *Lynch v. Rosenthal*, 144 Ind. 86; 55 Am. St. Rep. 168. See, also, on lottery schemes as applied to town lots, *Branham v. Stallings*, 21 Colo. 211; 52 Am. St. Rep. 213; and the monographic note to *Yellow-Stone Kit v. State*, 16 Am. St. Rep. 45.

CONTRACTS—ILLEGAL CONSIDERATION.—An illegal contract cannot be divided and held valid in part when the inducement thereto and the sole object in view was the formation of an unlawful combination, which cannot be separated from the other parts of the contract and leave any subject matter capable of enforcement: *Santa Clara Mill etc. Co. v. Hayes*, 76 Cal. 387; 9 Am. St. Rep. 211. If any part of the consideration of a contract is illegal, the whole contract is void as against public policy, although the illegal act or promise is coupled with one which is legal: *McNamara v. Gargett*, 68 Mich. 454; 13 Am. St. Rep. 355; *Handy v. St. Paul etc. Pub. Co.*, 41 Minn. 188; 16 Am. St. Rep. 695.

PLEADING—SUFFICIENCY OF PLEA.—A plea must answer all it professes to answer. If it purports to answer the whole declaration, and answers but a part, it is bad on demurrer: *Goodrich v. Reynolds*, 31 Ill. 490; 83 Am. Dec. 240; *Wittick v. Traun*, 27 Ala. 562; 62 Am. Dec. 778, and note.

COOPER v. HOCKING VALLEY NATIONAL BANK.

[21 INDIANA APPEALS, 858.]

NEGOTIABLE INSTRUMENTS — INTEREST DUE AT TIME OF PURCHASE.—A bona fide purchaser for value of negotiable paper before maturity is within the protection of the law merchant, although interest on the note purchased is due and unpaid at the time of the purchase.

EVIDENCE—ADMISSION OF JOINT MAKER OF NOTE.—A letter from a joint maker of a note to the payee, containing an admission, is admissible in evidence in an action on the note by the assignee thereof.

H. H. Mathias, S. A. Hays, F. D. Ader, and J. P. Allee, for the appellants.

A. J. Vorys, Brill & Harvey, and B. F. Corwin, for the appellee.

³⁵⁸ HENLEY, C. J. This was an action brought by appellee upon a promissory note payable at a bank in this state. The note was executed and delivered by appellants to McLaughlin Brothers as a part of the purchase price of a stallion purchased by them from said McLaughlin Brothers. The payees, before the maturity of the note, indorsed it to the appellee. This action was commenced in Marion county, but afterward the venue was changed to Hendricks county, where the appellants filed an answer consisting of five paragraphs. Appellee replied to the second, third, fourth and fifth paragraphs of answer. Appellants' demurrer to the third paragraph of appellee's reply was overruled. There was a trial by jury and verdict in favor of appellee for eleven hundred and eighteen dollars and twenty-three cents, for which amount the court rendered a judgment in favor of appellee. Appellants moved for a new trial. This motion was overruled. The necessary steps were then taken by appellants to perfect an appeal to this court.

³⁵⁹ Errors are assigned in this court as follows: 1. The complaint does not state facts sufficient to constitute a cause of action; 2. The court erred in overruling the demurrer of appellants to the third paragraph of the appellee's reply; 3. The court erred in overruling the motion of appellants for a new trial.

Appellants' counsel do not discuss the first error assigned. In discussing the second specification of the assignment of errors, counsel for appellants say: "Was the note, at the time of the indorsement, governed by the law merchant? If it was, then the third paragraph of the reply states facts sufficient to avoid the several defenses set up in the paragraphs of answer to which it was directed." The third paragraph of reply plainly avers that appellee purchased the note before maturity, and was a bona fide purchaser for value, and without notice. From this it will be seen that the material question then is, Was the note governed by the law merchant? It is contended by counsel that the note, while negotiable under the law merchant at the time of its execution, did not retain its commercial character at the time it came into appellee's hands, because the interest thereon was by the terms of the contract payable annually, and, no in-

terest having been paid, the note was dishonored, and lost its commercial character thereby. At the time of the purchase of the note by appellee two installments of interest were due and unpaid. We do not believe it would serve any good purpose to enter into a discussion of the reasons for or against the rule that interest is an incident of the debt, and that the bona fide purchaser for value of negotiable paper is within the protection of the law merchant, although the interest on the note purchased was due and unpaid at the time of the purchase. The rule is correct, and the great weight of authority sustains it: ³⁰⁰ 1 Daniel on Negotiable Instruments, sec. 787; National Bank of N. A. v. Kirby, 108 Mass. 497; Patterson v. Wright, 64 Wis. 289.

In appellants' motion for a new trial, ten reasons are assigned why the motion ought to be granted. Counsel for appellants discuss only those questions arising under the third, sixth, seventh, eighth, and ninth reasons. The third reason in the motion for a new trial relates to the exclusion of certain testimony. The testimony excluded was not relevant to any of the issues tendered in this cause, and was properly rejected. In the sixth reason for a new trial, the appellants complain of the action of the lower court in admitting in evidence a letter which George B. Cooper, one of the makers of the note in suit, had written to the payees long before the note was purchased by appellant. Cooper was one of the partners in the purchase of the "company stallion," and, in his letter to the payees of the note, said, "The stallion question is settled, and harmony again prevails." It was an admission of one of the parties to the record, and as against himself, and against the others who had a joint interest with him in the matter in litigation, was admissible. It was evidence, also, which tended to show that appellee was a purchaser in good faith of the note in suit, as the payees, armed with this letter, would have no reason to represent to prospective buyers of the paper anything but that the note was good, and would be paid promptly at maturity. This view of the matter supported the testimony of appellee's cashier.

The other reasons in the motion for a new trial relate to the giving and the refusal to give certain instructions. The instructions given we have carefully considered, and must conclude that they were as favorable to appellants as the law and evidence ³⁶¹ would warrant. The instructions asked by appellants and refused were properly refused, because, in so far as they stated the law correctly, the jury were in such manner instructed by the court.

We cannot disturb the verdict upon the weight of the evidence, and, whatever may have been the real merits of this controversy, the record presents no error for which the cause should be reversed.

Judgment affirmed.

NEGOTIABLE INSTRUMENTS—INTEREST DUE AT TIME OF PURCHASE.—If a note is indorsed before maturity, it is dishonored paper at the time of the indorsement, if interest is then overdue on it and unpaid, and this fact is known to the purchaser. The note in his hands is, therefore, subject to all equities between the original parties, for he is not a bona fide purchaser without notice: *First Nat. Bank v. Forsyth*, 67 Minn. 257; 64 Am. St. Rep. 415; *Kelley v. Whitney*, 45 Wis. 110; 30 Am. Rep. 697, and note thereto. The contrary doctrine was announced in an earlier case: *Hart v. Stickney*, 41 Wis. 630; 22 Am. Rep. 728. See, also, the monographic note to *First Nat. Bank v. County Commrs.*, 100 Am. Dec. 196.

EVIDENCE.—On the question of the declarations and admissions of a former holder of a negotiable instrument, see *Paige v. Cagwin*, 7 Hill, 361; 42 Am. Dec. 68, and note thereto.

HUFFMAN v. STATE.

[21 INDIANA APPEALS, 449.]

CRIMINAL LAW—NEW TRIAL.—Although the verdict is not sustained by the evidence in a criminal case, this is not cause for a new trial.

HIGHWAYS—TRESPASS AGAINST ABUTTING OWNER. An owner of lands abutting upon a public highway has such a proprietary right to the center of the highway as to render one who is unlawfully upon such part of the highway, and who refuses to depart therefrom upon notice, liable to a prosecution for criminal trespass.

HIGHWAYS—ADDITIONAL SERVITUDE—PIPE LINE.—The construction of a pipe line upon a highway is an imposition of an additional servitude upon the fee from that embraced in the easement for highway purposes, and compensation therefor must be made to the owner of the fee.

HIGHWAYS—TRESPASS UPON—CONSTRUCTION OR REMOVAL OF PIPE LINE.—One who enters upon a public highway and constructs a pipe line thereon without the consent of the owner of the fee, or grant from the proper county officers, is a trespasser and has no right to remove such pipe line without the permission of such owner of the fee.

HIGHWAYS—UNLAWFUL OBSTRUCTION OF—ESTOPPEL.—If a pipe line is unlawfully constructed upon a public highway without the knowledge or consent of the owner of the fee therein, the fact that after such construction he made no objection to it, or its maintenance, does not estop him from asserting his right to prohibit the removal of the pipe line.

HIGHWAYS—UNLAWFUL USE OF—TRESPASS.—Neither a private citizen, nor a corporation, has any inherent right to use a public highway for a purpose not contemplated by law, and when the proper steps have not been taken to acquire such right, it is a trespass to do so.

J. Cantwell, S. W. Cantwell, and L. B. Simmons, for the appellant.

W. L. Taylor, attorney general, M. Moores, J. W. Fesler, and E. E. Stevenson, for the state.

⁴⁵⁰ WILEY, J. Appellant was prosecuted for trespass under the following provision of the statute: "Whoever, being unlawfully upon the inclosed or uninclosed land of another, shall be notified to depart therefrom by the owner or occupant, or his agent or servant, and neglect or refuse to depart therefrom, shall be guilty of a misdemeanor, and, upon ⁴⁵¹ conviction thereof, shall be fined not less than five nor more than fifty dollars." Burns' Revised Statutes of 1894, sec. 2018 (Horner's Rev. Stats. 1897, sec. 1941). While, in the court below, a motion to quash the affidavit (the prosecution having originated before a justice of the peace was made and overruled, and such ruling is challenged by an assignment of errors, there is no necessity of referring to the affidavit further, for the reason that the question of its sufficiency is waived by a failure to discuss it. On a plea of not guilty, the cause was tried by a jury, resulting in a verdict of guilty and a judgment of conviction. Appellant's motion for a new trial was based upon three reasons: 1. The verdict was contrary to law; 2. The verdict was contrary to the evidence; 3. The verdict was not sustained by the evidence. This motion the court overruled, and such ruling is assigned as error and presents the only question for decision.

Under the statute defining the causes for which a new trial may be granted in criminal cases, the third reason assigned in the motion in this case does not come within the statute, and hence does not present any question for review. The first and second reasons, however, present the question discussed by counsel, and under them the court can decide the question of contention.

The lands described in the affidavit upon which the trespass is charged to have been made were owned by one Samuel Sipe, and occupied by one Andrew Sipe, who was the tenant and in possession. A public highway bounds one side of the lands, and it was in and upon this highway that the trespass, if any, was committed. It is shown by the evidence without contradiction that some three or four years prior to the date fixed in the affidavit, the Salemonie Mining and Gas Company constructed a two-inch pipe line on the highway ⁴⁵² in front

of the land of said Samuel Sipe; that the Ft. Wayne Gas Company, by purchase, succeeded to the rights of the original company, and owned said line at the date of the commencement of this prosecution; that at the time said two-inch pipe line was put in, Andrew Sipe owned the land in question, and lived upon it; that said line was put in on the side of the highway next to the Sipe land, and near the fence inclosing said land; that the said Ft. Wayne Gas Company was putting in a larger pipe line on the opposite side of the road, had the trench dug, and the pipe placed and strung along ready to put in; that at the date fixed in the indictment, appellant was in the employment of the Ft. Wayne Gas Company, in charge of a force of men who were engaged in taking up the two-inch pipe, and refilling the ditch from which it was removed; that the said Andrew Sipe went to appellant, who was in the highway, but on the side thereof next to the Sipe land, and ordered him off the premises, and told him that he did not want him to trespass upon said lands; that appellant refused to depart therefrom; that said Andrew Sipe also ordered the men engaged in taking up said line to depart; that some of them left the ditch, and appellant ordered them back to work; that at the time appellant was ordered to depart from said lands he was in the public highway, and remained therein all the time during the conversation between the said Andrew Sipe and himself, and did not at any time go upon the lands described in the affidavit, except to remain in the highway and on the side thereof next to said lands. As to whether the said Andrew Sipe knew at the time that the pipe line was being constructed along and upon said highway in front of said lands, and as to whether he consented thereto, there is a sharp contradiction. On the one hand, he testified that he did not ⁴⁵³ know it was being constructed until after the company had passed beyond said premises, and that he did not consent thereto, nor give his permission so to construct the same; while, on the other hand, other witnesses did testify that he both knew and gave his consent to such construction. It further appears that after the line was constructed he knew of it, and knew that it was being used, and made no objection thereto. Hence, if it was a material fact that he had or had not knowledge of the construction of the line at the time it was constructed, or that he did or did not give his consent thereto, we must presume that the jury resolved such facts in favor of the state; and, under the rule that this court will not weigh the evidence where there is a conflict, the

question is put at rest by the finding of the jury. It is upon these facts that we are to determine whether or not the verdict is contrary to law, or contrary to the evidence.

The controlling question is simply this: Has the owner of lands abutting upon a public highway such a proprietary right in the highway, to the center thereof, as to notify and direct one who is unlawfully upon such part of the highway to depart, and will the refusal and failure of such person to depart, upon such notice, render him liable to prosecution for trespass under the statute? It is the firmly established rule in this state that the owner of lands abutting upon a public highway owns the fee to the center thereof, subject only to the easement which the public has for highway purposes: *Cooley on Torts*, 318; *People v. Foss*, 80 Mich. 559, 564; 20 Am. St. Rep. 532; *Consumers' etc. Gas Co. v. Huntsinger*, 14 Ind. App. 156.

The right of the owner yields only to the greater rights of the public. As we have said, the only right the public has is simply an easement affording a passage over and along the highway: *Consumers' ⁴⁵⁴ Gas etc. Co. v. Huntsinger*, 14 Ind. App. 156; *Haslett v. New Albany etc. Ry. Co.*, 7 Ind. App. 603, and cases there cited.

It is likewise settled that such abutting owner has a special proprietary right in the highway separate and distinct from that of the general public, and that this right cannot be taken or impaired without compensation: *Haslett v. New Albany etc. Ry. Co.*, 7 Ind. App. 603. It has been held by this court that the easement for road purposes, which grants to the general public the right to pass and repass over a man's land, does not carry with it a right to use it for other purposes not legitimately connected with the use of highways: *Consumers' Gas etc. Co. v. Huntsinger*, 14 Ind. App. 156.

It cannot be said that the construction of a pipe line for carrying natural gas comes within the uses for which public highways were intended. It has been held that a right may be granted by the board of commissioners to construct a pipe line along a public highway; but it is also the law that constructing such pipe lines is an imposition of an additional burden upon the fee from that embraced in the easement for highway purposes, and that compensation must be made to the owner of the fee: *Kincaid v. Indianapolis etc. Gas Co.*, 124 Ind. 577; 19 Am. St. Rep. 113.

It seems to us that when the Salemonie Gas Company entered upon the lands in question without the consent of the

owner of the fee, and without permission of the board of county commissioners, it became a trespasser, and was upon such lands unlawfully. If it was unlawful in the first place to go upon the lands to construct the pipe line without the consent of the owner, it was likewise unlawful to go upon them to remove the same, and hence, when appellant was upon the lands of the prosecuting witness, in charge of a force of men engaged in removing such pipe line, he was unlawfully there. While appellant ⁴⁵⁵ was not himself engaged in the manual removing of the pipe, he was directing and overseeing the work of removal. The evidence shows that appellant was not standing or walking in the traveled way, but was on that side of the road adjacent to the land described, some ten or twelve feet from the center, and part of the time only about two feet from the fence inclosing such lands.

Appellant insists that as the owner and occupant of the land stood by and saw the pipe line being constructed, made no objection thereto, and by his long silence acquiesced therein, he is estopped from asserting the right to notify appellant to leave the premises. If the facts upon which appellant relies to work an estoppel were undisputed, there might be much merit in his position; but there is evidence in the record, as we have seen, from which the jury might, and doubtless did, find that the owner and occupant did not know that said line was being constructed in front of his premises until after it was completed. The appellant urges that the doctrine of estoppel is applicable here in his behalf, on the ground that Sipe stood by, had full knowledge that the pipe line was being constructed, and that he did not, at the time, or thereafter, make any objection, or offer any protest, et cetera. Counsel for appellant say: "The evidence shows clearly that no objection was ever made by the prosecuting witness at the time of the construction of the pipe line, nor since that time up to the commission of the alleged trespass, either to the construction or maintenance of said line." In this statement counsel are not supported by the evidence, for, as we have seen, there is evidence from which the jury doubtless did conclude that the prosecuting witness did not know that the pipe line was being constructed along his lands. It is true that the evidence does not show that he made any ⁴⁵⁶ objection to the work or maintenance of the line after its completion, but this is not enough to create an estoppel by conduct: See *Roberts v. Abbott*, 127 Ind. 83; *Bigelow on Estoppel*, ed. 1886, 552. It is true, as

counsel say, that the courts in this state have repeatedly held that where a landowner stands by and permits a pipe line company or a railroad company to construct a pipe line or railroad across his land, with a full knowledge that it is being done, and makes no objection until the same is constructed, he is estopped from maintaining an action for possession of the land, or a suit in ejectment, and that in such case his only remedy is an action for damages: *Kincaid v. Indianapolis etc. Gas Co.*, 124 Ind. 577; 19 Am. St. Rep. 113; *Evansville etc. R. R. Co. v. Nye*, 113 Ind. 223; *Indiana etc. Ry. Co. v. Allen*, 113 Ind. 581; *Louisville etc. Ry. Co. v. Soltwedde*, 116 Ind. 257; 9 Am. St. Rep. 852; *Porter v. Midland Ry. Co.*, 125 Ind. 476; *Indiana etc. Ry. Co. v. McBroom*, 114 Ind. 198; *Louisville etc. Ry. Co. v. Beck*, 119 Ind. 124; *Bravard v. Cincinnati etc. R. R. Co.*, 115 Ind. 1; *Sherlock v. Louisville etc. Ry. Co.*, 115 Ind. 22; *Strickler v. Midland Ry. Co.*, 125 Ind. 412. With the doctrine established by the cases cited we are in full accord, but it is not applicable here, for the facts are not sufficient upon which it can rest.

It is further urged by appellant that he was not guilty of the offense charged, because it does not appear that he was unlawfully upon the premises of the prosecuting witness, and, if he was upon the premises lawfully, he could not be there unlawfully, until after notified to depart, and hence, as he was not notified a second time to depart, he did not violate the provisions of the statute under which he was prosecuted. Appellant's reasoning is good, but his premise is unsound, and hence his conclusion not tenable. He assumes ⁴⁵⁷ that he was not, in the first instance, unlawfully upon the lands of the prosecuting witness, but in this he is in error. As we have seen, he was there without the license or permission of the occupant of the land. He was not using the highway for any of the purposes contemplated by law. He was not even a traveler thereon, within the legal meaning of the term. We have already shown that a public highway is not dedicated to the public, and maintained at public expense, for the purpose of allowing pipe line and other companies to construct and maintain pipe lines in and upon them. Neither a private person nor a corporation has any inherent right so to use a public thoroughfare, and where the proper steps have not been taken to acquire such right, it is a trespass, within the meaning of the statute, so to do. So, when appellant went upon the premises of the prosecuting witness to take up the pipe line, he was

there unlawfully; and when he refused to depart, upon being notified to do so, it was a violation of the statute, for which he must answer. The case of *Manning v. State*, 6 Ind. App. 259, cited by appellant, is not in point, and has no controlling influence here. In that case the appellant went upon the land of the prosecuting witness upon her invitation. While there he had an altercation with her, and she ordered him to depart. It was held that, as soon as he was ordered to depart, he was there unlawfully; and upon again being notified to depart, and failing to do so, he was guilty of trespass. In the case before us, appellant was unlawfully upon the premises in the first instance, and being notified to depart, and refusing to comply with the notice, he violated the statute.

In his work on *Roads and Streets*, Judge Elliott, at page 536, says: "As owner of the fee, subject only to the public easement, the abutter has all the ordinary ⁴⁵⁸ remedies of the owner of a freehold. He may maintain trespass against one who unlawfully cuts and carries away the grass, trees, or herbage, and even against one who stands upon the sidewalk in front of his premises and uses abusive language toward him, refusing to depart. And one who, without lawful authority, destroys and reconstructs a highway, is a trespasser, although he makes a new way upon his own premises equally safe and convenient. The abutter may also maintain ejectment against a railroad company which has placed its track upon his side of a street without paying or tendering damages therefor, or against an individual who has wrongfully and unlawfully encroached thereon." In support of the foregoing quotation the following authorities are cited: 3 Kents' Com. 432; Angell on Highways, sec. 319; *Goodtitle v. Alker*, 1 Burr. 133; *Adams v. Emmerson*, 6 Pick. 57; *Robbins v. Borman*, 1 Pick. 122; *Cole v. Drew*, 44 Vt. 49; 8 Am. Rep. 363; *Chambers v. Furry*, 1 Yeates, 167; *Cooley on Torts*, 318; *Clark v. Dasso*, 34 Mich. 86; *Baker v. Shepherd*, 24 N. H. 208; *Adams v. Rivers*, 11 Barb. 390; *Hunt v. Rich*, 38 Me. 195; *Ruggles v. Lesure*, 24 Pick. 187; *Weathered v. Bray*, 7 Ind. 706; *Terre Haute etc. R. Co. v. Rodel*, 89 Ind. 128; 46 Am. Rep. 164.

Abutting owners have the exclusive right to the soil, subject only to the easement of the right of passage in the public, and the incidental right of properly fitting the way for use: Elliott on *Roads and Streets*, 519, and authorities there cited. Subject only to the public easement, the proprietor has all the usual rights and remedies of the owner of a freehold. As was said by

Elliott, J., in *Kincaid v. Indianapolis etc. Gas Co.*, 124 Ind. 577, 19 Am. St. Rep. 113: "Subject to the right of the public, the owner of the fee of a rural road retains all right and interest in it. He remains the owner, and, as such, ⁴⁵⁹ his rights are very comprehensive": Citing *Brookville etc. Co. v. Butler*, 91 Ind. 134; 46 Am. Rep. 580; *Shelbyville etc. Co. v. Green*, 99 Ind. 205. Again in the same case it was said: "The appropriation of the land for a rural highway did not entitle the local officers to use it for any other than highway purposes, although they did not acquire a right to use it for all purposes legitimately connected with the local system of highways. A use for any other than a legitimate highway purpose is a taking within the meaning of the constitution, inasmuch as it imposes an additional burden upon the land, et cetera. . . . The authorities, although not very numerous, are harmonious upon the proposition that laying gaspipes in a suburban road is the imposition of an additional burden, et cetera." From the authorities we are unable to reach any conclusion, other than that appellant was unlawfully upon the lands described in the affidavit, and, under the facts shown by the record, was guilty of trespass.

Judgment affirmed.

Henley, J., took no part in the decision of this case.

CRIMINAL LAW—NEW TRIAL.—The courts seem to be divided on the question whether a new trial will be granted because the defendant was acquitted or convicted against the weight of evidence. It is not a ground for a new trial in New York: *People v. Mather*, 4 Wend. 229; 21 Am. Dec. 122; nor in Virginia: *McWhirt's Case*, 3 Gratt. 594; 46 Am. Dec. 196. It is sufficient ground for granting a new trial in Mississippi: *Carotti v. State*, 42 Miss. 334; 97 Am. Dec. 465; and in Iowa: *State v. Cross*, 12 Iowa, 66; 79 Am. Dec. 519.

HIGHWAYS—TRESPASS AGAINST ABUTTING OWNER.—The owner of a right of way cannot interfere with the soil under the way. If he uses the way in any manner except to pass and repass, he is answerable as a trespasser to the owner of the fee. The owner of the adjoining land may maintain trespass against another for interfering with a drain under a road. Herbage growing upon a public road belongs exclusively to the owner of the fee in the land, and he may maintain trespass against one who puts his cattle into the highway to graze. So he may against one who builds upon or obstructs a public road, or who, instead of passing along it, remains standing upon it, refusing to depart: *Dubuque v. Maloney*, 9 Iowa, 451; 74 Am. Dec. 358. See note to *Mayhew v. Norton*, 28 Am. Dec. 303.

HIGHWAYS—ADDITIONAL SERVITUDE—PIPE LINE.—Laying gaspipes in a suburban road is the imposition of an additional burden, for which compensation must be made to the land-owner: *Kincaid v. Indianapolis etc. Gas Co.*, 124 Ind. 577; 19 Am. St. Rep. 113. See, also, *Zehren v. Milwaukee Elec. Ry. etc. Co.*, 99 Wis. 83; 67 Am. St. Rep. 844.

HIGHWAYS—ESTOPPEL AGAINST OBJECTING TO ACTS OF TRESPASSER.—A landholder who, without objection, permits a telegraph line and poles to be erected upon a public highway, the fee of which belongs to him, is not thereby estopped from subsequently objecting to injuries done, or about to be done, by the corporation, to trees growing in such highway, by trimming or cutting them off to further facilitate the stringing of wires: *Dally v. State*, 51 Ohio St. 348; 46 Am. St. Rep. 578.

TERRE HAUTE ELECTRIC RAILWAY CO. v. YAUT.

[21 INDIANA APPEALS, 406.]

RAILROAD COMPANIES—STREET RAILWAYS—LIABILITY FOR FRIGHTENING HORSES.—Licensed railroad companies have as much right to run their cars in the streets of a city as others have to drive through them with their horses and vehicles, and cannot ordinarily be held responsible for horses taking fright at the appearance, movement, or noise of the cars, unless the conduct complained of in the management of the cars is attributable only to a wanton or malicious disregard for the safety of the occupants of the vehicle.

RAILROAD COMPANIES—STREET RAILWAYS—LIABILITY FOR FRIGHTENING HORSES.—If a horse attached to a vehicle on a public highway is frightened by a street-car operated thereon, and through such fright becomes unmanageable and injures the driver, the railway company is not liable therefor on the ground of negligence, unless the car is being operated in an unusual, unnecessary, and improper manner, in wanton disregard for the safety of the person thus injured.

J. G. McNutt and F. A. McNutt, for the appellant.

J. O. Piety and S. R. Hamill, for the appellee.

407 COMSTOCK, J. Appellee, who was plaintiff below, sued the Terre Haute Electric Railway Company to recover damages for a personal injury alleged to have been caused by the negligence of the appellant company. The complaint was in two paragraphs, the first charging negligence, the second willful injury. The second paragraph was withdrawn. A demurrer for want of facts to the first paragraph was overruled, the cause put at issue by general denial, and verdict returned in favor of appellee for nine hundred and five dollars. A motion for a new trial on the grounds that the verdict was contrary to law, was not sustained by sufficient evidence, that the damages were excessive, and for alleged errors of the court in admitting and refusing to admit evidence, and in giving and refusing to give instructions, was overruled, and judgment rendered on the verdict. The first and second errors assigned question the sufficiency of the complaint; the third, the action of the court in overruling appellant's motion for a new trial.

The complaint charges that on the day of the alleged injury, defendant owned and operated a street railway line with double tracks running along a public street in the city of Terre Haute, and along the center of the National road east of said city; that on said day, while plaintiff and his wife were traveling in a one-horse buggy along said highway, and on the south side thereof, and going east, they met one of the defendant's electric street-cars going west; that "the said horse saw and heard the said car traveling as aforesaid, and said horse did then and there become frightened at said fast-going car, and noise caused thereby, and began to plunge and start, and was becoming ⁴⁸⁸ unmanageable; that thereupon this plaintiff jumped out of his said buggy, and took hold of the harness and bridle on and about the said horse's head, so that he would be more able to manage and control said horse, all of which was in plain view of defendant and defendant's agents who were controlling, operating, and running said car, and said servant ought to have seen, and did see, some time before the said car had come near said horse, the imperiled condition and position of the plaintiff caused by the fast-going car as aforesaid; that notwithstanding the plaintiff's dangerous and imperiled position and condition, caused as aforesaid, the defendant by its agent, wrongfully, carelessly, and negligently ran said car at a high rate of speed as aforesaid toward, on, near to, and within but a few feet of this plaintiff and the said horse, which caused said horse to become entirely unmanageable, and to start, plunge, turn, and to run, throwing this plaintiff down, and causing said horse to run over and trample on said plaintiff." It is not claimed by appellee's learned counsel that appellant was at fault in running its car and making the noise necessarily incident thereto, nor that it was run upon the occasion in question in an improper manner up to the point where it was alleged the horse was becoming unmanageable; but that, when the motorman saw that appellee's horse was frightened and becoming unmanageable, he should have stopped the car.

Booth on Street Railway Law, in section 298, states the law in the following language: "And, . . . for obvious reasons, companies which have been duly licensed, and therefore have as much right to run their cars in the streets as others have to drive through them with their horses and vehicles, cannot ordinarily be held responsible for horses taking fright at the appearance, movement, or noise of the cars. If a ⁴⁸⁹ horse takes fright at an approaching car, and, because the car is not stopped, . . . becomes unmanageable and runs away, injuring the

driver or others, the company is not liable, unless the conduct complained of, in the management of the car, is attributable only to a wanton or malicious disregard for the safety of the driver or other travelers upon the street. . . . To the extent that travelers, whether in cars, on foot or in private vehicles, have the right to proceed without unnecessary interruption or delay, the rights of all are equal, and the law makes no distinction between the vehicles used or the means employed. No other rule would be reasonable or practicable; for if drivers, motormen, or gripmen were required to stop their cars, slacken their speed, or omit or discontinue necessary signals, upon which the safety of others depends, because timid horses may become frightened, or already manifest symptoms of fear, not indicating imminent peril, street railway service would be so materially embarrassed by numerous delays as to defeat the purpose for which such franchises are granted, and the dangers to the general public, for whose protection warnings are given, would be greatly enhanced": Citing, the following among other cases, *Chapman v. Zanesville Street Ry. Co.* (Ohio Com. Pleas, 1892), 27 Week. Law Bull. 70; *Coughtry v. Willamette Street Ry. Co.*, 21 Or. 245; *Cornell v. Detroit etc. Ry. Co.*, 82 Mich. 495.

In *Doster v. Charlotte Street Ry. Co.*, 117 N. C. 651, the supreme court of North Carolina said: "Where a horse is being driven or is running uncontrolled along a highway parallel to a railway of any kind, though it give unmistakable evidence by its movements that it is alarmed at an approaching train or car, the engineer or motorman in charge is not negligent in failing to diminish the speed, unless the ⁴⁹⁰ animal is actually on the track, in his front, or he has reasonable ground to believe that in its excited state it is about to go or may go upon it, so as to cause a collision." In *Steiner v. Philadelphia etc. Co.*, 134 Pa. St. 199, which was an action to recover for injuries received occasioned by the running away of a team of horses standing by the street railway track growing out of the continuous ringing of the bell, the court said: "If the gripman saw that plaintiff's horses were restive, it does not follow that he had any reason to apprehend the accident that occurred. The plaintiff, according to his own testimony, was at their heads and might naturally be supposed to be able to control them."

The pertinency of these extracts from the text-book and reports justify, we think, the foregoing lengthy quotations. The complaint, judged by the law as set out in the foregoing authorities, is fatally defective. It does not appear from the aver-

ments that appellee would have been able, because of the gentleness of the horse or from any other reason, to have controlled it, and prevented the injury had the car been stopped before its near approach; nor that the motorman had any reason to apprehend the accident that occurred. Neither do they show that he manifested a wanton disregard for the safety of appellee; nor that he had reason to believe that appellee, who was in the position which he believed the best to manage his horse, would not be able to do so. The averments that the car was being run at a high rate of speed and making a great noise, and that it was run carelessly and negligently, are not averments of facts showing negligence. Many decisions might be cited from the reports of this and other states in which railway companies have been held liable for damages occasioned by frightening horses. Upon examination, it will appear that the liability ⁴⁹¹ was held to attach on the ground of negligence when the fright has been caused by the running of the train or car in an unusual, unnecessary, or improper manner, or when those in charge, seeing the injured party in imminent peril, have acted in a manner attributable only to a wanton disregard for the safety of those in peril. To hold the complaint sufficient would be to declare it to be the duty of a motorman operating a car in a lawful manner to at once stop or slacken its speed at the sight of a frightened horse on the public highway adjacent to the track, although held by his owner in a manner from which it might fairly be supposed he would be able to control him. To so hold, we believe, would be error. The complaint in the Lake Erie etc. Ry. Co. v. Juday, 19 Ind. App. 436, cited by appellee, in its averments charged that the servants of the railway company operating the hand-car at which plaintiff's horse was frightened refused to check the car, although signaled and requested to do so; this at the time plaintiff was in the buggy, with two other persons, when said agents saw that the horse was unmanageable. These facts alone were sufficient to show a wanton disregard for the safety of those in the buggy, amounting to negligence.

We do not deem it necessary to consider the other alleged errors discussed by counsel. Judgment reversed, with instructions to sustain the demurrer to the complaint.

RAILROAD COMPANIES—STREET RAILWAYS.—Rights of a street railway company to the use of the streets of a city: See *Hall v. Ogden City Street Ry. Co.*, 13 Utah, 243; 57 Am. St. Rep. 726; *Evers v. Philadelphia Traction Co.*, 176 Pa. St. 376; 53 Am. St. Rep. 674.

RAILROAD COMPANIES—LIABILITY FOR FRIGHTENING HORSES.—Where the plaintiff was driving his horse along a highway parallel and adjacent to a railroad, and the horse was frightened by smoke from the engine of a train coming in the opposite direction, the engine having been necessarily freshly fired up, which increased the smoke, and the plaintiff was injured in consequence, it was held that the railroad company was not liable: *Lamb v. Old Colony R. R. Co.*, 140 Mass. 79; 54 Am. Rep. 449. But where an engineer wantonly and maliciously sounds the locomotive whistle, thus frightening a team of horses on the highway, causing it to do damage, the railroad company is liable: *Chicago etc. R. R. Co. v. Dickson*, 68 Ill. 151; 14 Am. Rep. 114; *Billman v. Indianapolis etc. R. R. Co.*, 76 Ind. 166; 40 Am. Rep. 280.

PRUDENTIAL INSURANCE COMPANY v. HUNN.

[21 INDIANA APPEALS, 525.]

INSURANCE—INSURABLE INTEREST.—If an insurer contracts with the person whose life is insured to pay the insurance to another person, it is not necessary for the latter, in an action brought by him upon the policy to show that he had an insurable interest in the life insured.

INSURANCE—INSURABLE INTEREST.—A person has an insurable interest in his own life, and he may effect such insurance, and appoint anyone to receive the money in case of his death during the existence of the policy.

INSURANCE — INSURABLE INTEREST — WAGERING POLICY.—A policy of insurance issued to one upon the life of another, the former having no insurable interest in the life of the latter, is void, as being a wagering policy and in contravention of public policy.

INSURANCE.—INSURABLE INTEREST IN THE LIFE OF ANOTHER must be a pecuniary interest, and though such interest need not appear on the face of the policy, it must be pleaded and shown in an action thereon.

INSURANCE — INSURABLE INTEREST — SUFFICIENCY OF COMPLAINT.—A complaint upon an insurance policy by a mother upon the life of her son, alleging that she was the contracting party, is bad on demurrer, unless it also shows she had an insurable interest in the life of her son.

INSURANCE — INSURABLE INTEREST — WAGERING POLICY.—In case the person insured is only nominally the contracting party, while the beneficiary has in reality procured the insurance and paid the premiums, then, in order that the transaction may be taken out of the category of wagering contracts, the beneficiary must have had an insurable interest of a pecuniary character, either present or prospective, at the time the policy had its inception.

INSURANCE—PLEADING.—A complaint must proceed upon some definite theory, and the plaintiff, in an action on a life insurance policy, cannot claim that the complaint declares upon a policy issued to him, and also that it declares upon a policy issued to the person whose life is insured.

J. E. Williamson, for the appellant.

J. B. Rucker, for the appellee.

⁵²⁶ BLACK, C. J. The complaint by the appellee, Minnie Hunn, against the appellant, contained two paragraphs, both based upon a certain policy of life insurance. A demurrer to each paragraph for want of sufficient facts was overruled. The verdict for the appellee was expressly based upon the second paragraph, by which it was alleged, in substance, that the appellant, in consideration of the quarter-annual payment of four dollars and eighty-eight cents, to be paid to it on or before the twenty-seventh day of February, May, August, and November in every year, executed to the appellee a policy of insurance on the life of Thomas S. Hunn for one thousand dollars, on the twenty-seventh day of May, 1895, a copy of which policy was made an exhibit. It was further alleged that said Thomas S. Hunn died on the thirtieth day of August, 1896, in the city of Evansville, Vanderburgh county, in this state; that the appellee was his mother, and that the policy was made payable to her as such; that proofs were furnished the appellant of the death of said Thomas S. Hunn on the twenty-sixth day of September, 1896; that the appellee performed all requirements of said policy on her part to be performed, and all quarter-annual premiums were paid to the appellant, and receipted for by it; that by consent and agreement of the appellant the time for the payment of the quarter-annual premium or payment which fell due on the twenty-seventh day of August, 1896, was extended by it to the thirty-first day of August, 1896, at which time it was fully paid to it; that the payment of said sum of one thousand dollars had been demanded of the appellant, and payment had been refused, although the same was due; wherefore, et cetera. In the policy filed as ⁵²⁷ an exhibit, the appellant promised to pay "unto Minnie Hunn, beneficiary, mother of Thomas S. Hunn, of," et cetera, "herein designated as the insured, or, if the insured survive the beneficiary, to the executors, administrators, or assigns of the insured, one thousand dollars, immediately on acceptance of satisfactory proofs of the death of the insured," et cetera. The first paragraph was, in effect, the same as the second, except that the first did not contain an averment of demand (which was not necessary, the action being upon a promise to pay a certain sum of money at a specified place to a designated person, upon acceptance of satisfactory proofs of the death of a person named during the continuance of the contract), and except, also, that, the first did not contain an allegation of extension of time for payment of the premium.

The complaint does not show in either paragraph that the ap-

pellee had any insurable interest in the life of Thomas S. Hunn, unless the averment that he was her son be a sufficient showing in that regard. Where the insurance company contracts with the person whose life is insured to pay the sum insured to another person, it is not necessary for such other person, in an action brought by him upon the policy, to show that he had an insurable interest in the life insured. A person has an insurable interest in his own life, and he may effect such insurance, and appoint anyone to receive the money in case of his death during the existence of the policy: *Provident etc. Ins. Co. v. Baum*, 29 Ind. 236; *Franklin etc. Ins. Co. v. Sefton*, 53 Ind. 380; *Continental Ins. Co. v. Volger*, 89 Ind. 572; 46 Am. Rep. 185; *Elkhart etc. Assn. v. Houghton*, 103 Ind. 286; 53 Am. Rep. 514; *Amick v. Butler*, 111 Ind. 578; 60 Am. Rep. 722; *Burton v. Connecticut etc. Ins. Co.*, 119 Ind. 207; 12 Am. St. Rep. 405. A policy issued to one upon the life of another, the former having no insurable interest in the life of the latter, is void; it being ⁵²⁸ a wagering policy, and in contravention of public policy: *Franklin Ins. Co. v. Hazzard*, 41 Ind. 116; 13 Am. Rep. 313. In that case it was said: "In our opinion, no one should hold a policy upon the life of another in whose life he had no insurable interest at the time he acquired the policy, whether the policy be issued to him directly from the insurer, or whether he acquired the policy by purchase and assignment from another": See, also, *Amick v. Butler*, 111 Ind. 578; 60 Am. Rep. 722. It is not necessary that the insurable interest appear on the face of the policy, but it must be shown in an action thereon. Whether or not a person to whom a policy is issued on the life of another has an insurable interest in the life insured is a question of law, dependent upon the facts; and, in a pleading based upon the policy, the facts from which the conclusion of law may be drawn should be stated: *Franklin Ins. Co. v. Sefton*, 53 Ind. 380. In *Burton v. Connecticut Ins. Co.*, 119 Ind. 207, 12 Am. St. Rep. 405, it was decided that, as a rule, a grandfather is under no legal obligation to support or provide for his grandchild, and that, though this relationship be stated in the complaint, the court cannot, as a matter of law, infer from this fact alone such an insurable interest in the life of the grandfather as will uphold a policy issued upon his life directly to the grandchild. In *Continental Ins. Co. v. Volger*, 89 Ind. 572, 46 Am. Rep. 185, which involved a policy of insurance taken out by a daughter on the life of her mother, it was said: "It will be observed that the complaint does not show that the appellee had,

at the time of receiving the policy, or afterward, any insurable interest in the life of her mother, the assured, unless the fact of the relationship of mother and daughter gave her such interest. The law is well settled that a policy taken by and payable to one upon the life of another, in the continuance of whose life the assured has no pecuniary interest, is void, as ⁵²⁹ being against public policy. . . . The insurable interest in the life of another must be a pecuniary interest. Some of the authorities tend in the direction that near relationship, as between parent and child, is a sufficient foundation upon which to rest an insurable interest. But this view is not sustained by the weight of authority." It was held in that case that, in an action upon a policy taken out by one upon the life of another, the complaint must state facts showing that the former had an insurable interest in the life of the latter.

In the complaint before us, the appellee is represented as a contracting party, and the argument on behalf of the appellee proceeds in part upon the same theory. It is also claimed in argument that the policy shows that the person whose life was insured contracted with the appellant. A policy of life insurance is property. It is a chose in action. The question as to who is the owner thereof, with right to sue thereon, when there has been no assignment of the contract, depends upon the question with whom was the contract made, to whom was the policy issued, by the insurance company. In *Continental Ins. Co. v. Volger*, 89 Ind. 572, 46 Am. Rep. 185, it was said: "It was alleged in each paragraph of the complaint that the appellee insured the life of his mother; that the policy was payable to the appellee, and that she paid seven annual premiums thereon. Though the policy was payable to the appellee, it may be, if it had been taken out and the premiums paid by her mother, that the latter, as claimed in the first cause of demurrer, would be the real party in interest, and that in such case the action should have been brought by her. . . . But as the appellee took out the policy and paid the premiums, we think she should be regarded ⁵³⁰ as the real party in interest"—the complaint of the appellee in that case being in two paragraphs, one seeking specific performance of the contract in the policy to issue a paid-up policy, and the other seeking judgment in a certain sum for premiums paid by the appellee on the policy: See, also, *Elkhart etc. Assn. v. Houghton*, 103 Ind. 286; 53 Am. Rep. 514. In case the person insured is only nominally the contracting party, while the beneficiary named in the policy "has in reality pro-

cured the insurance and paid the premiums, then, in order that the transaction may be taken out of the category of wagering contracts, the beneficiary must have had an insurable interest of a pecuniary character, or of that nature, either present or prospective, at the time the policy had its inception": *Amick v. Butler*, 111 Ind. 578, 60 Am. Rep. 722. In *United Brethren Mut. Aid Soc. v. McDonald*, 122 Pa. St. 324, 330, 9 Am. St. Rep. 111, it was said that "although the policy states that the first annual payment of twenty-four dollars was paid by McDevitt [the person on whose life the policy was issued] the plaintiff [McDonald] unequivocally testified that he paid all the money that was paid on it. It is very plain from all the testimony that McDevitt simply suffered the use of his name; that the insurance was effected at the suggestion of McDonald or McDonald's wife, at their own expense, for their exclusive benefit." It was held that the plaintiff, having no insurable interest in the life of McDevitt, there was nothing to support the policy.

The policy set forth as an exhibit in the case before us might have been executed to the appellee, as alleged in the complaint. There is nothing in the policy which is necessarily inconsistent with this averment in the complaint. It is a well settled and necessary rule that a complaint must proceed upon some definite theory. The appellee cannot be permitted to claim that the ⁵⁸¹ complaint declares upon a policy issued to her, and also that it declares upon a policy issued to the person whose life was insured. It must be treated as a complaint on a policy executed to the appellee, and therefore cannot be held sufficient on demurrer.

The judgment is reversed.

INSURANCE—INSURABLE INTEREST—PREMIUM PAID BY INSURED.—A policy of life insurance payable to one who has no interest in the life of the insured is valid and enforceable when the policy is taken out in good faith and the premium paid thereon by the insured: *Albert v. Mutual Life Ins. Co.*, 122 N. C. 92; 65 Am. St. Rep. 693. A person has such an insurable interest in his own life that he may insure it even for the benefit of a stranger: *Northwestern Masonic Aid Assn. v. Jones*, 154 Pa. St. 99; 35 Am. St. Rep. 810.

INSURANCE—INSURABLE INTEREST—PECUNIARY INTEREST.—To create an insurable interest in the life of another, kinship is not necessary. It is sufficient if the relationship between the insurer and the beneficiary is one of mere friendship, if the circumstances show that the loss of the life of the former will result in pecuniary loss to the latter: *Carpenter v. United States Life Ins. Co.*, 161 Pa. St. 9; 41 Am. St. Rep. 880.

INSURANCE—INSURABLE INTEREST—RELATIONSHIP—WAGERING CONTRACTS.—One who takes out insurance on the life of another payable to himself, and himself paying the premium,

must have an insurable interest in the life insured. Otherwise, it is a wagering contract, and the mere fact of relationship does not constitute such insurable interest, unless there is a legal right of support arising from it: *Prudential Ins. Co. v. Jenkins*, 15 Ind. App. 297; 57 Am. St. Rep. 228. A policy of insurance on the life of another, taken by one who had an insurable interest in it, for the purpose of assigning it to a third person who had no such insurable interest, is void as a wagering policy in the hands of the assignee: *Keystone Mut. Ben. Assn. v. Norris*, 115 Pa. St. 446; 2 Am. St. Rep. 572; *United Brethren Mut. Aid Soc. v. McDonald*, 122 Pa. St. 324; 9 Am. St. Rep. 111.

INSURANCE—INSURABLE INTEREST—PLEADING.—The plaintiff in an action on a life insurance policy issued to him upon the life of another must allege in his complaint that he had an insurable interest in the life of the person insured: *Burton v. Connecticut Mut. Life Ins. Co.*, 119 Ind. 207; 12 Am. St. Rep. 405.

CLEVELAND, CINCINNATI, CHICAGO AND ST. LOUIS RAILWAY COMPANY v. HUDDLESTON.

[21 INDIANA APPEALS, 621.]

WATERS AND WATERCOURSES—OBSTRUCTION—PLEADING.—A complaint alleging that a railroad company, for the purpose of allowing water in a ditch, known as the "Holloway ditch," to flow under its tracks and continue in the channel of the ditch as had been done for twenty years previous thereto, negligently placed in the line of said ditch, immediately below the premises of plaintiff, an insufficient sewer, is insufficient, as it does not show the obstruction of a natural watercourse.

NEGLIGENCE—PLEADING.—A complaint based upon negligence must state facts showing a specific duty owing to the party complaining, and a wrongful breach of such duty by the defendant.

NEGLIGENCE—PRESUMPTION.—If acts complained of were done by a party on his own land, and in the use of his own property, the presumption is that they were rightfully, and not wrongfully or negligently, done.

WATER AND WATERCOURSES—PLEADING CONCLUSION OF LAW.—An allegation in a complaint for obstructing a natural watercourse, that plaintiff is entitled to the free and unobstructed flow of the water in the channel, is a statement of a conclusion of law.

WATER AND WATERCOURSES—SURFACE WATER.—Railroad companies are under no duty to provide an outlet for surface water, nor liable for turning it upon the lands of adjacent proprietors.

WATERS AND WATERCOURSES—OBSTRUCTIONS—PLEADING.—If a party seeks to recover from a railroad company upon the theory that his land or property has been injured by an overflow caused by the company's obstructing the water in a ditch, he must show that such ditch was rightfully established and constructed through the property of the company, and that the latter was under a duty not to obstruct it.

RAILROAD COMPANIES—RIGHT TO MAKE CHANGES IN ROADBED.—The law presumes that land-owners have received full compensation for all injuries resulting from the construction

and operation of a railroad, and that the railroad company acquires all the estate, interest, and right necessary thereto, and the construction and operation of a railroad includes the right to make necessary changes in the roadbed and culverts.

EASEMENTS.—USE AND ENJOYMENT of what is claimed as an easement must have been adverse, under a claim of right, exclusive, continuous, and uninterrupted, besides being within the knowledge and with the acquiescence of the owner of the estate over which the easement is claimed.

EASEMENTS BY PRESCRIPTION—PLEADING.—An averment that a culvert was constructed for the purpose of allowing the waters therein to flow and to continue in the channel of a specified ditch, "as had been done for twenty years," is not an allegation of facts constituting a right by prescription.

WATER AND WATERCOURSES—OBSTRUCTION.—Railroad companies have no right to obstruct a natural watercourse or a ditch through which flows other than surface water, to the damage of another, without being liable therefor.

B. K. Elliott, W. E. Elliott, and J. T. Dye, for the appellant.

G. W. Brill and G. C. Harvey, for the appellee.

⁶²¹ **COMSTOCK, J.** The complaint alleges that the plaintiff is the owner of the land therein described; that his land was injured by an overflow of the water of a ditch running through it; that the ditch was ⁶²² known as the "Holloway ditch"; that water was accustomed to flow therein, and that "the plaintiff was entitled to the free and unobstructed flow of water in the channel of said ditch below said land." The allegations referred to are followed by averments as follows: "That on the — day of —, 1893, the defendant, in making a sewer through and under the embankment, threw up for their grade on which their tracks were laid, immediately in the line of said ditch, and for the purpose of allowing the waters therein to flow under said railroad, and to continue in the channel of said ditch, as had been done for twenty years previous thereto, negligently placed in the line of said ditch immediately below the premises of plaintiff, aforesaid, an insufficient sewer of but three feet in diameter, when for many years before there had been a bridge of some twelve feet in width at the same place, and it was necessary at said place to have a much larger sewer than the one so put in by defendant to carry water in its ordinary channel. That from said day to the present time the defendant has negligently maintained said sewer, and has thereby since said time, and during all of said time, obstructed and stopped the natural flow of water of said ditch, and raised the water thereof on divers occasions within the last two or three years fifteen feet above its ordinary level, and caused it to back upon said plaintiff's said premises, and flood the same."

A demurrer to the complaint upon the ground that it did not state facts sufficient to constitute a cause of action was overruled, and exceptions taken. The cause was put at issue by general denial, submitted for trial to a jury, and a verdict returned in favor of appellee for four hundred and fifty-eight dollars, for which amount the court, after overruling appellant's motions for a new trial and in ⁶²³ arrest of judgment, rendered judgment in favor of appellee.

The first and second specifications of the assignment of errors question the sufficiency of the complaint. Appellant insists that the complaint does not show the obstruction of a natural watercourse. It will be noticed upon reading that it does not aver that the ditch was a natural watercourse, nor set out facts showing it to be such; while from the expression "Holloway ditch" an artificial ditch would be inferred, construing, under the rule, the language used most strongly against the pleader: *Cleveland etc. Ry. Co. v. Dugan*, 18 Ind. App. 435, and authorities cited.

If the complaint is good, it must be because facts are stated showing a duty on the part of appellant to construct a larger sewer than the one it actually constructed. A complaint based upon negligence must state facts showing a specific duty owing to the party complaining, and a wrongful breach of the duty by the defendant: *Faris v. Hoberg*, 134 Ind. 269; 39 Am. St. Rep. 261; *Cleveland etc. Ry. Co. v. Stephenson*, 139 Ind. 641; *Thiele v. McManus*, 3 Ind. App. 132; *Morrow v. Sweeney*, 10 Ind. App. 626. The acts complained of were done by appellant on its own land, and in the use of its own property. It will not be presumed that they were wrongfully done. The allegation that appellee "was entitled to the free and unobstructed flow of the water in the channel" is the statement of a conclusion. In *Field v. Chicago etc. Ry. Co.*, 76 Mo. 614, it was held that where an action was grounded on a breach of duty, "the facts out of which the duty arose must be pleaded." From the facts pleaded, was the appellee entitled to have the water flow on through the lands of the appellant? If it had this right, it was derived from the existence of an artificial ditch, construing ⁶²⁴ the complaint most strongly against the pleader. The complaint in the case before us does not show that the ditch carried any other than surface water. It is settled in this state that a railroad company is not under a duty to provide an outlet for surface water, nor liable for turning it upon the lands of adjacent proprietors. In *Cairo etc. Ry. Co. v. Stevens*, 73 Ind. 278, 38 Am. Rep. 139,

the court said: "The complaint proceeds on the theory that the defendant was lawfully in possession of its right of way across the land described and for the distance of ten miles southward, but whether by condemnation or by purchase is left to conjecture. The defendant was therefore guilty of no trespass in entering upon its said right of way, and in making all proper and necessary excavations and embankments for the construction of its roadbed. The gist of the complaint is in the averments that the defendant 'failed negligently and carelessly, in the construction of said embankment, to make any culvert, bridge, or drain in, through, or under said embankment, whereby the water coming on the land hereinbefore described could escape, and that within five years last past the water falling upon said real estate of the plaintiff, and the water flowing thereon from the river, and from the surrounding land, has been stopped and hindered by said embankment from flowing off,' et cetera. No attempt is made to charge an interference with any natural watercourse, but only with the flow of surface water and waters overflowing from the river and spreading over the adjacent bottom or low lands. The question presented is, therefore, whether the defendant, having acquired a right of way for the construction of its railroad, and having found it necessary or expedient to raise its track above the natural surface of the land, owed any duty to the plaintiff to provide culverts or other means of passage ⁶²⁵ through its embankment for the surface water or water overflowing from the river and descending in that direction from or over the lands of the plaintiff. If, upon the facts of the complaint, such duty existed, a careless and negligent breach thereof, together with actionable damages, is shown, and the complaint is good. If such duty did not exist, the complaint is not good." The court held the complaint bad. The following authorities sustain the foregoing conclusion of the court: *Hill v. Cincinnati etc. Ry. Co.*, 109 Ind. 511, and cases cited; *Jean v. Pennsylvania Co.*, 9 Ind. App. 56; *New York etc. Ry. Co. v. Speelman*, 12 Ind. App. 372; *Robinson v. Shanks*, 118 Ind. 125; *Johnson v. Chicago etc. Ry. Co.*, 80 Wis. 641; 27 Am. St. Rep. 76; *Nichol v. Canada etc. Ry. Co.*, 40 U. C. Q. B. 583; *O'Connor v. Fond du Lac etc. R. R. Co.*, 52 Wis. 526; 38 Am. Rep. 753. In the case last cited the court said: "The company has only obstructed a ditch which drained or carried off surface water from the plaintiff's premises. We do not think the defendant was bound to keep that ditch open on its own land for the convenience of the plaintiff; in other words, the owner of

land is under no legal obligation to provide a way for the escape of mere surface water coming onto his land from the land of his neighbor, but has the right to change the surface of the ground so as to interfere with or obstruct the flow of such water." To the same effect was the decision in *Atchison etc. Ry. Co. v. Hammer*, 22 Kan. 763; 31 Am. Rep. 216. The complaint does not show a right to construct and maintain a ditch through appellant's land. This can only be done by the statement of facts showing such lawful right.

An artificial waterway may not be constructed or maintained, except by authority of law, or under a contract, in any case where it imposes a burden upon ⁶²⁶ the property of an adjacent owner. Where, as here, a plaintiff seeks a recovery against a railroad company upon a theory that his land or property has been injured by an overflow, he must show by a statement of the facts that the ditch was rightfully established and constructed on or through the property of the company, and that the company was under a duty not to place culverts across such ditch. The company unquestionably had a right to construct culverts in the line of its right of way, and, indeed, to make a solid embankment, unless there was a lawful right to establish and maintain the ditch under its track. The right to change the track cannot be destroyed by constructing an artificial waterway and conducting water to the bed on which the rails of the track rest, except only in cases where by contract, or by appropriate legal proceedings, authority to limit and restrict the rights of the company to enjoy the free use of its property has been secured. Such authority cannot be secured by the mere voluntary act of the interested parties. No man, of his own volition, can put a burden upon another, or restrict another's right to freely use and enjoy his property.

There are no facts averred showing a license from the appellant to construct a ditch to conduct water to or through its property. Such license will not be inferred: *Boltz v. Smith*, 3 Ind. App. 43. The law presumes that landowners have received full compensation for injuries resulting from the construction and operation of a railroad. The construction and operation of railroads include necessary changes in the roadbed and culverts: *Clark v. Hannibal etc. Ry. Co.*, 36 Mo. 202; *Hodge v. Lehigh Valley Ry. Co.*, 39 Fed. Rep. 449; *Aldrich v. Cheshire Ry. Co.*, 21 N. H. 359; 53 Am. Dec. 212; *Johnson v. Atlantic etc. Ry. Co.*, 35 N. H. 569; 69 Am. Dec. 560; *Slatten v. Des ⁶²⁷ Moines etc. R. R. Co.*, 29 Iowa, 148; 4 Am. Rep. 205; *Van Shoick v.*

Delaware etc. Co., 20 N. J. L. 249; Porterfield v. Bond, 38 Fed. Rep. 391; White v. Chicago etc. R. R. Co., 122 Ind. 317; 3 Elliott on Railroads, sec. 1004.

Where a right to build and maintain a railroad is acquired, the principal right includes the subsidiary right to make needed changes, since the presumption is that the company acquires all the estate, interest, and right necessary for the proper construction and maintenance of a railroad: Hargis v. Kansas City etc. Ry. Co., 100 Mo. 210; East Railway Co. v. Telford, 89 Tenn. 293; Prather v. Western Union etc. Co., 89 Ind. 501; Indianapolis etc. Ry. Co. v. Rayl, 69 Ind. 424; Campbell v. Indianapolis etc. R. R. Co., 110 Ind. 490; Duck River etc. Ry. Co. v. Cochran, 3 Lea, 478; Day v. Railroad Co., 41 Ohio St. 392; Jones v. Erie etc. Ry. Co., 144 Pa. St. 629; Kansas etc. Ry. Co. v. Allen, 22 Kan. 285; 31 Am. Rep. 190; cases cited in 3 Elliott on Railroads, sec. 938, p. 1304.

The learned counsel for appellee claim that the complaint is sufficient because it shows a prescriptive right in the averment that the water had flowed through appellant's land for more than twenty years. The following are the allegations of the complaint upon this point: "The defendant, making a sewer through and under the embankment threw up for their grade on which their tracks were laid, immediately in the line of said ditch, and for the purpose of allowing the waters therein to flow under said railroad, as they had done for twenty years previous thereto, negligently placed in line of said ditch an insufficient sewer." Appellant insists that the statement ⁶²⁸ "as they had done for twenty years" is merely a recital. But if we concede, without deciding, that this is a statement of a fact, and not a recital, the averment would not show a prescriptive right, for the reason that allowing water to flow in a designated channel does not establish a prescriptive right: 1. Because a mere permissive use does not create an easement in land; 2. Because, in order that an easement may be created, the use must be under a claim of right uninterrupted, continuous, and adverse; 3. Because the right to control surface water is not lost by a failure to exercise the right: Gould on Waters, sec. 338; Silver Creek etc. Corp. v. Union Lime etc. Co., 138 Ind. 297. "The enjoyment must be under claim of right, and contrary to the interests of the owner. An enjoyment with the consent of the owner, or consistently with the rights of the true owner, has no tendency to prove a conveyance from him": Brace v. Yale, 10 Allen, 441; Davis v. Cleveland etc. Ry. Co., 140 Ind. 468, and authorities there cited.

In *McCardle v. Barricklow*, 68 Ind. 356, the court said: "The use and enjoyment of what is claimed as an easement must have been adverse, under a claim of right, exclusive, continuous, and uninterrupted, besides being within the knowledge and acquiescence of the owner of the estate over which the easement is claimed:" Citing *Washburn on Easements*, 131; *Palmer v. Wright*, 58 Ind. 486; *Peterson v. McCullough*, 50 Ind. 35; *Mitchell v. Parks*, 26 Ind. 354; *Snowden v. Wilas*, 19 Ind. 10; 81 Am. Dec. 370. The averment that the culvert was constructed for the "purpose of allowing the waters therein to flow under the railroad, and to continue in the channel of said ditch, as had been done for twenty years," is not an allegation of facts constituting a right by prescription. "A natural watercourse does not lose its character as such by the fact that its channel is artificially ⁶²⁹ deepened for the purpose of drainage. It makes no difference what appellations may have been given to it": 1 Am. & Eng. Dec. Eq. 47. An artificial ditch may carry other than surface water. The railroad company would have no right to obstruct a natural watercourse or a ditch through which flowed other than surface water, to the damage of another, without being liable therefor. For such injury appellant would be liable, but the complaint before us does not present such a case. For the reasons that the complaint does not show that the ditch carried other than surface water, and does not show a prescriptive right in appellee, it must be held insufficient.

We do not deem it necessary to pass upon the other questions raised by the assignment of errors, as they may not arise upon a second trial. Judgment reversed, with instruction to the trial court to sustain appellant's demurrer to the complaint, and for other proceedings not inconsistent herewith.

WATERS AND WATERCOURSES—OBSTRUCTION—CULVERTS.—A railroad company, in constructing its road over watercourses, must make suitable bridges, culverts, or other provisions for carrying off the water as effectually as the stream would if in its natural state, and has no more right than any private owner to turn a stream of water upon land on which it does not naturally flow: *Ohio etc. Ry. Co. v. Thillman*, 143 Ill. 127; 36 Am. St. Rep. 359. A railroad company is not bound to construct waterways and culverts to carry off surface water, in the absence of any channel or ravine crossing and closed by its embankment: Note to *Kansas City etc. R. R. Co. v. Lackey*, 48 Am. St. Rep. 591; *Yazoo etc. R. R. Co. v. Davis*, 73 Miss. 678; 55 Am. St. Rep. 562.

NEGLIGENCE—PLEADING.—To entitle a plaintiff to recover in an action alleging his injury by the negligence of the defendant, there should be a stated right on the part of the plaintiff, and duty on the part of the defendant in respect to that right, and a breach by him of such duty, whereby the plaintiff suffered injury: *Western*

Union Tel. Co. v. State, 82 Md. 293; 51 Am. St. Rep. 464; Daugherty v. Herzog, 145 Ind. 255; 57 Am. St. Rep. 204.

WATERS AND WATERCOURSES—RAILROAD COMPANIES.—RIGHT TO MAKE CHANGES IN OPERATION OF ROAD.—If the proper construction of a railway will subject adjoining land to overflow, or obstruct its drainage, this is an item of damage which should be estimated and allowed for in condemnation proceedings, and it is conclusively presumed that commissioners, in making their award, in cases of condemnation, have considered and awarded damages for all such injuries: *Yazoo etc. R. R. Co. v. Davis*, 73 Miss. 678; 55 Am. St. Rep. 562. If one grants a right of way over his land to a railroad company, all damages to the remainder of the land arising from the construction of the road, past, present, and future, are released: *Watts v. Norfolk etc. Ry. Co.*, 39 W. Va. 196; 45 Am. St. Rep. 894.

ADVERSE USER—PLEADING.—What constitute the elements of adverse possession: *Hess v. Rudder*, 117 Ala. 525; 67 Am. St. Rep. 182; *Wheeler v. Taylor*, 82 Or. 421; 67 Am. St. Rep. 540; *Alcorn v. Sadler*, 71 Miss. 684; 42 Am. St. Rep. 484. What is and what is not a sufficient plea of adverse user: *Shahan v. Alabama etc. R. R. Co.*, 115 Ala. 181; 67 Am. St. Rep. 20.

CASES
IN THE
SUPREME COURT
OF
LOUISIANA.

STATE v. ROBERTSON.

[50 LOUISIANA ANNUAL, 92.]

HOMICIDE—DUTY TO RETREAT.—If a person is attacked suddenly, fiercely, and violently, he is not obliged to retreat, especially where it would increase, rather than diminish his danger. On the contrary, he may instantly kill his adversary, without retreating at all, and, if he does so, it will be justifiable homicide.

HOMICIDE—INSTRUCTIONS—DUTY TO RETREAT.—It is proper to instruct the jury, in a homicide case, that one suddenly attacked is not compelled to retreat when imminent danger would follow, and is apparent.

Fred. W. Price, for the appellant.

M. J. Cunningham, attorney general, A. B. Hundley, district attorney, and P. A. Simmons, Jr., for the appellee.

93 MILLER, J. The defendant appeals from the sentence for manslaughter.

Our decision is controlled irrespective of the other question raised by the exception reserved on behalf of the defendant to the charge of the court. The instruction requested by the counsel for the accused was in substance that one suddenly attacked is not compelled to retreat when imminent danger would follow and is apparent. This was refused, and in signing the bill the court states it did charge that the party assaulted is compelled to retreat until some imminent and immediate danger of life, or some great bodily harm arises, and, besides, the general law as to self-defense had been given. As the court charges as to the duty of retreat of the person assaulted, with the intent to take his life or inflict great bodily harm, we must assume the phase of

testimony was before the jury to call for a charge of that character. While the charge requested might be deemed deficient in some respects, we think the accused was substantially entitled to the instruction asked. The court, in its refusal to give that instruction, informs us the law on the subject had already been given, and incorporates in the bill that portion of his charge he deemed sufficient. The obligation to retreat of one who is assaulted with intent to kill or inflict great bodily injury is not unqualified. In the leading cases of Selfridge, Harrigan, and others, three cases of self-defense followed by our courts and recognized as correct in the text-books, the law is stated in substance thus: When from the nature of the attack, there is reasonable ground to believe there is a design to destroy the life of the accused or commit any known felony on his person, the killing of the assailant will be justifiable homicide, and again: "A man may repel force by force in defense of his person, ⁹⁴ habitation, or property against one who manifestly by violence or surprise to commit a felony, such as murder, robbery," et cetera. In these cases he is not obliged to retreat, but may pursue his adversary until he has secured himself from all danger, and if he kills him in so doing it is justifiable homicide: 1 Archbold's Criminal Law, 791 et seq., notes at foot; State v. Chandler, 5 La. Ann. 490; 52 Am. Dec. 599; State v. Spears, 46 La. Ann. 1524. The charge given makes the retreat compulsory without that qualification we deem settled that, as stated in the Selfridge case, when the attack on the accused is so sudden, fierce, and violent that a retreat would not diminish but increase his danger, the accused may instantly kill his adversary without retreating at all. We think the verdict should be set aside and a new trial granted.

It is therefore ordered, adjudged, and decreed that the sentence of the lower court be set aside and reversed, the case is remanded for a new trial and the accused be held in custody to abide that trial.

HOMICIDE — DUTY TO RETREAT — SELF-DEFENSE.—The duty of a person feloniously assailed to retreat is imperative if he can do so with safety: Sullivan v. State, 102 Ala. 135; 48 Am. St. Rep. 22, and note. Life may be lawfully taken in self-defense, but it must appear that he who takes it was in imminent danger of death or great bodily harm, and that no other way of escape from the danger was open to him: Commonwealth v. Breyessee, 160 Pa. St. 451; 40 Am. St. Rep. 729, and note. The slayer, however, is not obliged to retreat before exercising his right of self-defense, unless there are means of escape apparent to him: Note to Carter v. State, 28 Am. St. Rep. 953. But in other jurisdictions, it is held that a party who is unlawfully attacked by another may

stand his ground, and use such force as reasonably appears necessary to repel the attack and protect himself: *State v. Reed*, 53 Kan. 767; 42 Am. St. Rep. 322. Where a person, being himself without fault, reasonably apprehends death or serious bodily harm to himself, unless he kills his assailant, the killing is justifiable: *Carter v. State*, 30 Tex. App. 551; 28 Am. St. Rep. 944, and note; *Meuly v. State*, 26 Tex. App. 274; 8 Am. St. Rep. 477.

HOMICIDE—SELF-DEFENSE—INSTRUCTIONS.—All law applicable to evidence adduced in self-defense, in a murder case, should be set forth in the charge to the jury: *Carter v. State*, 30 Tex. App. 551; 28 Am. St. Rep. 944; note to *People v. Lennon*, 15 Am. St. Rep. 263; and the instructions should give the accused the benefit of a reasonable fear of death or of great bodily harm from the deceased: *Garner v. State*, 28 Fla. 113; 29 Am. St. Rep. 232.

NEWELL v. LEATHERS.

[50 LOUISIANA ANNUAL, 162.]

APPEAL—JURISDICTION—AMOUNT.—The supreme court of Louisiana has jurisdiction of a case, on appeal, which involves a right to the possession of certain premises, where the plaintiff makes oath that such right is worth more than two thousand dollars, and that he will be damaged in an amount exceeding that sum if the defendant is not enjoined from interfering with such right.

WATERS—ALLUVION—DIVISION OF.—If alluvion is formed in front of the property of several riparian proprietors, the accretion should be divided between the parties in proportion to the extent of their respective lines on the old frontage, and each proprietor of the original tracts takes the quantity of alluvion that may be between the lines of his old frontage on the watercourse measured forward to the new frontage. The lines by which the new frontage is reached may be parallel, or convergent, or divergent, according as the extent of the newly-formed water line may be the same in the one case, or less in the other, or greater in the third, than the ancient water line of the tracts. This method of division excludes the idea of a proportionate area or acreage system of division between the several tracts fronting on the alluvion to be divided.

WATERS—ALLUVION—DIVISION OF—RESPECTIVE IMPORTANCE OF LINES.—In dividing a batture or alluvion which has been formed in front of the property of several riparian proprietors, the course, or bearing, or direction of the side lines of the tracts or lots of land in front of which the alluvion is formed is of no consequence in the division of the batture formed subsequently to the acquisition of the tracts, but the extent of the old frontage of the tracts on the watercourse is of consequence, because the extent of the new frontage on the watercourse is to be determined from this.

TRIAL—CONTINUANCE—DISCRETION OF COURT.—The granting or refusing of motions to continue a case rest largely in the sound discretion of the court below, and its rulings in regard thereto will not be disturbed unless clearly erroneous. It cannot be held that there was any abuse of discretion in overruling a motion to continue an injunction suit which had been on the calendar about fifteen months, and which had already been continued several times.

Wade R. Young, for the appellant.

Elam & Dale, for the appellees.

¹⁶³ BLANCHARD, J. While there are allegations of actual possession by both parties, judging the character of the action by the whole pleadings, it does not appear to be solely a possessory action having for its object, on part of plaintiff, to be maintained in the possession of certain premises, or, on part of defendant, to be quieted in the possession of the premises he describes. The right of possession in virtue of certain contracts of lease and purchases, is also put at issue.

Plaintiff claims the right of possession of the entire alluvion in front of the town of St. Joseph from the edge of the pond, in front of the public levee, to the present margin of the Mississippi river.

He avers this right to be worth more than two thousand dollars, and that he would be damaged in an amount exceeding that sum if his right of possession is not vindicated.

Defendant, in turn, asserts his own right of possession of part of the premises in dispute, and prays that this right be recognized and enforced.

The Mississippi river once ran along the immediate front of the town of St. Joseph. Gradually the condition changed. The river slowly receded, until now the water line is more than a half mile from the town. In front of, above and below, the town an extensive alluvion or batture has formed. Possessing under certain leases and other contracts, plaintiff established, some years ago, a public landing and warehouse on this batture. This is the landing that steamboats, transporting merchandise and other commodities and passengers to and from St. Joseph, use. Heretofore it has been a monopoly in the hands of the plaintiff, who has derived and still derives large revenues from it.

Defendant Leathers, who owns and navigates boats upon the river, seeking to establish a landing for his boats in front of the town, acquired by purchase and lease certain rights in, to, and on the batture. He begun the work of constructing his landing by driving some piles along what he claimed as his portion of the river front. Whereupon plaintiff instituted this suit and caused writs of injunction to issue prohibiting the work.

It will be thus seen that the real contention between the parties is ¹⁶⁴ a landing for boats. Plaintiff seeks to preserve in himself the exclusive right of maintaining a public landing on the batture in front of the town. Defendant resists this ex-

clusive privilege, and attempts to establish another landing along the river front.

It thus appears that there is nothing in dispute in this controversy except the right of defendant to establish a public landing on the land described in his answer, and plaintiff attests under oath that if defendant is allowed this right, his (plaintiff's) public landing will be rendered comparatively worthless, and he will be damaged exceeding the sum of two thousand dollars. In this view of the case, this court has jurisdiction: *Crescent City etc. Co. v. Larrieux*, 30 La. Ann. 798; *State v. Hebrew Congregation*, 31 La. Ann. 205; 33 Am. Rep. 217; *Hyde v. Teal*, 46 La. Ann. 645; *Waters Pierce Oil Co. v. Mayor etc.*, 47 La. Ann. 863.

The question presented on the merits is simple. Was the alleged trespass committed on premises held under lease by plaintiff? On whose front line were the two piles driven by defendant? If on that of the premises acquired by defendant by purchase from R. H. Snyder, or by lease from Mrs. Carrie M. Davidson, then, obviously, plaintiff's case must fail, for it is not pretended that he had the possession, or right of possession, of such premises.

Plaintiff's contention is, that that part of the river front of the batture where the piles were driven is covered by the lease which was executed to him by Mrs. Jennie Levy, and that the Snyder and Davidson tracts held by defendant have no frontage on the river.

Defendant contends that the Snyder, Davidson, and Levy tracts of batture all front on the river, and that the three together give a continuous frontage of about four hundred feet. These tracts lie between St. Joseph and the river. It is further contended by defendant that the piles were driven by him either on the Snyder or Davidson tract.

The town of St. Joseph is situated between the Panola plantation on the upper side and the Duck Pond plantation on the lower side.

Plaintiff's public landing and warehouse is located on the river about opposite the middle front of the town, and about midway between the lower boundary line on the batture of Panola and the upper boundary line on the batture of Duck Pond.

The batture tract on which this landing is was leased by plaintiff from the parish of Tensas. The next above lie tracts or lots of ¹⁶⁵ batture fronting on the river owned by Moore, Young and the Farrar estate. Then comes the Jennie Levy tract.

Plaintiff claims the possession or control of all of these tracts under his contracts. Next above the Levy tract is the Davidson tract or lot, and then the Snyder tract—both claimed by defendant. This brings us to the Panola line. These several tracts of alluvion were accretions inuring as riparian rights to the owners of the soil along the original front of the town of St. Joseph.

The United States survey was made in 1828. At that time the river line, or front of the tract of land upon which St. Joseph was afterward located, was the same length substantially—about thirty chains—as is the new river line of the batture in front of the town at the present time. Thus we have, practically, the same new river front for each riparian proprietor as the old river front gave, and, therefore, by lineal division, each proprietor will have the same measure of front on the new line as he had on the old.

To adjust the contentions of the several riparian proprietors in this way accords with the rule laid down by the law for the measurement and division of alluvion.

The language of the Civil Code, section 516, is free from ambiguity: "If an alluvion be formed in front of the property of several riparian proprietors, the division is to be made according to the extent of the front line of each at the time of the formation of the alluvion." (Italics ours.)

The course, or bearing, or direction of the side lines of the tracts or lots of land in front of which alluvion is formed is, therefore, of no consequence in the division of the batture formed subsequent to the acquisition of the tracts. What is of consequence is the extent of the old frontage of the tracts on the watercourse, and from this is to be determined the extent of the new frontage on the watercourse.

This excludes the idea of a proportionate area of acreage system of division between the several tracts fronting on the alluvion to be divided. Each proprietor of the original tracts takes the quantity of alluvion that may be between the lines of his old frontage on the watercourse, measured forward to the new frontage. The lines by which the new frontage is reached may be parallel, or convergent, or divergent, according as the extent of the newly formed water line ¹⁸⁶⁶ may be the same in the one case, or less in the other, or greater in the third, than the ancient water line of the tracts: Duranton, vol. 4, No. 421; Fuzier-Herman, Code Annotés, vol. 1, p. 749, Nos. 49, 50; Baudry-Lacantinerie, Précis Droit Civil, 3d ed., p. 773; Deer-

field v. Arms, 17 Pick. 41; 28 Am. Dec. 276; Batchelder v. Keniston, 51 N. H. 496; 12 Am. Rep. 143; Jones v. Johnston, 18 How. 150; Johnston v. Jones, 1 Black, 209; Kehr v. Snyder, 114 Ill. 313; 55 Am. Rep. 866; Armstrong v. Wheeler, 52 Conn. 428; Crandell v. Allen, 118 Mo. 403; Gray v. Deluce, 5 Cush. 9, 12, 13; Porter v. Sullivan, 7 Gray, 443; Miller v. Hepburn, 8 Bush, 326; Gould on Waters, 2d ed., secs. 162, 163; Am. and Eng. Ency. of Law, 2d ed., 477.

"This mode of distribution," said the court in *Deerfield v. Arms*, 17 Pick. 41, 28 Am. Dec. 276, "secures to each riparian proprietor the benefit of continuing to hold to the river shore, whatever changes may take place in the condition of the river by accretion, and the rule is obviously founded in that principle of equity upon which the distribution ought to be made." We do not interpret *Delord v. New Orleans*, 11 La. Ann. 699, cited adversely, as establishing a different rule.

R. H. Snyder owned lots or tracts of land in the town of St. Joseph, fronting on the old river line. Alluvion formed along this front; and in 1865 Snyder sold to James Friendship a lot on the east or river side of the levee in front of his town property. This lot was of small dimensions, some sixty feet wide by a depth of one hundred and forty-three feet toward the river, but far from reaching the river.

On the north or upper side it bordered lands of the Panola plantation on the river side of the levee. The sale left in Snyder still a batture frontage on the old river line, as well as the tract of batture between the lot sold to Friendship and the river. Then in 1872 he sold to Bernard Levy a lot or piece of land commencing at the southwest corner of the lot sold to Friendship, thence running in an easterly direction along the southern line of Friendship's lot to its extreme eastern boundary, thence on to the margin of the river at low water, thence down the margin of the river to the northern boundary of batture lands owned by the Misses Murdock, thence westerly along the Murdock line to the levee, thence up the levee to the place of beginning.

By the sales to Friendship and Levy, Snyder may have disposed ¹⁶⁷ of all the batture he owned lying opposite and immediately in front of his original St. Joseph lots, but he still had left the piece of batture on the east or river side of the Friendship lot. This, as we understand it, he sold in March, 1895, to the defendant Leathers, less, perhaps, parts of it previously sold to Beaumont and Woods. In the act of sale to Leathers this ground is described as bounded on the east by the

river, and on the south or lower by batture lands of Mrs. Carrie M. Davidson. This leads to the tracing of the Davidson acquisition.

Bernard Levy, who bought from Snyder, having died, his widow, Mrs. Jennie Levy, came into possession of his estate. She added to her holdings of batture land in front of St. Joseph by purchasing a tract from A. F. Brown. Then, in 1888, she sold to R. S. Emerson a part of what she owned. The description is, that certain lot or piece of ground bounded on the north by a line beginning at the southwest corner of the Friendship lot and running in an easterly direction "parallel to said line" (what line?) to the river; on the east by the river, on the south by a line commencing at a point mentioned on the public levee and running east, southeast to the river, and west by the levee. It is stated in the deed that the property sold has a frontage on the levee of about sixty-eight feet. What its river line is is not stated, but it is distinctly described as bordering on the river.

Emerson, who bought from Mrs. Levy, died, and Mrs. Susan A. Brown was recognized as his sole heir at law. She sold the tract just described to Joseph Moore in 1890. Moore donated it to his daughter, Mrs. Carrie M. Davidson, and she, on August 3, 1895, leased it to defendant Leathers, for a term of five years. A few days before she leased to defendant, to wit, on July 29, 1895, she secured from Mrs. Jennie Levy a corrected description of the tract. In this conveyance it is set out that the description in the former deed to R. S. Emerson, executed in 1888, is erroneous and ambiguous, in this, that three directions or courses are given, each inconsistent with the other. Mrs. Levy, therefore, in order to correct same, declares it to have been her intention when she sold to Emerson to fix and define the south line of the tract as alone starting on the public levee at the point mentioned in the first conveyance and running to the river in a direction parallel with the line between the lands of the vendor and Robert Murdock outside the public levee.

¹⁶⁸ These several tracts of alluvion, being adjuncts of the original holdings on the ancient line of the river, were entitled to go to the new river line for frontage, and to have there the same frontage that the original tracts or lots had on the ancient line, for, as we have seen, the river frontage of the two lines are practically equal.

The vendors of these several tracts of alluvion intended to convey, and did expressly convey, to the river margin, and this intention, purpose, and object cannot be defeated by running

the lines on courses that would render impossible a frontage on the river. A river front was what the vendees stipulated for; it was the object they had in view in thus acquiring property valueless, or nearly so, without such frontage.

To sustain the contention of plaintiff as to these lines would run the lines of the Snyder and Davidson tracts and part of the Levy tract on to the batture in front of the Panola plantation, and thus defeat entirely a river frontage for the first two tracts.

So, too, to sustain plaintiff's contention that the alluvion must be divided by the area or acreage rule of distribution would run the lines of the tracts mentioned on to the batture that must be held as appertaining to the Panola plantation. To take from the Panola batture to make up acreage quantity for lots fronting on the ancient line of the river below the Panola southern boundary would lead to an absurdity. Such a rule of measurement and division, if carried out, would defeat a frontage on the river, not only for the Snyder and Davidson tracts, but for the Panola plantation as well, though the latter had a front of miles on the ancient river line, and there is the same length of new river line in front of the plantation: *St. Louis v. Rutz*, 138 U. S. 226.

The last survey made of this alluvion, by order of the lower court, showed the piles driven by defendant to be on the front of the tract he had acquired from Snyder. Plaintiff does not hold this tract under lease or other contract. The evidence discloses he endeavored to purchase the tract from Snyder just prior to its acquisition by defendant. He must have then believed the tract had a river frontage, or else he would not have desired it. He had no use for it except that it fronted on the river, and was necessary to enable him to maintain his monopoly of the public landing.

So, too, in 1895, he offered to lease the batture tract of Mrs. Carrie M. Davidson. This was after the present suit was filed. What use ¹⁸⁹⁵ did he have for this tract, except that he feared it bordered on the river, and was necessary to him in sustaining his exclusive right to a public landing on the town front?

The rule adopted by the surveyor for his measurement and division, which he says he obtained from Hodgman's Work on Surveying, is the one long recognized by the law, and precisely laid down in *Deerfield v. Arms*, 17 Pick. 41; 28 Am. Dec. 276.

As defendant was proceeding to erect a public landing on his own premises, it follows that plaintiff has no case. It is not necessary to decide other questions of law raised by the plead-

ings. Certain questions of practice are raised and insisted on by plaintiff's counsel in argument. One is a motion to quash the jury venire made by plaintiff, and the other is the refusal of the court to continue the case on application of plaintiff. His counsel excepted to the rulings of the court and reserved bills of exception. With regard to the refusal to continue the case, we cannot say the trial judge erred. The case had already been several times continued, and much delay had ensued.

When the last motion to continue was overruled, the case had then been on the docket about fifteen months—a long time for an injunction suit to remain untried in the court of the first instance. The granting or refusal of motions to continue rest largely in the sound discretion of the court below and its ruling in regard thereto will not be disturbed unless clearly erroneous. In the last application for continuance defendant agreed to admit that the plaintiff, who was the witness absent because of illness, would testify to the statements set forth if present, and thus the evidence was gotten into the record.

With regard to the motion to quash the venire, it suffices to say we do not think the grounds urged sufficient. Besides, the plaintiff, after having prayed for a jury, waived trial by jury and submitted the case to the court.

For the reasons herein assigned it is ordered that the former decree of this court, dismissing the appeal for want of jurisdiction, is set aside, and that the judgment appealed from be affirmed with costs.

Nicholls, C. J., takes no part in this decision because of absence when the case was argued.

WATERS—ALLUVION—DIVISION OF.—Land formed by alluvion in a river is, in general, to be divided between the several riparian proprietors entitled thereto, according to the following rule: 1. Measure the whole extent of their ancient line of the river, and compute how many rods, yards, or feet each proprietor owned of such line; 2. Divide the newly-formed bank or river line into equal parts, and appropriate to each proprietor as many of these parts as he owned rods, yards, or feet of the old line; and 3. Draw lines from the points at which the proprietors respectively bounded on the old shore line to the points thus determined as the points of division on the newly-formed shore: *Deerfield v. Arms*, 17 Pick. 41; 28 Am. Dec. 276. For other and different rules, see *Hubbard v. Manwell*, 60 Vt. 235; 6 Am. St. Rep. 110; and monographic note to *Coulthard v. Stevens*, 35 Am. St. Rep. 311, on accretion and alluvion.

TRIAL—CONTINUANCE.—An appellate court will not revise the action of the court below in overruling an application for a continuance, unless error is clearly disclosed: Note to *Hyde v. State*, 67 Am. Dec. 640.

BREAUX v. LE BLANC.

[50 LOUISIANA ANNUAL, 228.]

PARTNERSHIP—CAUSE FOR DISSOLUTION—CEASING OF RELATION.—Partnership is essentially a relation of mutual trust and confidence, and when they cease the contract, in effect, is dissolved.

PARTNERSHIP—CAUSE FOR DISSOLUTION—BREACH OF OBLIGATION.—A partnership may be dissolved, under statutory authority, for the breach of any of the obligations thereof.

PARTNERSHIP—CAUSE FOR DISSOLUTION—"JUST CAUSE."—Under a statute which declares that a partnership may be dissolved for "just cause," but which does not furnish any interpretation of that term, the question as to what is "just cause" is one for the court to determine for itself in any given case.

PARTNERSHIP—CAUSE FOR DISSOLUTION—BREACH OF OBLIGATION.—If one of two members of an ordinary planting partnership fails or refuses to comply with his agreement to furnish his share of the funds necessary to carry on the firm business, he has no right or interest in having the contract of partnership kept in force, particularly where the violation of this essential obligation is accompanied by acts affording a constant source of irritation and annoyance to his copartner. On the contrary, equity and justice require the dissolution of the firm.

Gus A. Breaux, William Campbell, R. W. Elliott, and Fenner, Henderson & Fenner, for the appellant.

Charles D. Caffery, Joseph A. Chargois, and W. S. Parkerson, for the appellees.

228 WATKINS, J. The plaintiff seeks the annulment and dissolution of a planting partnership which he alleges he entered into in February, 1896, with the defendant Weber, under the terms, stipulations and conditions of an act of partnership which was signed by the parties in duplicate, and to which special reference is made—his averment being that said husband was the real partner, although, for personal reasons of his own, the name of his wife was employed and used, and he acted as her ostensible agent.

The contract of partnership declares that it was made and entered into on the 8th of February, 1896, between Mrs. Bertha A. Le Blanc, wife of Joseph A. Weber, represented therein by her said husband under a letter of attorney, and Gustave A. Breaux, as the owner of the Oakburn plantation, situated in the parish of Lafayette, for the purpose of operating and cultivating same in sugar cane; and that same was to continue in force for a term or period of three years from the date thereof.

Said act of partnership stipulated, amongst other things, that said partners should cultivate and harvest crops of sugar cane,

and such other crops as are usual and suitable; and that, for said purposes, the owner, Breaux, obliged himself to furnish the plantation with all such houses as then stood thereupon, "including corncribs, mule stables, cabins, et cetera, reserving to himself the dwelling-house, private stables, and buildings in the yard, and lots adjoining said dwelling and yard, pasture for all animals to be used for the benefit of the place, and the stock of each (partner), except such lots as hereinbefore reserved. All repairs to buildings and fences to be made at the common expense."

It further stipulates that the mules, farming utensils, carts, harness, et cetera, were to be inventoried and appraised, and that the planting partnership should take them at the appraisalment—Breux to receive "credit for same as well as for mules sold."

It further provides that all mules, farming implements, carts, harness, et cetera, and "whatever else is bought for the place, as well as for provisions purchased for the store to furnish hands, shall be purchased by the firm."

It further stipulated that Joseph A. Weber should give "his undivided time and attention to the management and cultivation of the place without compensation other than such as shall be received from a division of the proceeds of the crops hereinbefore provided"; that "the funds necessary to cultivate the said plantation shall be procured by the firm in amount not to exceed three hundred and sixty dollars per month, until the crop is laid by, and thereafter in such amount as shall be agreed upon." And it contains the further express stipulation that "no debt of any kind shall be contracted without the consent of both partners previously obtained."

It further provides that "all building material for buildings erected (on the plantation) are to be paid for by said Breux; and that no building material shall be bought without his consent—expenses of buildings to be at the expense of the copartnership."

The contract stipulated that J. A. Weber was to be the general overseer and manager of the firm—reserving the right of consultation to the said Breux as to any general disposition of the place. It provided that Weber was "to ditch, drain, and cultivate the plantation as he judges best to enable him to make profitable crops—the firm to feed two horses for Mr. Weber, which were to be used for plantation purposes." Finally it specified that "all cane crops shall be sold to the best advan-

tage and for the most money obtainable, and after proper expenses and liabilities of the firm are paid the proceeds shall be equally divided between the partners."

The foregoing are the essential stipulations of the contract of partnership which was signed by Gus. A. Breaux and Bertha A. Weber per J. A. Weber; and it was thereafter duly filed for record, and recorded according to law.

²⁸¹ The grounds of nullity assigned in the plaintiff's petition are substantially as follows, viz.: 1. That notwithstanding an appraisement was made of all the agricultural implements, carts, mules, et cetera, and said property was nominally transferred to the partnership, neither Weber nor his wife have ever paid a single cent therefor; 2. That agricultural implements and mules were purchased for the plantation account, the plaintiff paying his share; while the defendant failed to pay his share, but on the contrary charged plaintiff's personal account in one instance, and declined making payment in another; 3. That there are some debts due by the firm which have not been paid, because the defendant avers his inability to pay his share, though plaintiff is ready and willing to discharge his proportionate share thereof; 4. That in violation of his contract, and disregard of the rules of prudence, and without just cause, he delayed the commencement of the delivery of the sugar cane for a period of three weeks, thus carelessly and heedlessly endangering the entire crop—notwithstanding plaintiff's protest, and in disregard of his duty as manager of the plantation for the partnership; 5. That by the defendant's gross mismanagement the cost of the harvesting of the crop was increased fully forty per cent; 6. That in January, 1897, notwithstanding the most propitious weather, defendant ordered all plantation work to be discontinued, when he should have been using every exertion to plant cane for the crop of that year; and that in consequence of that action no portion of the crop has been planted; that during that period of delay the defendant was daily absent from the place, to the utter neglect of the duties of his employment; 7. That in January, 1897, the defendant complained of the manner in which funds for raising the crop were being handled, and demanded that same should be placed in his hands for disposal; and he declared that he would not proceed any further with the partnership, unless his demand was complied with—notwithstanding plaintiff's refusal so to do on the ground that the contract of partnership does not thus provide; that thereupon the plaintiff distinctly refused to furnish any more than

his proportionate share thereof, and demanded of the defendant that he should furnish his ²³² share thereof, and that he must be prepared to pay his share of the January pay-rolls, according to the rules governing the plantation; and also demanded that the defendant should be ready to pay his share of the debts contracted in 1896; and that he defaulted in meeting both of said demands.

Then follows this general averment, viz.: "Now petitioner avers that, during the whole of the year 1896, and up to this time, the said Weber has persistently manifested a disposition to and has violated the contract of partnership to his detriment; and that his conduct shows that he has persistently acted so as to render the continuation of (the) partnership impossible except on his own terms, and with a disregard of all other rights"—specifying various details of his exercise of undue and overbearing authority.

Petitioner then specifies that "utterly forgetting the relations that should exist between partners, the defendant at great pains and with evident satisfaction," publicly and to many persons spoke in terms of detraction of him, styling him a bankrupt and wholly incompetent for the transaction of business.

He avers that he is the sole owner of said plantation and all the property which is included in the contract of partnership, and that it is his home and the place of residence of his family. And he avers that, for the various reasons assigned, he is entitled to have the partnership dissolved and to retake the possession and control of said plantation and property.

It is upon these allegations the plaintiff asks a judgment dissolving and annulling the contract of partnership; and to prevent irreparable injury he obtained a writ of injunction.

The defendant denies all the plaintiff charges, and avers that he has at all times and in every respect been ready and able to peaceably carry out all the provisions of the contract of partnership. He specially denies that he ever violated any part of the contract, and avers his willingness and ability to meet his share of the pay rolls.

On the trial there was judgment rejecting the plaintiff's demands and dissolving his injunction, and from that decree the plaintiff has appealed.

In his reasons for judgment the judge a quo makes this statement substantially, viz.: ²³³ That during the year 1896 the plaintiff succeeded in effecting a loan of six thousand dollars with which to run the plantation during that year, and granted

alien on the crop to secure the payment—the crop yielding some five thousand dollars in net proceeds. That in the early part of the year 1897, the partners being unable to make arrangements to obtain money to enable the firm to operate the plantation for the year 1897, they each for himself sought to raise his share of the funds; and that just here arose the trouble between them.

The judge disposes of this entire matter in a few words, viz.: “It must be borne in mind that six thousand dollars was borrowed on the crop of 1896. That Weber swears that he did not handle any of the money. That the amount of expenses to make out and handle the crop had not been shown; and the proceeds of the crop were shown to amount to about five thousand dollars—and no accounting or settlement had been made of the result of the first year’s experience. The evidence fails to show what was the result of the venture for the first year. It was shown, and not contradicted, that Weber did not receive the proceeds of the crop of 1896. Under these circumstances, friction was unavoidable, for the contract required an equal distribution of the proceeds after payment of debts. And so matters dragged on through January, 1897, when work was stopped, as stated above,” et cetera.

The judge does not say so, but the foregoing statement implies that the defendant was absolved from fault or blame, because plaintiff had not rendered him an account of the proceeds of the crop of 1896.

In so deciding he has evidently overlooked two very important facts: 1. That the articles of partnership bound the partners to furnish each his proportionate share of the funds necessary to operate the plantation during each year; 2. That the partners proved unsuccessful in obtaining the needed funds and the plaintiff procured, on his own individual responsibility, the sum of six thousand dollars and granted a lien on the crop to secure its payment. That the total proceeds of the crop amounted to only five thousand dollars—one thousand dollars less than the loan to the plaintiff—and yet because the plaintiff did not turn over same to his impecunious partner, Weber, and thus expose himself to the loss of the entire sum, it is suggested that “friction was unavoidable.”

²³⁴ The judge in his reasons admits that “the contract required an equal distribution of the proceeds after the payment of debts” and not before. Had the defendant furnished his share of the six thousand dollars, instead of the plaintiff bor-

rowing the whole upon his own account, there would have been some propriety in his claim for an accounting. But the judge concedes that the proceeds of the crop of 1896 amounted to one thousand dollars less than the plaintiff had borrowed, and hence the defendant was without interest in them, or any right to an account—except as a bare technicality.

In the paragraph of the reasons for judgment, which immediately precedes the one just quoted, the judge observes that “the nonpayment of debts does not give the right to one partner to have the partnership dissolved”; but that is not the full claim which the plaintiff makes. It is that, notwithstanding the contract of partnership obliged the defendant to support one-half of the expenses of the cultivation of the crops, and to furnish one-half of the money necessary for that purpose, he had totally failed to furnish any part of the funds and expenses to make and harvest the crop of 1896, and had failed and refused to reimburse the plaintiff his portion of that indebtedness beyond the value of the crop. That having the experience of 1896 before him, the plaintiff insisted that the defendant should furnish his quota of the funds necessary to liquidate the payroll for the month of January, 1897; and also to pay his proportionate share of the current indebtedness of the partnership. But the defendant either failed or refused to comply with his demands.

The crop venture of 1896 proving to have been a loss instead of a profit, the defendant had no means, and it seems quite likely that he had no credit.

Under this state of facts, what course was open to the plaintiff but the one he pursued, institution of a suit for the dissolution of the partnership? None. The judge in his reasons for judgment states that “the parties being unable to make necessary arrangements to obtain the money for the firm for 1897, they sought each for himself to obtain his share for the necessary expenses.” But the plaintiff procured his share and the defendant failed altogether.

Again: “And so the matter dragged on through January, 1897, when work was stopped,” et cetera. ²³⁵ It was under these circumstances that this suit was filed and injunction granted on February 7, 1897, immediately after the events just recited had transpired.

This was not a mere matter of disagreement which a little forbearance would have reconciled, or a slight difference of opinion which a delicate remonstrance would have cured. It was

very much more serious than that. The facts developed during the planting operations of the year 1896 had demonstrated the defendant's total inability to supply his proportionate share of the funds to defray the plantation expenses, and that he was utterly without credit.

The plaintiff had risked in the enterprise his sugar plantation, and its outfit of carts, mules, and farming implements; and circumstanced as the defendant was, the plaintiff was called upon to risk, also, the whole of the plantation expenses, for the year 1897, and then pay the defendant one-half of the profits, if any. In our opinion, the reasons assigned by the judge, when taken in the light of the surrounding circumstances, do not justify his judgment.

In addition to the foregoing, there are several other grounds equally as fatal to the contract as the one just examined and analyzed. One of these is, that this plantation is the home of the plaintiff and the residence of his family, and that the defendant's systematic course of conduct toward the plaintiff and about his house was a constant source of irritation and annoyance, whereas it should have been his constant endeavor to bring about pleasant and harmonious relations between them. Besides this, the defendant mistreated one of the plaintiff's personal servants, and more than once invaded the private grounds that the plaintiff had reserved to himself, and was guilty of trespassing thereon. It would serve no useful purpose to go over any more of the details of the troubles of the partners.

Our code declares that a partnership may be dissolved for the breach of any of the obligations thereof: Rev. Civ. Code, sec. 2888; *Bruce v. Ross*, 18 La. 341. It declares that a partnership may be dissolved for "just cause," without furnishing any interpretation of that term; hence it is a question for the court to determine for itself in any given case.

²³⁶ Partnership is essentially a relation of mutual trust and confidence, and when they cease the contract in effect is dissolved: *Harrison v. Tennant*, 21 Beav. 482.

It is clear to our minds that the defendant is without right or interest to have the contract of partnership kept in force; on the contrary, we think equity and justice require its dissolution. And it is so ordered.

It is therefore ordered and decreed that the judgment appealed from be annulled and reversed; and it is further ordered and decreed that the contract of partnership heretofore subsisting between the plaintiff and the defendant be dissolved and an-

nulled, and the plaintiff restored to the possession of his plantation and property; and that his injunction be reinstated and perpetuated, and that all costs of both courts be taxed against the defendant—fully reserving the right of each one of the partners to an accounting and final settlement of the partnership affairs and accounts. .

What is a Sufficient Cause for the Dissolution of a Partnership.*

Dissolution, Generally.—The primary purpose of this note is to show what is a sufficient cause for the dissolution of a partnership, but, as that which will, of itself, cause the dissolution of a firm is so closely connected with that which may be set up by a partner as a cause for dissolution, it is deemed best to introduce, first, those events which, per se, amount to a dissolution. Partners may, at the time of forming the partnership, prescribe the period for which it shall endure, and how and when it may be determined. Its continuance may be for a definite term, or it may be at the will of the partners; and it is well settled that a partnership at will may be terminated at the pleasure of any member of the firm, so long as he acts without any fraudulent intent: *Skinner v. Tinker*, 34 Barb. 333; *Pine v. Ormsbee*, 2 Abb. Pr., N. S., 375; *Fletcher v. Reed*, 131 Mass. 312; *Loorya v. Kupperman*, 54 N. Y. Supp. 1005, 25 Misc. Rep. 518; *Briggs v. Weidmann Cooperage Co.*, 3 N. Y. Supp. 813; *Carlton v. Cummins*, 51 Ind. 478; *Blaker v. Sands*, 29 Kan. 551; *Peacock v. Peacock*, 16 Ves. 49. If a partnership is terminable at will, and the partners cannot agree upon a mode of settlement, the effect is to throw the proceedings for winding up into a court of equity: *Stevens v. Yeatman*, 19 Mo. 480.

As partnerships are formed by the mutual agreement of all the partners, so may they be altered, modified, or dissolved, by like agreement. A partnership for a definite period may be dissolved by mutual consent: *Wood v. Gault*, 2 Md. Ch. 433; *Bank of Montreal v. Page*, 98 Ill. 109; *Kennedy v. Porter*, 109 N. Y. 526, 548; and a written agreement for the dissolution of a partnership, and disposition of the property of the firm operates as a merger of all prior and contemporaneous agreements respecting the same matters, and supersedes them: *Bragg v. Geddes*, 93 Ill. 39. But an express agreement to dissolve is not necessary. Words and acts implying such intention are sufficient. If partners, by mutual consent, cease to do business, and divide the partnership property, this amounts to a dissolution, as much as if done by an express agreement to that effect. Furthermore, a dissolution does not necessarily depend upon a settlement between the partners. The power to close up the partnership accounts would still continue: *Richardson v. Gregory*, 126 Ill. 166, affirming the same case, 27 Ill. App. 621. See, also, *Ligare v. Peacock*, 109 Ill. 94. When articles of partnership contain a

*REFERENCE TO MONOGRAPHIC NOTES:

Dissolution of partnership by decree: 98 Am. Dec. 260-271.

clause referring all matters in difference between the partners to arbitration, the arbitrator may, in case of dispute, award a dissolution, if he sees fit to do so: *Vawdrey v. Simpson* [1896], 1 Ch. 166. Subsequent agreements between the partners of a land syndicate, which operate to vest in one of them the whole beneficial ownership of the land, contributed by the others to the partnership, and which provide for the distribution of the proceeds in a manner different from, and inconsistent with, that provided by the syndicate agreement, create a dissolution of the partnership: *Chapman v. Hughes*, 104 Cal. 302; but a mere agreement by a partner to sell his interest, to be paid for in monthly payments, does not dissolve the existing partnership relation, where he is held out, after such agreement, as a member of the firm: *Russell v. White*, 63 Mich. 409; and an agreement by partners that they shall continue to hold, as tenants in common, a certain debt secured by mortgage, each to have and own an undivided half interest, does not dissolve the partnership as to this debt, where it is clearly apparent that they were to continue to hold this firm property as they had been holding it: *Preston v. Fitch*, 137 N. Y. 41. A partnership is none the less ended, however, by reason of the fact that certain specific property of the firm, after a settlement and adjustment of the firm business, remains unsold, and that each partner, under the settlement, retains his proportionate part of such property: *Sharpe v. Johnston*, 59 Mo. 557.

Events which, per se, Amount to a Dissolution.—Notwithstanding that a time for the dissolution of a firm may be fixed by partnership articles, or that the partners may dissolve their relation by an agreement, express or implied, before such time, the partnership may be dissolved by the happening of any of the events which, in law, are held to effect that result. Thus, the withdrawal of a partner causes a technical dissolution of the firm: *Slemmer's Appeal*, 58 Pa. St. 168; 98 Am. Dec. 255; *Spaunhorst v. Link*, 46 Mo. 197; *Abbot v. Johnson*, 32 N. H. 9; *Bank of Mobile v. Andrews*, 2 Sneed, 534; and the introduction of a new member into an existing partnership works its dissolution, and the creation of a new partnership: *Hatchett v. Blanton*, 72 Ala. 423; *McCall v. Moss*, 112 Ill. 493; *Bank of Mobile v. Andrews*, 2 Sneed, 534; *Mudd v. Bast*, 34 Mo. 465; though the members of a firm would be estopped, as against firm creditors, from claiming that a dissolution resulted from changes in which they concurred or acquiesced: *Carter v. McClure*, 98 Tenn. 109; 60 Am. St. Rep. 842. If both partners refuse to perform their part of the partnership agreement, there is no rule of law requiring, or recognizing, a continuance of the partnership: *Ligare v. Peacock*, 109 Ill. 94. The mere taking of an account of stock does not work a dissolution per se: *Russell v. Leland*, 12 Allen, 349.

Accomplishment of Purpose.—Upon the completion of the enterprise for which a partnership was formed, it determines eo instanti. In other words, a firm is dissolved when it ceases to do the business for which it was organized: *Sims v. Smith*, 11 Rich. 565, 566; *Potter v. Tolbert*, 113 Mich. 486; *Bank of Montreal v. Page*, 98 Ill. 109; *Spurck*

v. Leonard, 9 Ill. App. 174; Phillips v. Reeder, 18 N. J. Eq. 95; as where a banking firm closes the doors of its bank, and does no business afterward, except to collect its accounts and liquidate its debts: Potter v. Tolbert, 118 Mich. 486. A partnership for the purpose of buying, storing, and selling eggs, is dissolved by the completion of the business contemplated: Bohrer v. Drake, 33 Minn. 408; and so with a partnership for the construction of a building: Sims v. Smith, 11 Rich. 565, 566.

Bankruptcy or Insolvency.—The bankruptcy or insolvency of a partner has the effect, in law, of immediately dissolving the partnership, his acts thereafter being void: Fox v. Hanbury, Cowp. 445, 448; Wilson v. Greenwood, 11 Swanst. 471; Morgan v. Marquis, 9 Ex. 145, 147; Halsey v. Norton, 45 Miss. 703; 7 Am. Rep. 745; Eustis v. Bolles, 146 Mass. 413; 4 Am. St. Rep. 327; Marquand v. New York Mfg. Co., 17 Johns. 525, 535; Blackwell v. Claywell, 75 N. C. 213; McNutt v. King, 59 Ala. 597; Amsinck v. Bean, 22 Wall. 395, 404; Williamson v. Wilson, 1 Bland. Ch. 418; Dearborn v. Keith, 5 Cush. 224; Hubbard v. Guild, 1 Duer, 662; and by the terms “bankruptcy” and “insolvency,” we mean the commission or sufferance of some act which is by law declared to be an act of bankruptcy or insolvency. It is not necessary that there should have been an actual adjudication of bankruptcy or insolvency; and an admission of being unable to pay one’s debts is enough, if put in legal form before a court. All persons must take notice of the dissolution of a partnership arising from the bankruptcy of one of its members; and the publication of bankruptcy or insolvency proceedings is legal notice to all persons, by which they are bound: Eustis v. Bolles, 146 Mass. 413; 4 Am. St. Rep. 327; though an act done by one of the partners prior to the first publication of the notice of his insolvency would be valid, though done subsequently to the filing of his petition: President etc. v. Hildreth, 9 Cush. 356. The bankruptcy of a partner will not dissolve the firm, however, even in case of an adjudication of bankruptcy, if the adjudication was obtained by his copartner for that purpose, and was not required for any other: Amsinck v. Bean, 22 Wall. 395, 404, per Clifford, J., and to the general rule a qualification may be added that bankruptcy or declared insolvency, like death, only works a dissolution to the extent of stopping new engagements, except those required to complete the unfinished business of the partnership and to wind up its affairs: King v. Leighton, 100 N. Y. 386; reversing the same case, 22 Hun, 419.

The mere fact, alone, that a partnership is insolvent does not operate, per se, as a dissolution of the firm. There must be a stoppage of payment, assignment, or act amounting, in law, to a declaration of insolvency to work a dissolution: Siegel v. Chidsey, 28 Pa. St. 279; 70 Am. Dec. 124; Arnold v. Brown, 24 Pick. 89; 35 Am. Dec. 296. An assignment, however, by copartners, for the benefit of their creditors, of the entire firm assets, except property exempt

from execution, operates as a dissolution of the partnership: *Wells v. Ellis*, 68 Cal. 243; *Clark v. Wilson*, 19 Pa. St. 414; *McKelvy's Appeal*, 72 Pa. St. 409; provided the assignment is valid. An assignment, void for illegality, would not effect a dissolution: *Simmons v. Curtis*, 41 Me. 373.

An assignment by one partner of all his interest in the firm, for the benefit of his creditors, is, ipso facto a dissolution of the partnership, according to some of the authorities, probably by a preponderance of them, whether the partnership is one at will or for a definite term: *Marquand v. New York Mfg. Co.*, 17 Johns. 525, 535; *Thompson v. Noble*, 108 Mich. 19; *Conrad v. Buck*, 21 W. Va. 396; *Arnold v. Brown*, 24 Pick. 89; 35 Am. Dec. 296; *Ogden v. Arnot*, 29 Hun, 146; *Saloy v. Albrecht*, 17 La. Ann. 75; *Cameron v. Stevenson*, 12 U. C. C. P. 389, 391. "The principle on which this doctrine rests is, on the one hand, that new partners cannot be introduced into the firm without the consent of all the other partners; and, on the other hand, that the creditors of the partner taking his property by assignment cannot be involved against their consent in the responsibility of the continuance of the partnership business. This doctrine is firmly established, where the partnership is for an indefinite term, but it has not been received without dissent where the partnership is for a definite term. Under such a contract, the withdrawal of capital contributed by one member of the firm would be a violation of the contract of partnership, and might prejudice the interests of other members of the firm. Under such an arrangement it has been held that an assignment by one partner of his interest in the partnership property is a cause for dissolution (it may be on equitable terms), and an accounting, on the application of the assignee, and is ipso facto, a dissolution of the partnership at the option of the other partners": *Davis v. Megroz*, 55 N. J. L. 427, per Depue, J. Compare *Riddle v. Whitehill*, 135 U. S. 621, 633, showing that the assignee of one partner cannot be made a member of a partnership against the will of the other partners. It is quite clear, however, that one of two partners has no authority to assign all of the partnership property to a trustee, for the benefit of firm creditors, and thus put an end to the entire partnership business: *Dana v. Lull*, 17 Vt. 390; *Havens v. Hussey*, 5 Paige, 30; *Wells v. March*, 30 N. Y. 344; but he may show the assent of an absconding partner to such act, by a letter from him, received after his departure from the state: *Welles v. March*, 30 N. Y. 344. In fact, if one of several partners absconds the others may execute an assignment for the benefit of creditors: *Palmer v. Myers*, 43 Barb. 509; *Deckard v. Case*, 5 Watts. 22; 30 Am. Dec. 287. A general assignment of partnership property, made by one member of the firm, in the name of himself and his partners, in trust for the benefit of partnership creditors, is not an actual dissolution of the partnership, if the joint transactions are not at an end: *Pleasants v. Meng*, 1 Dall. 380, 384, 390; and it has been held that a transfer from one partner to another, of all his interest in the firm property, to be applied to the payment of

partnership debts, does not dissolve the firm, although the transfer states that the firm is dissolved: *Shepard's case*, 3 Ben. 347.

Death.—The general rule is, that the death of a partner, eo instanti, dissolves the firm of which he is a member, whether the partnership is one at will or for a fixed term: *Parker v. Parker*, 99 Ala. 239; 42 Am. St. Rep. 48; *Durant v. Pierson*, 124 N. Y. 444; 21 Am. St. Rep. 686; notes to *Laughlin v. Lorenz*, 86 Am. Dec. 600; *Childs v. Hyde*, 77 Am. Dec. 115; *Powell v. North*, 3 Ind. 392; 56 Am. Dec. 513, and note; *Schmidt v. Archer*, 113 Ind. 365; *Scholefield v. Eichelberger*, 7 Pet. 586; *Burwell v. Mandeville*, 2 How. 560; *Fulton v. Thompson*, 18 Tex. 278, 286; *Alexander v. Lewis*, 47 Tex. 481; *McNaughton v. Moore*, 1 Hayw. (N. C.) 189; *Washburn v. Goodman*, 17 Pick. 519; *Vilas v. Farwell*, 9 Wis. 460; *Jones v. McMichael*, 12 Rich. 176; *Egberts v. Wood*, 3 Paige, 517; 24 Am. Dec. 236; *Sims v. McEwen*, 27 Ala. 184; *Hoard v. Clum*, 31 Minn. 186; *Knapp v. McBride*, 7 Ala., N. S., 19; *Crawshay v. Maule*, 1 Swanst. 495; *Cobble v. Tomlinson*, 50 Ind. 550; *Goodburn v. Stevens*, 5 Gill, 1; *Roberts v. Kelsey*, 38 Mich. 602; *Marlett v. Jackman*, 3 Allen, 287, 291; *Frank v. Beswick*, 44 U. C. Q. B. 1; *Williamson v. Wilson*, 1 Bland, 418; *Davis v. Christian*, 15 Gratt. 11; *McCall v. Moss*, 112 Ill. 493; *Landa v. Shook*, 87 Tex. 608; *Bank of Mobile v. Andrews*, 2 Sneed, 534; *McGrath v. Cowen*, 57 Ohio St. 385. A special partnership is dissolved by the death of the special partner: *Ames v. Downing*, 1 Bradf. 321. The death of a partner is notice to all the world of the dissolution of the firm; but, while the death of a partner terminates the partnership, yet a community of interest in the winding up of the partnership matters continues to exist between the surviving partners and the representatives of the deceased; and for this purpose it may be said that the partnership continues to have a limited existence: Note to *Crawshay v. Maule*, 1 Swanst. 495, 507; *Maynard v. Richards*, 166 Ill. 466; 57 Am. St. Rep. 145.

There are cases which hold that a partnership may, by previous agreement, be continued after the death of one of the partners: *Gratz v. Bayard*, 11 Serg. & R. 41; *Powell v. Hopson*, 13 La. Ann. 626; *Scholefield v. Eichelberger*, 7 Pet. 586; *Duffield v. Brainerd*, 45 Conn. 424; *Alexander v. Lewis*, 47 Tex. 481; *Davis v. Christian*, 15 Gratt. 11; *McNeish v. United States etc. Oat Co.*, 57 Vt. 316; *Walker v. Wait*, 50 Vt. 668; *Tenney v. New England etc. Union*, 37 Vt. 64; that it may be continued under the provisions of the will of the deceased partner, with the consent of the surviving partner: *Davis v. Christian*, 15 Gratt. 11; *Burwell v. Mandeville*, 2 How. 560; *Pitkin v. Pitkin*, 7 Conn. 307; 18 Am. Dec. 111; and that a partnership may, after the death of a partner, be continued by a court of equity on behalf of the infant children of the deceased partner, if the surviving partners consent: *Powell v. North*, 3 Ind. 392; 56 Am. Dec. 513. So in *Butler v. American Toy Co.*, 46 Conn. 136, it was held that, the business of a firm having been continued after the death of one of its members precisely as before, the representatives of the deceased member taking the benefit of his interest, the firm was not

to be regarded as dissolved by his death. A simple provision in the articles of copartnership, for the continuance of the partnership for a fixed period, is not an agreement for the continuance of the firm after the death of one of the partners: *Hoard v. Clum*, 31 Minn. 186; and a misapprehension of the effect, on the partnership, of the death of one of the partners, does not operate to continue the contract of partnership against the clear intention of the partners to terminate it: *Williams v. Philadelphia etc. Co.*, 150 Pa. St. 20. In a late Ohio case, *Williams, J.*, says: "As a partner cannot possibly continue to be a member of a firm after his death, any agreement with his executor, or other person having a beneficial interest in the share of the assets which belonged to him, for the continuation of the business thereafter with the surviving partner, is necessarily the formation of another partnership, the terms of which, when not otherwise expressly agreed upon, may be implied, from the manner of conducting the business, to be the same as those of the former partnership": *McGrath v. Cowen*, 57 Ohio St. 385, 401. So, in *Kennedy v. Porter*, 109 N. Y. 526, 549, the court said: "What is inaccurately called provision against the dissolution of the partnership is an agreement that if either party dies his property shall remain in the firm and in the business for the benefit of his children, or that his children, or some one of them, or some other person, shall immediately, on his death, take his place in the firm and become partner in his stead. All these agreements and arrangements, and all that can be made for a similar purpose, are, in fact, only bargains for the creation of a new partnership when the old one ceases to exist." In many of the cases, it is said that the death of a partner operates as a dissolution of the firm, "unless provision is expressly made to the contrary." But in the language of the court, in *Kennedy v. Porter*, 109 N. Y. 526, 549, "we doubt very much whether this qualification be necessary or accurate, for we do not believe that any provisions made beforehand, in reference to the death of a partner, or any agreements or arrangements made subsequently to his death, can prevent this dissolution." And in *Laney v. Laney*, 6 Dem. 241, it was distinctly held that a provision in a partnership agreement that the death of a member should not work a dissolution, but that the business should continue and be conducted by the survivors until a day specified, was invalid and abortive, it not being competent for the parties thus to modify or abrogate the law of wills and intestate distribution. "If such an agreement," said the surrogate, "is valid for three years after death, it must be equally so for one hundred years, and thus by partnership agreements, appearing valid on their face, the whole law relating to wills and trusts could be circumvented and rendered practically of no effect."

The rule, however, that the death of a partner dissolves the firm at once, and for all purposes, depends entirely upon the *delectus personarum*; and, as there is usually no *delectus personae* in mining partnerships, it follows, as a consequence, that such a partnership is not dissolved by the death of a partner: *Taylor v. Castle*, 42 Cal.

367; *Jones v. Clark*, 42 Cal. 180; and the death of a member does not work a dissolution of a voluntary association: *Tenney v. New England etc. Union*, 37 Vt. 64.

Execution or Attachment, Levy of.—The mere filing of an attachment against partnership property does not dissolve the partnership: *Foster v. Hall*, 4 Humph. 343; nor will the mere seizure of such property under a writ of attachment have that effect: *Barber v. Barnes*, 52 Cal. 650; and it has been held that the seizure under execution of the interest of a defendant in partnership property does not dissolve the partnership: *Choppin v. Wilson*, 27 La. Ann. 444; but a levy of execution against one partner on his interest in the firm, and the sale of such interest, does dissolve the firm: *Renton v. Chaplain*, 9 N. J. Eq. 62; *Sanders v. Young*, 31 Miss. 111; *Theriot v. Michel*, 28 La. Ann. 107; *Carter v. Roland*, 53 Tex. 540; *Morrison v. Blodgett*, 8 N. H. 238; 29 Am. Dec. 653; *Aspinall v. London etc. Ry. Co.*, 11 Hare, 325; *Habershon v. Blurton*, 1 De Gex & S. 121; unless the levy and sale were collusive to force a dissolution and deprive the copartner of valuable rights: *Renton v. Chaplain*, 9 N. J. Eq. 62. So, if one partner, during the temporary insanity of his copartner, buys the latter's interest at an execution sale, giving a check on the firm's bank deposit, the sale will not be regarded as a dissolution of the firm, but will be set aside: *Helmores v. Smith*, 85 Ch. Div. 436.

Marriage.—Partnership relations between a man and a woman are dissolved by their marriage: *Bassett v. Shepardon*, 52 Mich. 3; and the marriage of a woman dissolves a business partnership, which before that time had existed between herself and another: *Brown v. Chancellor*, 61 Tex. 437.

Sale or Mortgage of Partnership Property or Interest Therein.—A sale which practically includes all of the property used by a firm in carrying on its business whether made by the firm, or a member thereof, operates as a dissolution of the partnership: *Patterson v. Hare*, 4 N. Y. App. Div. 319, 320; *Pennville Nat. Gas etc. Co.*, 21 Ind. App. 1; *Whitton v. Smith*, 1 Freem. Ch. 231; *Smith v. Vanderburg*, 46 Ill. 34; *Thompson v. Bowman*, 6 Wall. 316; *Blaker v. Sands*, 29 Kan. 551; *Dellapiazza v. Foley*, 112 Cal. 380. A conveyance of partnership property to a corporation, formed by members of the firm, in exchange for company stock, is a step toward the dissolution of the partnership: *Coggsell etc. Co. v. Coggsell*, N. J. Ch., May, 1898. The destruction of the property which is the subject matter of the copartnership is another cause which will, on the same principle, work a dissolution per se: *Jackson v. Deese*, 35 Ga. 84, 91.

A sale by one partner to third persons of all his interest in the partnership property is held, in many cases, to operate, ipso facto, as a dissolution of the partnership, notwithstanding a stipulation in the articles that the firm shall continue for a specified term: *Whitton v. Smith*, 1 Freem. Ch. 231; *Westbrook v. Wheeler*, 25 Ont. 559; *Cochran v. Perry*, 8 Watts & S. 262; *Horton's Appeal*, 13 Pa. St. 66, 71; *Parkhurst v. Kinsman*, 1 Blatchf. 488; *Reece v. Hoyt*, 4 Ind. 169;

Barkley v. Tapp, 87 Ind. 25; Buford v. Neely, 2 Dev. Eq. 481; Moore v. Steele, 67 Tex. 435; Ayer v. Ayer, 41 Vt. 346; Carroll v. Evans, 27 Tex. 262; Mudd v. Bast, 34 Mo. 465; Ballard v. Callison, 4 W. Va. 326; Clark v. Wilson, 19 Pa. St. 414; Bank v. Fowle, 4 Jones Eq. 8, 10; Monroe v. Hamilton, 60 Ala. 226; McCall v. Moss, 112 Ill. 493; Miller v. Brigham, 50 Cal. 615; Marx v. Goodnough, 16 Or. 26; Marquand v. New York Mfg. Co., 17 Johns. 525; Freeman v. Hemenway, 75 Mo. App. 611; Manderfield v. Field, 7 N. Mex. 17; especially if the partner absconds after making such sale: Ayer v. Ayer, 41 Vt. 346. In Westbrook v. Wheeler, 25 Ont. 559, it is said that "there is no authority to be found in England for holding that a partnership for a definite term, which has not expired, can be put an end to by the voluntary assignment by one of the partners of his interest in the business, and at his instance, or at the instance of his assignee, against the will of the other partner; but authority for so holding is not wanting in the United States." In support of this, the court cites Marquand v. New York Mfg. Co., 17 Johns. 525; and, with respect to this case, the court said, in Bank v. Fowle, 4 Jones Eq. 8, 11, "there is nothing, either in the decision itself, or in the reasoning by which it is supported, which makes the assignment operate to dissolve the partnership against the will of the assignee." A partnership for a fixed period is not dissolved by a member's sale of his transferable shares therein, as where he holds "stock" in a co-operative store, organized without incorporation: Carter v. McClure, 98 Tenn. 109; 60 Am. St. Rep. 842.

It is sometimes held that the assignment, by one partner, of his rights to a copartner is, ipso facto, a dissolution of the firm: Spaunhorst v. Link, 46 Mo. 197; Cochran v. Perry, 8 Watts & S. 262; Schleicher v. Walker, 28 Fla. 680; Lesure v. Norris, 11 Cush. 328, 329; Clark v. Carr, 45 Ill. App. 469; Heath v. Sansom, 4 Barn. & Adol. 172, 175; Wiggin v. Goodwin, 63 Me. 389, 391; Sistare v. Cushing, 4 Hun, 503; Rogers v. Nichols, 20 Tex. 719, 724; Edens v. Williams, 36 Ill. 252; but much must necessarily depend upon the contract of transfer, and a sale of partnership effects by one partner to another is frequently said not to be, ipso facto, a dissolution of the firm, but simply evidence tending to show a dissolution: Taft v. Buffum, 14 Pick. 322; Lobdell v. Baldwin, 93 Mich. 569; Waller v. Davis, 59 Iowa, 103. It may, therefore, be announced, as a rule, that the assignment, by a partner, of his interest in partnership property, to his copartner, does not have the effect of dissolving the firm, unless the terms of the transfer show that the parties contemplated and intended his entire withdrawal from the firm, and the termination of his duties, liabilities, and authority as a partner between themselves. A sale does not work a dissolution if no partner goes out: Monroe v. Hamilton, 60 Ala. 226; Taft v. Buffum, 14 Pick. 322; Russell v. Leland, 12 Allen, 349; Russell v. White, 63 Me. 409. So, if a partner sells less than his entire share, still retain'ng an interest in the firm, the partnership is not, of course,

dissolved by the fact of sale, where a new member is not introduced into the firm.

The assignment, by way of mortgage, or otherwise, of one partner's interest in a firm, whether to a copartner or to a third person, as a mere security for a debt, has been held to work a dissolution of the partnership: See *Bank v. Fowle*, 4 Jones Eq. 8, 10; *Horton's Appeal*, 13 Pa. St. 66, 71; *Carroll v. Evans*, 27 Tex. 262; but the better view is, that such an assignment does not work a dissolution of the firm, where the transaction contemplates a continuance of the partner's interest and authority therein: *Du Pont v. McLaren*, 61 Mo. 502; *Monroe v. Hamilton*, 60 Ala. 226; *Mechanics' Bank v. Godwin*, 5 N. J. Eq. 334, 338; *Ferrero v. Buhlmeier*, 34 How. Pr. 33; *Brown v. Beecher*, 120 Pa. St. 590, 607. Thus, a chattel mortgage by one member of a firm of his interest in the copartnership property does not necessarily dissolve the firm: *State v. Quick*, 10 Iowa, 451; *Inglis v. Floyd*, 33 Mo. App. 565. Neither will an assignment by him, if he is in failing circumstances, to secure his debts, be regarded as a dissolution: *Ferrero v. Buhlmeier*, 34 How. Pr. 33. And, where an assignment by a copartner of his interest in the copartnership is a mere security, and it is agreed by all parties that the assignor shall act in the partnership business as agent of the assignee, it does not produce the effect of dissolving the firm: *Buford v. Neely*, 2 Dev. Eq. 481.

Mining partnerships do not come within the rule that a partner's sale of his interest in the business dissolves the firm. These are not like trading partnerships, for there is usually no *delectus personae*. Hence, a conveyance by a member of a mining partnership of his interest in the mine and business, even if made to a stranger, does not dissolve the partnership: *Kahn v. Smelting Co.*, 102 U. S. 641; *Taylor v. Castle*, 42 Cal. 367; *Bissell v. Foss*, 114 U. S. 252; *Patrick v. Weston*, 22 Colo. 45; *Duryea v. Burt*, 28 Cal. 569; *Skillman v. Lachman*, 23 Cal. 198; 83 Am. Dec. 96; *Freeman v. Hemenway*, 75 Mo. App. 611, 617. It has been held, however, that a lease of interest in partnership mines by one partner to the other operates as a dissolution or suspension of the partnership: *McAdams v. Hawes*, 9 Bush, 15; and there may be a partnership in the working of a mine subject to the law of ordinary partnerships: *Freeman v. Hemenway*, 75 Mo. App. 611, 616. Furthermore, the general law of copartnerships, which continues the liability of a general partner for the acts of his copartners after a dissolution of the partnership, in favor of persons who have had dealings with, and given credit to, the partnership, until they have had personal notice of the dissolution, applies to a mining copartnership, which is dissolved by a transfer of its property to a corporation: *Dellapiazza v. Foley*, 112 Cal. 380.

War.—A declaration of war *per se* and at once effects a total dissolution of a partnership existing between residents of hostile states, for commercial intercourse between states at war with each other is interdicted: *Taylor v. Hutchison*, 25 Gratt. 536; 18 Am. Rep.

699; *Booker v. Kirkpatrick*, 26 Gratt. 145; *Hubbard v. Matthews*, 54 N. Y. 43; 13 Am. Rep. 562; *Woods v. Wilder*, 43 N. Y. 164; 3 Am. Rep. 684; *Bank of New Orleans v. Matthews*, 49 N. Y. 12, 15; *Griswold v. Waddington*, 15 Johns. 57; 16 Johns. 438; *Seaman v. Waddington*, 16 Johns. 510; *The William Bagaley*, 5 Wall. 377; *Mutual Ben. Life Ins. Co. v. Hillyard*, 37 N. J. L. 444; 18 Am. Rep. 741; *McAdams v. Hawes*, 9 Bush, 15; *Douglas v. United States*, 14 Ct. of Cl. 1; *Exposito v. Bowden*, 7 El. & B. 763, 794; extended note to *Dorsey v. Kyle*, 96 Am. Dec. 629. It was not until August 16, 1861, the date of the issuance of the president's proclamation, declaring commercial intercourse between citizens of the insurrectionary states and of the loyal states unlawful, that a copartnership theretofore existing between citizens of the two sections was dissolved by the late civil war: *Matthews v. McStea*, 91 U. S. 7, affirming *McStea v. Matthews*, 50 N. Y. 166.

Declaring Partnership Void Ab Initio.—We have seen what causes will, per se, effect a dissolution of a partnership. These causes may, of course, be set up in a court of equity as a cause for dissolution, but this is necessary only in a few exceptional cases. Courts of equity will not assume jurisdiction to decree a dissolution of partnership where none is needed or required to work such a dissolution: *Burns v. Rosenstein*, 135 U. S. 449; 41 Fed. Rep. 841. There are cases, however, where it is proper to have a partnership declared void ab initio, or where it is desirable and necessary to have a partnership dissolved, although there has occurred no event which, per se, amounts to a dissolution thereof. "The jurisdiction of a court of equity, in cases of copartnership," says Lacy, J., in *Howell v. Harvey*, 5 Ark. 270, 39 Am. Dec. 376, "flowing from the peculiar trusts and duties growing out of that connection, is of the most extensive and beneficial character. It often declares partnerships utterly void, in cases of fraud, imposition, and oppression in the original agreement." This, of course, includes misrepresentations and other frauds preceding the partnership agreement and entering into it. It is, therefore, a general rule that a court of equity may decree the dissolution of a partnership during the term for which it was entered into, and declare it void ab initio, where there is fraud, imposition, misrepresentation, or oppression in the original agreement: *Oteri v. Scalzo*, 145 U. S. 578, 588; *Fogg v. Johnston*, 27 Ala. 432; 62 Am. Dec. 771; *Smith v. Everett*, 126 Mass. 304; *Newbigging v. Adam*, 34 Ch. Div. 582; *Richards v. Todd*, 127 Mass. 167; *Mycock v. Beatson*, 13 Ch. Div. 384; *Howell v. Harvey*, 5 Ark. 270; 39 Am. Dec. 376; *Rosenstein v. Burns*, 41 Fed. Rep. 841; 135 U. S. 449; *Jennings v. Broughton*, 17 Beav. 234, affirmed in the same case, 5 De Gex, M. & G. 125; *Hamll v. Stokes*, 4 Price, 161; *Andrewes v. Garstin*, 10 Com. B., N. S., 444; *Stainback v. Fernley*, 9 Sim. 556; *Rawlins v. Wickham*, 1 Giff. 355; 3 De Gex & J. 304; *More v. Rand*, 60 N. Y. 208; *Evans v. Montgomery*, 50 Iowa, 325.

Thus, if an infant, upon entering into a contract of copartnership, represents himself to be of age, he cannot set up infancy as a de-

fense to his copartner's suit for a dissolution: *Bush v. Linthicum*, 59 Md. 344, 356. Equity has jurisdiction, where a person has been induced by fraudulent representations to enter into a partnership, to rescind the contract at his instance, and put an end to it ab initio: *Oteri v. Scalzo*, 145 U. S. 578, 588; *Mycock v. Beatson*, 13 Ch. Div. 384. So a bill in equity lies to recover deposits paid by a shareholder in a joint-stock company, where the project is a bubble: *Green v. Barrett*, 1 Sim. 45. And, if the owner of a patent right, wishing to sell it to a partnership, induces a person to go into partnership with two others and purchase the right, and the seller gives the former person a secret advantage over his copartners by taking a note from him for a large amount, executed only as a blind, with the understanding that it is never to be paid, this is a fraud upon the rights of the other two copartners, justifying a decree dissolving the partnership: *White v. Smith*, 63 Ark. 513. If a contract of copartnership is void ab initio by reason of fraud in its inception, its revision will relate back to the time when it was made: *Harlow v. La Brum*, 82 Hun, 292. In *Richards v. Todd*, 127 Mass. 167, a partnership was declared void for fraudulently inducing a party to purchase a share in it, by altering the books so as to mislead the purchaser as to the amount of business done, to his prejudice.

Misrepresentation of material facts is a ground for setting aside a partnership contract: *Rawlins v. Wickham*, 1 Giff. 355; 3 De Gex & J. 304; and it is not essential that the misrepresentation should be sufficient to afford ground for an action of deceit: *Newbigging v. Adam*, 34 Ch. Div. 582; but they must be material, for representations in glowing and exaggerated colors of the prospects of the enterprise are not sufficient: *Jennings v. Broughton*, 17 Beav. 234, affirmed in same case, 5 De Gex, M. & G. 126. A partner's exaggeration of the value of property which he put into the firm as capital is no ground for a dissolution: *Gerard v. Gateau*, 84 Ill. 121; 25 Am. Rep. 438. A person who has been induced to enter into a partnership contract by a material misrepresentation of the other party is entitled to have the contract set aside, and not merely to have the representation made good: *Rawlins v. Wickham*, 3 De Gex & J. 304; 1 Giff. 355; but it is not competent, on the question whether one partner was induced to join the partnership by false representations as to its terms, to prove that others joined without such representations: *Bruce v. Nickerson*, 141 Mass. 403, 405. A court of equity will dissolve a partnership at the complaint of one who was induced to enter into a partnership with another through his misrepresentations as to his skill as a machinist and engineer; and because of the misconduct and violation of duty of the latter: *Fogg v. Johnston*, 27 Ala. 432; 62 Am. Dec. 771.

Power of Courts to Dissolve Partnerships.—Notwithstanding some contrariety of opinion upon the question, it seems that the law is, and ought to be, that one partner cannot, by any act of his own, and at his will, terminate a partnership for a fixed period, before

that period has elapsed. A partnership agreement, like any other, is binding upon the parties, and they must adhere to its terms. Neither partner is at liberty to recede from it against the will of the other, without a sufficient cause: *Ambler v. Whipple*, 20 Wall. 546; *Hannaman v. Karrick*, 9 Utah, 236; note to *Karrick v. Hannaman*, 168 U. S. 332; *Ferrero v. Buhlmeier*, 34 How. Pr. 33; *Henn v. Walsh*, 2 Edw. Ch. 129. A partnership must exist in law until its affairs are settled: *Brown v. Higginbotham*, 5 Leigh, 583, 27 Am. Dec. 618. A court of equity, however, may decree the dissolution of a partnership for causes arising subsequently to its formation, such as misconduct, fraud, or violation of duty of one partner, his incapacity or inability to contribute his skill, labor, or diligence, or to perform his obligations or duties, or for the existence of a state of facts rendering it impracticable to accomplish the purposes of the partnership: *Fogg v. Johnston*, 27 Ala. 432; 62 Am. Dec. 771; *Meaher v. Cox*, 37 Ala. 201; *Sleghortner v. Weissenborn*, 20 N. J. Eq. 172; *Ferrero v. Buhlmeier*, 34 How. Pr. 33; *Werner v. Leisen*, 31 Wis. 169; *Blake v. Dorgan*, 1 G. Greene, 537; *Richards v. Baurman*, 65 N. C. 162; and a court of chancery alone has jurisdiction of the differences between partners for the purpose of settlement: *Mudd v. Bates*, 73 Ill. App. 576. The mere filing of a suit for the dissolution of a firm, and the settlement of its accounts, does not, ipso facto, operate as a dissolution of the partnership: *Bagnetto v. Bagnetto*, La., May, 1899; and, if there has been a dissolution and an accounting, by the acts of the parties, a suit for a dissolution and an accounting cannot be maintained in a court of equity: *Gibson v. Glover*, 3 Colo. App. 506. A defendant's assent to the dissolution of a partnership, and the winding up of its affairs in chancery, makes it unnecessary to prove the special grounds for dissolution set forth in the bill, or for the court to decree a dissolution: *Burns v. Rosenstein*, 135 U. S. 449.

Abandonment.—As shown above, a court of equity may decree a dissolution of the partnership, for causes arising subsequently to the formation of the contract, founded upon the misconduct, or fraud, or violation of duty, of one partner; or on account of the inability or incapacity of one partner to perform his obligations and duties, and to contribute his skill, labor, and diligence in the promotion and accomplishment of the objects of the partnership or for the existence of an impracticability in carrying on the undertaking for which the partnership was formed: *Fogg v. Johnston*, 27 Ala. 432; 62 Am. Dec. 771; note to *Slemmer's Appeal*, 98 Am. Dec. 261. These causes we shall now consider. It has been held that the desertion of the firm business, or the absconding of a partner, of itself, dissolves the partnership: *Whitman v. Leonard*, 8 Pick. 177; *Beaver v. Lewis*, 14 Ark. 188; *Potter v. Moses*, 1 R. I. 430; especially if he sells out his interest and goes off; *Ayer v. Ayer*, 41 Vt. 346; but the weight of authority is against the proposition that the desertion or absconding of a partner operates, per se, as a dis-

olution of the firm, especially where there is no showing of an intention to dissolve the partnership. The most that can be said is, that a partner's desertion or abandonment of the partnership enterprise, or his voluntary absence and refusal to perform his partnership duties, is a ground upon which his copartners may elect to consider the firm dissolved: *Arnold v. Brown*, 24 Pick. 89; 35 Am. Dec. 296; *Ligare v. Peacock*, 109 Ill. 94; *Denver v. Roane*, 99 U. S. 355; *Burgess v. Badger*, 124 Ill. 288. If the articles of copartnership reserve to one partner the right to absent himself, the fact that he does so, within the prescribed limits, cannot be treated as an abandonment by the copartner: *Frothingham v. Seymour*, 121 Mass. 409, 413; *McFerran v. Filbert*, 102 Pa. St. 73; and a partner cannot dissolve the firm during the absence and without the consent of the other partner, when the latter was absent with the consent of the dissolving partner: *Howell v. Harvey*, 5 Ark. 270; 39 Am. Dec. 376. If one partner deserts the firm, or absconds, his copartner is entitled to take possession of the partnership property for the benefit of the firm, and he has power to transfer the whole of it: *Palmer v. Myers*, 43 Barb. 509; *Hamill v. Hamill*, 27 Md. 679; *Quinn v. Quinn*, 81 Cal. 14; *Rhea v. Vannoy*, 1 Jones Eq. 282; but, while the failure of one partner to perform his part of the contract of partnership may authorize the other partners to refuse to go on with the partnership, and to have a dissolution declared, yet the contract of partnership can no more be canceled by the act of a part of the partners than any other contract: *Burgess v. Badger*, 124 Ill. 288; *Ligare v. Peacock*, 109 Ill. 94. Thus if a partner has absconded, his copartner cannot, by declaring the partnership dissolved, and proceeding to close up the firm business, so destroy the other's interest that an attachment may not be levied thereon by a creditor of the absconding partner: *Bollu v. Metcalf*, Wyo., April, 1896. A partner, however, who refuses to act with his firm, or who absconds, is not entitled to subsequent earnings: *Denver v. Roane*, 99 U. S. 355.

It is clear from the foregoing that the mere abandonment, by a partner, of the firm business, or the fact of his absconding, cannot, of itself, be relied on as a dissolution of the firm. The question of abandonment is one of law to be determined from the facts; *Henry v. Bassett*, 75 Mo. 89, 95; and while circumstances may be considered by the court, or by a jury, as tending to establish a dissolution or abandonment of a partnership, their effect may be entirely overcome by the proof of other circumstances tending to show a continuance of the partnership: *Harris v. Hillegass*, 54 Cal. 463, 470. If there is a clear intent to dissolve, a dissolution must be the result. Thus, if a partner abandons the business and property of the firm, and refuses to participate in a settlement of the business, saying that his two copartners may settle as they please, this amounts to a dissolution of the partnership, and, if the latter take the firm assets, crediting the old partnership with them, and enter into a new copartnership, a court will hold that the dissolution was as-

sented to by all of the members of the old firm: *Blake v. Sweeting*, 121 Ill. 67. Mere neglect is not abandonment, even in a partnership for a single transaction, where there is no positive refusal to act: *Henry v. Bassett*, 75 Mo. 89, 93. If all the partners abandon the business and close up the concern, it amounts to a dissolution without proof of any formal agreement to that effect: *Ligare v. Peacock*, 109 Ill. 94; *Spurck v. Leonard*, 9 Ill. App. 174.

Destroyed Confidence.—A court of equity will dissolve a partnership where all confidence between the partners has been destroyed, so that they cannot proceed together in prosecuting the business for which it was formed. And this result follows not only where such want of confidence is occasioned by the misconduct or gross mismanagement of the partner against whom the dissolution is sought, but when such want of confidence and distrust has arisen from other circumstances, provided it has become such as cannot probably be overcome. But a partner who, by his own willful misconduct, has caused such want of confidence, will not be allowed to take advantage of it to procure a dissolution: *Sleghortner v. Weissenborn*, 20 N. J. Eq. 172, 177; *Sutro v. Wagner*, 23 N. J. Eq. 388; *Smith v. Jeyes*, 4 Beav. 503; *Harrison v. Tennant*, 21 Beav. 482; *Watney v. Wells*, 30 Beav. 56; *Meaher v. Cox*, 37 Ala. 201; *Bush v. Linthicum*, 59 Md. 344, 346; *Blake v. Dorgan*, 1 G. Greene, 537. Compare *Ferrero v. Buhlmeier*, 34 How. Pr. 33. If a partner does acts inconsistent with the duty of partners, and of a nature to destroy the mutual confidence which ought to subsist between them, and makes it impossible that the business can be conducted in partnership with benefit to either party, a court of equity will decree a dissolution before the expiration of the term for which the partnership was entered into: *Smith v. Jeyes*, 4 Beav. 503. The same is true where the circumstances have so changed as to render it impossible to carry on the partnership without injury to all the partners: *Harrison v. Tennant*, 21 Beav. 482. A partnership should be dissolved where one of the firm has deliberately resolved to break up and ruin its business: *Sutro v. Wagner*, 23 N. J. Eq. 388; or where ill-feeling between the partners renders it impossible to conduct the business successfully or beneficially: *Watney v. Wells*, 30 Beav. 56; or where one of them fraudulently sells out trust funds and applies the proceeds to his own use: *Essell v. Hayward*, 30 Beav. 158; or where one partner becomes a party to a suit in which the other is adversely interested, and therein makes allegations against the other, which operate to destroy all mutual confidence: *Harrison v. Tennant*, 21 Beav. 482. Although the defendants, in a suit to dissolve a partnership, may not have committed such acts of misconduct, or been guilty of such willful violation of the partnership agreement, as would authorize a court of equity to decree a dissolution for that cause, yet a dissolution will be decreed if it appears that they refuse to carry out one of the terms of the contract, insisting that it must either be either changed or disregarded, in or-

der that the partnership business may be successfully conducted; that they have refused to correspond with the complainants, on matters connected with their business; that the state of feeling between the partners justifies the apprehension that the business cannot be continued to the mutual advantage of the partners; that there is no joint property which might be sacrificed by a sale; and that a dissolution would probably not inflict material injury on either party: *Meaher v. Cox*, 37 Ala. 201, 214.

Exclusion of Partner.—The wrongful exclusion of one partner is a cause for which a court of equity may decree a dissolution of the partnership: *Kennedy v. Kennedy*, 3 Dana, 239; *Einstein v. Schnebly*, 89 Fed. Rep. 540; *Groth v. Payment*, 79 Mich. 290; *Major v. Todd*, 84 Mich. 85; *Wilcox v. Pratt*, 52 Hun, 340; *Wood v. Beath*, 23 Wis. 254, 260; *Hartman v. Woehr*, 18 N. J. Eq. 383; *Goodman v. Whitcomb*, 1 Jac. & W. 589, 593; *Newton v. Doran*, 1 Grant U. C. 590. It is evident, however, that the results flowing from a premature dissolution of a partnership might be most disastrous to an excluded partner who has capital invested in the enterprise, and it may not always be according to the best interests of the parties concerned to dissolve the partnership at once and to close out the business. The excluded partner may, therefore, stand upon his partnership agreement, until the term expires, and have an accounting, for he is entitled to an account of profits, and to his share of them, until the partnership is legally dissolved; or he may, before the expiration of the term, seek a dissolution on account of his illegal exclusion, and have a receiver appointed: See the cases already cited under this subdivision; also, *Smith v. Fagan*, 17 Cal. 179; *Karrick v. Hannaman*, 168 U. S. 328; *Roberts v. Eberhardt*, Kay, 148; *Wilson v. Greenwood*, 1 Swanst. 471, 481; extended note to *Slemmer's Appeal*, 98 Am. Dec. 269; *Hannaman v. Karrick*, 9 Utah, 236.

The denial by one partner of all rights of his copartner in the firm property, and his assertion of an exclusive right to the possession and use of it, entitles the excluded partner to a dissolution of the copartnership, though it is a joint stock company, and an accounting: *Groth v. Payment*, 79 Mich. 290; *Werner v. Leisen*, 31 Wis. 169. So where he is excluded from an inspection of the books of the firm: *Wood v. Beath*, 23 Wis. 254, 260; *Gowan v. Jeffries*, 2 Ashm. 296. Compare *Goodman v. Whitcomb*, 1 Jac. & W. 589, 593. Where certain partners refused to use the style of firm name agreed upon, but used one which excluded the name of the complainant, contrary to the agreement, it was held that the court should act by injunction, but that if this was ineffectual, dissolution would properly be decreed: *Marshall v. Coleman*, 2 Jac. & W. 266. A dissolution was granted where one partner excluded the others from the store, retained possession, and retailed the goods on his own account: *Story v. Moon*, 3 Dana, 331. So a bill states a sufficient ground for the dissolution of a partnership where it, after setting out an agreement between the plaintiff and the de-

fendant, as owners in common of a ranch, to improve it in partnership, the plaintiff to advance the money needed, and the defendant to supervise the work, alleges that the plaintiff has advanced thereunder over sixty thousand dollars, none of which has been repaid, and that the defendant, by his agent, has excluded the plaintiff from any voice in the management of the business, and threatens, and is proceeding, to make improvements against the plaintiff's advice and protest, and for which, under the partnership contract, the plaintiff is bound to pay: *Einstein v. Schnebly*, 89 Fed. Rep. 540. Voluntary mutual associations, it has been held, are so far partnerships that dissolution may be decreed for improperly excluding a member from voting: *Gorman v. Russell*, 14 Cal. 531; affirmed in the same case, 18 Cal. 688. But see "Trifling Grievances," *infra*. A partner cannot be excluded because he failed at an agreed time, subsequent to the formation of the partnership, to pay in his share of the capital. He is a partner until a legal dissolution, and for such exclusion he may have a dissolution on his own behalf, and an account of profits: *Hartman v. Woehr*, 18 N. J. Eq. 883. The fact that one partner monopolized all the labor in a certain department of the business, without complaint by the other, cannot be made a ground for dissolution by the latter: *Page v. Vankirk*, 1 Brewst. 282. A partner's pledge of his interest in a firm by way of collateral security, is no ground for his exclusion therefrom: *Wilcox v. Pratt*, 52 Hun, 340.

Hopeless State of Partnership Business.—It is a sufficient cause for the dissolution of a partnership that it clearly appears that the business for which the partnership was formed is impracticable, or cannot be carried on except at a loss, or without injury to all the partners. The object of all commercial partnerships is profit, and when that cannot be obtained the object fails, and the partnership should be terminated: *Seighortner v. Weissenborn*, 20 N. J. Eq. 172, 177; *Bailey v. Ford*, 13 Sim. 495; *Jennings v. Baddeley*, 3 Kay & J. 78; *Baring v. Dix*, 1 Cox, 213; *Harrison v. Tennant*, 21 Beav. 482; *Rosenstein v. Burns*, 41 Fed. Rep. 841; 135 U. S. 449; note to *Fogg v. Johnston*, 62 Am. Dec. 773; *Page v. Vankirk*, 1 Brewst. 282; *Dunn v. McNaught*, 38 Ga. 179; *Meaher v. Cox*, 37 Ala. 201; *Jackson v. Deese*, 35 Ga. 84, 90; *Holladay v. Elliott*, 8 Or. 85; *Brow v. Hicks*, 8 Fed. Rep. 155; *Moles v. O'Neill*, 23 N. J. Eq. 207. The impossibility of carrying on a joint business profitably upon the basis of the articles of agreement is sufficient to authorize either party to demand a dissolution of the contract of partnership: *Brien v. Harriman*, 1 Tenn. Ch. 467; *Holladay v. Elliott*, 8 Or. 85; *Rosenstein v. Burns*, 41 Fed. Rep. 841; 135 U. S. 449. A court of equity will dissolve a partnership where it appears that the business cannot be carried on according to the true intent and meaning of the articles of copartnership, although one partner objects to the dissolution: *Baring v. Dix*, 1 Cox, 213; and the court has jurisdiction to dissolve a partnership, of which the business cannot be carried on

at a profit, without further capital, where each party has contributed his share of capital; and, as a preliminary to the exercise of such jurisdiction, it is not necessary to show that the concern is financially embarrassed: *Jennings v. Baddeley*, 8 Kay & J. 78. Any circumstance rendering the continuance of a partnership or the attainment of the common end with a view to which it was entered into practically impossible, will, on principle, warrant a dissolution: *Harrison v. Tennant*, 21 Beav. 482; *Howell v. Harvey*, 5 Ark. 270; 39 Am. Dec. 376; but when, on an application for this cause, it appears that it is not impossible to properly continue the business on the terms of the partnership agreement, the relief asked should be denied: *Page v. Vankirk*, 1 Brewst. 282.

A farming partnership, whose articles limit the contributions of each partner to an amount which turns out to be below what is absolutely necessary to success, should be dissolved, owing to the absolute impossibility of conducting the business under such a provision, where one of the partners refuses to make any further contribution: *Brien v. Harriman*, 1 Tenn. Ch. 467. So where a partnership is formed in a whaling voyage for a term not exceeding three years, but the master of the vessel becomes short-handed by desertion, and an unsuccessful cruise for six months, added to other difficulties, make a want of success reasonably certain, one of the partners is justified in rescinding the contract: *Brown v. Hicks*, 8 Fed. Rep. 155. If a partnership is formed to take a contract to construct a railroad, the work to be paid for in bonds of the railroad corporation, a dissolution of the partnership should be decreed, where the incorporation is of doubtful validity, the bonds unsalable, and no money can be obtained to prosecute the work, for these circumstances make the object of the firm impracticable: *Holladay v. Elliott*, 8 Or. 84. So a dissolution should be decreed where the combustible property of the partnership is destroyed by fire, its teams taken off by an invading army, and the partners are reduced to such a pecuniary condition that the remaining assets cannot be rendered profitable: *Jackson v. Deese*, 35 Ga. 84, 87, 90.

The fact that the whole capital of the firm has been sunk or lost is ground for dissolution: *Van Ness v. Fisher*, 5 Lans. 236; *Jennings v. Baddeley*, 8 Kay & J. 78; *Brien v. Harriman*, 1 Tenn. Ch. 467. So is insolvency: *Bailey v. Ford*, 13 Sim. 495; *Sieghortner v. Weissenborn*, 20 N. J. Eq. 172, 182; *Williamson v. Wilson*, 1 Bland, 418; *Boyce v. Burchard*, 21 Ga. 74; even of one member of the firm, particularly where it is accompanied by his mismanagement of the partnership property: *Boyce v. Burchard*, 21 Ga. 74.

A partner's failure or refusal to comply with the terms of the partnership agreement as to contributing capital or funds required for the successful prosecution of the business is also a cause for dissolution, whether such failure or refusal arises from disinclination or inability: See principal case; *Boyd v. Mynatt*, 4 Ala. 79, 82; *Hartman v. Woehr*, 18 N. J. Eq. 383, 386; *Wood v. Beath*, 23 Wis. 254. Thus, if a partnership is formed for the purpose of buy-

ing and selling land, each partner to furnish an equal share of money, the refusal of one to make the necessary advances would be a good cause for putting an end to the partnership: *Turnipseed v. Goodwin*, 9 Ala. 872. And, if a partner refuses to manufacture articles as agreed, so as to make the works profitable, it is a cause for dissolution: *Wood v. Beath*, 23 Wis. 254. Even where the partnership articles as to the contribution of capital have been complied with, but the partnership concern cannot go on to its end without more capital, which one partner is unwilling, and the other unable, to advance, or both are unable or unwilling to advance the necessary funds, the partnership should be dissolved for this cause: *Seighortner v. Weissenborn*, 20 N. J. Eq. 172, 180; 21 N. J. Eq. 483; *Jackson v. Deese*, 35 Ga. 84, 90; *Brien v. Harriman*, 1 Tenn. Ch. 467; *Jennings v. Baddeley*, 8 Kay & J. 79. If a contract of partnership provides that one of the partners is to work a farm of the other upon a capital to be contributed by both, and the amount of capital contributed is too small for the purpose, and one partner refuses to make any further contribution, a court of equity will decree a dissolution: *Brien v. Harriman*, 1 Tenn. Ch. 467. If one member of a firm notifies his copartner, by letter, that he "will not pay another dollar" into the concern, and that, if the latter will not put any more capital into it himself, he had better wind it up, this terminates the partnership, except for the purpose of winding up the business: *Avery v. Craig*, Mass., March, 1899.

If the whole scheme upon which the partnership is based is found to be visionary, impracticable, and worthless, a dissolution should be decreed: *Lafond v. Deems*, 52 How. Pr. 41; 1 Abb. N. C. 318; reversed on other grounds in the same case, 81 N. Y. 507; *Baring v. Dix*, 1 Cox, 213. A society, in the nature of a partnership, whose principles with reference to the number of members and subscription of each is a mere "bubble," should be dissolved on application of a member: *Beaumont v. Meredith*, 3 Ves. & B. 181. So, a dissolution will be decreed where parties enter into a partnership for the purpose of spinning cotton, by means of a certain patented invention which proves to be a failure: *Burling v. Dix*, 1 Cox, 213.

Incapacity—Insanity.—If a partner, by reason of his infirmities, becomes totally incapable of performing the partnership duties incumbent upon him, a dissolution should be decreed, not only to protect the partner who has become incapacitated, but to relieve the other from the difficult position in which he is placed: *Leaf v. Coles*, 1 De Gex, M. & G. 171; *Anonymous*, 2 Kay & J. 441, 447; *Sayer v. Bennett*, 1 Cox, 107; *Page v. Vankirk*, 1 Brewst. 282. But, if a bill is filed to dissolve a partnership on the ground that the state of the defendant's health renders it impossible for the partnership business to be continued, and that the nature of the business renders it perilous to the plaintiff to have it attended to by an incompetent person, all further proceedings will be stayed, with liberty to apply, where, before the hearing, the defendant's health has improved. If he continues to improve, there would be no cause for

dissolution. Otherwise, the result of such an order would render the expense of another suit unnecessary: *Whitwell v. Arthur*, 35 Beav. 140. Mere diminution of mental capacity, not amounting to insanity, has been held not sufficient ground for dissolution: *Sadler v. Lee*, 6 Beav. 324, 331. It is said that a dissolution will be decreed in any case where the partner is unable to do his duty to the firm, by disease not in its nature temporary, but likely to continue for a long time, as paralysis, for example, or palsy: Note to *Slemmer's Appeal*, 98 Am. Dec. 267. In *Sayer v. Bennet*, 1 Cox, 107, Lord Kenyon said: "I think, indeed, it may be laid down as a general rule that where partners are to contribute skill and industry, as well as capital, if one partner becomes unable to contribute that skill, a court of equity ought to interfere for both their sakes."

The actual insanity of a partner does not operate, *ipso facto*, as a dissolution of the partnership: *Anonymous*, 2 Kay & J. 441, where the authorities on the subject were examined: *Raymond v. Vaughn*, 128 Ill. 256; 15 Am. St. Rep. 112; *Jurgens v. Ittmann*, 47 La. Ann. 367; but there must be a decree of dissolution: *Anonymous*, 2 Kay & J. 441, reviewing the authorities; *Raymond v. Vaughn*, 128 Ill. 256; 15 Am. St. Rep. 112. Compare *Cape Sable Co.'s case*, 8 Bland. 606, 674; *Jurgens v. Ittmann*, 47 La. Ann. 367. The reasons for insisting upon the necessity of a decree of dissolution are well stated in *Jones v. Noy*, 2 Mylne & K. 125, 130, where the master of the rolls said: "It is clear, upon principle, that the complete incapacity of a party to an agreement to perform that which was a condition of the agreement is a ground for determining the contract. The insanity of a partner is a ground for the dissolution of the partnership, because it is immediate incapacity; but it may not, in the result, prove to be a ground of dissolution, for the partner may recover from his malady. When a partner, therefore, is affected with insanity, the continuing partner may, if he think fit, make it a ground of dissolution; but in that case, I consider, with Lord Kenyon, that in order to make it a ground of dissolution, he must obtain a decree of the court. If he does not apply to the court for a decree of dissolution, it is to be considered that he is willing to wait to see whether the incapacity of his partner may not prove merely temporary. If he carry on the partnership business in the expectation that his partner may recover from his insanity, so long as he continues the business with that expectation or hope there can be no dissolution."

Confirmed and incurable insanity is, however, a ground for dissolving a partnership, and when it is shown that a partner is so far disordered in his mind as to be incapable of conducting the firm business according to the terms of the contract of copartnership, a court of equity will dissolve the firm: *Anonymous*, 2 Kay & J. 441; *Sadler v. Lee*, 6 Beav. 324; *Sayer v. Bennet*, 1 Cox, 107; *Leaf v. Coles*, 1 De Gex, M. & G. 171; *Sander v. Sander*, 2 Coll. 276; *Page v. Vankirk*, 1 Brewst. 282; *Griswold v. Waddington*, 15

Johns. 57; Raymond v. Vaughn, 128 Ill. 256; 15 Am. St. Rep. 112; Reynolds v. Austin, 4 Del. Ch. 24.

The permanent lunacy of a partner is a ground for the dissolution of the partnership at the instance of the lunatic, as well as of the other partner, for a person who has become permanently insane, though he has not been so found by inquisition, may maintain a suit by his next friend for the protection of property in which he is interested as a partner: Jones v. Lloyd, L. R. 18 Eq. 265.

A court of equity will not decree a dissolution of a partnership because of the insanity of one partner, if the malady is temporary only, with a fair prospect of recovery within a reasonable time: Raymond v. Vaughn, 128 Ill. 256; 15 Am. St. Rep. 112; and, notwithstanding proof of the actual insanity of a partner before a bill for dissolution was filed, a decree of dissolution will not be made, in a disputed case, without a further inquiry, whether, at the time when the relief is sought, the party is in such a state of mind as to be unable to conduct the business of the firm in conjunction with his copartners according to the contract of partnership: Anonymous, 2 Kay & J. 441. It has been held that an inquisition of lunacy as to one partner does, ipso facto, dissolve the partnership: Isler v. Baker, 6 Humph. 84; but an adjudication that one partner is temporarily insane does not dissolve the partnership. Upon a bill filed for that purpose, it has no other effect than to establish the insanity. In such a case, equity will look to the effect produced upon the partnership relations, and refuse to dissolve them, and apply the assets, unless the insanity materially affects the capacity of the partner to discharge the duties imposed by his contract relation: Raymond v. Vaughn, 128 Ill. 256; 15 Am. St. Rep. 112.

After an adjudication of the insanity of one partner, the continuing partner may apply for a dissolution of the partnership if he so desires; or, if it is a partnership at will, he may dissolve it of his own volition; but where one partner has been adjudged insane, and the remaining partner continues the business as before, without objection or notice to anyone, it is presumed that he did not intend a dissolution of the firm, but that he waited to determine whether the incapacity of his partner would prove merely temporary, and it would become practicable for him to resume business. So long as he thus continues to carry on the business without seeking to dissolve the partnership, there is no dissolution, nor is he excused from accounting for the profits derived by him from the business of the firm: Raymond v. Vaughn, 128 Ill. 256; 15 Am. St. Rep. 112. See, also, Jones v. Noy, 2 Mylne & K. 125.

On a bill to dissolve a partnership on the ground of the lunacy of a partner, the decree will not be made retrospective. The date of the decree ought to be the date of the dissolution. In other words, the court will, on application for dissolution for insanity, declare the partnership dissolved from the date of the decree, and not from a prior date: Besch v. Frollich, 1 Phill. Ch. 172; Sander v. Sander, 2 Coll. 276; and it has been held that a notice of disso-

lution given to a lunatic partner is sufficient to put an end to the partnership: *Robertson v. Lackie*, 15 Sim. 285; *Mellersh v. Keen*, 27 Beav. 236.

Misconduct, Generally—Gross Neglect—Breach of Duty.—Partners may provide in their contract that certain acts or conduct shall operate to dissolve the partnership; but, in the absence of special agreement, courts may dissolve a partnership for misconduct, gross neglect, or breach of partnership duty. One partner, however, is not authorized, by such reasons, to treat the partnership as ended, and to exclude the other, without a decree of dissolution: *Master v. Kirton*, 3 Ves. 74; *Ambler v. Whipple*, 20 Wall. 546. A court of equity is very cautious about dissolving partnerships for misconduct, et cetera, for it is difficult to draw a line indicating what misbehavior, or what degree of misconduct, will authorize a decree: *Slemmer's Appeal*, 98 Am. Dec. 263; and it is a rule to deny a dissolution where the misconduct or acts are not such as to prevent the profitable continuance of the business on the terms of the agreement between the partners: *Page v. Vankirk*, 1 Brewst. 282. It may be stated, therefore, as a general rule, that gross misconduct, want of good faith, or criminal want of diligence, or such cause as is productive of serious and permanent injury to the partnership concerns, or renders it impracticable to carry on the partnership business, is proper ground for dissolution: *Howell v. Harvey*, 5 Ark. 270; 39 Am. Dec. 376; *Gerard v. Gateau*, 84 Ill. 121; 25 Am. Rep. 438; *Meaher v. Cox*, 37 Ala. 201; *Kennedy v. Kennedy*, 3 Dana, 239; *Harrison v. Tennant*, 21 Beav. 482; *Wood v. Beath*, 23 Wis. 254; *Smith v. Jeyes*, 4 Beav. 503; *Cheesman v. Price*, 35 Beav. 142; *Waters v. Taylor*, 2 Ves. & B. 299; *Newton v. Doran*, 1 Grant U. C. 590; *Sleghortner v. Weissenborn*, 20 N. J. Eq. 172; *Sutro v. Wagner*, 23 N. J. Eq. 388; 24 N. J. Eq. 589.

Habitual intoxication, extravagance, and dishonesty are good grounds for dissolution: *Ambler v. Whipple*, 20 Wall. 546. Compare *Krigbaum v. Vindquest*, 10 Neb. 435. So, where the partner does acts of such a nature as to destroy all mutual confidence, a dissolution is authorized: *Smith v. Jeyes*, 4 Beav. 503; *Meaher v. Cox*, 37 Ala. 201. In *Sleghortner v. Weissenborn*, 20 N. J. Eq. 172, the defendant was charged by his partner with misconduct in making needless purchases of stock, by which the firm was run heavily in debt, and in permitting judgment to be recovered against the firm without the knowledge of his partner, and in colluding in the secret removal of assets for some purpose inconsistent with good faith, which latter act had led to the defendant's arrest for grand larceny. It was held that a dissolution should be decreed, all mutual confidence having been destroyed.

The failure of one partner, especially in seventeen instances, to enter in his accounts partnership moneys received by him, and for the purpose of defrauding his copartner, is, of itself, and independently of any provision in the contract of partnership, a sufficient ground for the other partner to dissolve the firm: *Cheesman*

v. Price, 35 Beav. 142. So a denial of a partner's right to personally inspect the books of the firm for the purpose of ascertaining the condition of its business, is cause for dissolution: Moore v. Price, 116 Ala. 247. So, of a partner's failure to keep proper books of account: Gowan v. Jeffries, 2 Ashm. 296; or to keep an account of receipts and expenditures which should be open to his copartner's inspection: Wood v. Beath, 23 Wis. 254. So with a partner's acts which show that he has deliberately resolved to break up and ruin the business of the firm: Sutro v. Wagner, 23 N. J. Eq. 388; 24 N. J. Eq. 589. And, if it agreed in the articles that a majority of the firm shall appoint a manager, to be subject to their control, and a manager is so appointed, but is subsequently dismissed by a majority, and another partner requests him to continue as manager, which he does, this partner's misconduct is such as entitles the others to a dissolution: Newton v. Doran, 1 Grant U. C. 590.

A partner who is being defrauded has a right to seek relief in a court of equity, by way of a dissolution and accounting, notwithstanding contractual stipulations: Adams v. Shewalter, 139 Ind. 178. Hence, if accounts are to be kept, but, by reason of the fraud of one of the partners, just and true accounts have not been made out, an accounting should be had from the date of the articles: Oldaker v. Lavender, 6 Sim. 239. A conveyance by one partner of partnership property, in fraud of partnership creditors, entitles the other member of the firm to maintain a bill for the dissolution and winding up of the copartnership: Hubbard v. Moore, 67 Vt. 532. Compare Hollister v. Simonson, 36 N. Y. App. Div. 63, 65; Atwood v. Smith, 11 Ala. 894. Partners will not be compelled to continue the partnership relation with one who has deliberately perpetrated frauds upon his associates, by keeping and rendering false accounts in the partnership business, and defrauding them of their just share in the profits of the undertaking. The partnership, for this cause, will be dissolved, and, as incident to it, there must necessarily be an accounting: Cottle v. Leitch, 35 Cal. 434, 440. But a contract of partnership cannot be annulled or rescinded because of a fraud perpetrated by one of the partners on one of his associates, in a former partnership between them individually, though, by means of such fraud, he procured the funds contributed as his share of the capital of the new firm: Ingraham v. Foster, 31 Ala. 123.

Misappropriation of Funds—Refusal to Account or Pay Over.—If a partner appropriates funds of the firm to his own use, without accounting therefor to his copartner, it is a ground for the dissolution of the firm by the latter, especially where the former endeavors to conceal from the latter the amount so appropriated: Flammer v. Green, 15 Jones & S. 538; Smith v. Jeyes, 4 Beav. 503, 505; Kennedy v. Kennedy, 3 Dana, 239. The loan of firm moneys, contrary to the partnership articles, has been held a ground for dissolution: Dumont v. Ruepprecht, 38 Ala. 175, 179; and a partnership of attorneys may be dissolved instantaneously if one of them sells out trust funds and applies the proceeds to his own use: Essel v. Hayward, 30 Beav.

158. If partners are, by their agreement, to make balances and pay differences monthly, and one of them refuses to do so, insisting that the business cannot be conducted on that basis, and refuses to go on unless the articles are rescinded in this respect, a dissolution will be decreed: *Meaher v. Cox*, 37 Ala. 201; and a partner's failure to pay over the proceeds of sales as required by the articles of partnership is ground for a dissolution: *Maher v. Bull*, 44 Ill. 97, 99. A refusal to account for moneys received, belonging to the partnership, and which should be accounted for and paid over, is ground for a decree dissolving the partnership: *Werner v. Leisen*, 31 Wis. 169; *Wood v. Beath*, 23 Wis. 254. Compare *Holladay v. Elliott*, 3 Or. 340. If the firm has ceased to do business, without a final settlement, and one partner has all the funds and refuses to account, the other is entitled to a dissolution and an accounting, particularly where the former has appropriated a part of the funds, and has purchased property in his own name with such part: *Reese v. McCurdy*, Ala., May, 1899.

Quarrels—Dissensions—"Chronic Hostility"—Refusal to Consult.—If quarrels, dissensions, or "chronic hostility" between partners is of such a serious and permanent character as to prevent the profitable continuance of the partnership business on the terms of the agreement between the partners, a dissolution should be decreed: *Lafond v. Deema*, 52 How. Pr. 41; 1 Abb. N. C. 818; reversed on other grounds in the same case, 81 N. Y. 507; *Gerard v. Gateau*, 84 Ill. 121; 25 Am. Rep. 438; *Phillip v. Von Raven*, 57 N. Y. Supp. 701; *Blake v. Dorgan*, 1 G. Greene, 537; *Whitman v. Robinson*, 21 Md. 30; *Bishop v. Breckles*, 1 Hoff. Ch. 534; *Singer v. Heller*, 40 Wis. 544; *Watney v. Wells*, 30 Beav. 56; *Leary v. Shout*, 33 Beav. 582; *Baxter v. West*, 1 Drew. & S. 173; *Harrison v. Tennant*, 21 Beav. 482. Thus, a mere defect of temper, while not alone a ground for dissolution, will authorize a decree, if it brings about violent and lasting dissension: *Lafond v. Deema*, 52 How. Pr. 41; 1 Abb. N. C. 818; reversed on other grounds in the same case, 81 N. Y. 507. An allegation of unfriendly relations of the partners, to authorize a dissolution, must be supported by proof of a state of affairs so serious as to prevent the success of the business: *Gerard v. Gateau*, 84 Ill. 121; 25 Am. Rep. 438; but if there are, apparently, irreconcilable differences and personal ill-will between the partners, which render co-operation in the business impossible, a court of equity will dissolve the partnership before its term has expired: *Phillip v. Von Raven*, 57 N. Y. Supp. 701; *Blake v. Dorgan*, 1 G. Greene, 537; *Whitman v. Robinson*, 21 Md. 30. Violent disputes, ill-will, or dissensions between the partners, which entirely prevent the beneficial effects of a connection, are sufficient to justify a decree of dissolution: *Bishop v. Breckles*, 1 Hoff. Ch. 534; *Singer v. Heller*, 40 Wis. 544; *Watney v. Wells*, 30 Beav. 56; *Leary v. Shout*, 33 Beav. 582. A dissolution should be decreed where it appears that the partners are in a constant state of quarrel; that one makes a rule of going to the office at an early hour, opening all the letters ad-

addressed to the firm, and failing to communicate the contents to the other; that the other partner is always arbitrary in his action; and that, generally, what one wants the other objects to: *Baxter v. West*, 1 Drew. & S. 173. A dissolution was decreed where it appeared that the defendant had conceived the idea that the plaintiff had cast some imputation on his honor and integrity, and refused to go on without an apology; and even after an apology and reconciliation, continued in the same state of mind, and made derogatory entries concerning the plaintiff in the partnership books, which the latter had to explain away: *Watney v. Wells*, 80 Beav. 56. A dissolution was also decreed where it appeared that, in consequence of a quarrel, one partner refused to proceed with the business, declared that work should be stopped, discharged the employés, and declared that, if others were employed, he would discharge them: *Bishop v. Breckles*, 1 Hoff. Ch. 534. One member of a partnership of attorneys wished a certain course to be pursued in a cause in which the firm had been retained. The other declined to adopt his partner's plan, and entered his name as sole attorney of record, and proceeded alone in the cause. This was held to be a ground for dissolution: *Harrison v. Tennant*, 21 Beav. 482.

A refusal of partners to meet, or to deal, or to correspond, with each other on matters pertaining to their business has been held a ground for dissolution: *Meaher v. Cox*, 37 Ala. 201; *Leary v. Shout*, 33 Beav. 582; *Bishop v. Breckles*, 1 Hoff. Ch. 534. Where one of two partners in an opera-house employed performers contrary to agreement, and insisted upon conducting the business to suit his views without consulting the other, a dissolution was decreed: *Waters v. Taylor*, 2 Ves. & B. 299; so where a violent outbreak was the result of certain transactions between partners, and the defendant expressed himself in violent language, and thereafter refused to hold personal communication or to deal with the plaintiff, except through writing, the partnership was dissolved: *Leary v. Shout*, 33 Beav. 582.

One partner will not be allowed by his own misconduct to render it impossible for the other to act in harmony with him, and then have a decree of dissolution for the dissension created by himself: *Harrison v. Tennant*, 21 Beav. 482, 493; *Fairthorne v. Weston*, 3 Hare, 387, 392; *Gerard v. Gateau*, 84 Ill. 121; 25 Am. Rep. 438. Thus, in *Fairthorne v. Weston*, 3 Hare, 387, the plaintiff excluded his partner from the business, and appropriated the assets to his own use, and then asked a dissolution. The court refused to grant the relief. And in *Gerard v. Gateau*, 84 Ill. 121, 25 Am. Rep. 438, the plaintiff wished to employ, and did, against the defendant's will, employ certain persons whose services the defendant predicted would prove unprofitable. The business, under the circumstances, did not prove a success, and the plaintiff sought a dissolution, which the court refused to decree. But where mutual confidence is destroyed, it makes little difference, except where it was brought about by the plaintiff, with premeditation, and for the pur-

pose of taking advantage of his own wrong, whether the result was occasioned by the fault of either or both of the partners. When it is admitted that this state of feeling exists, it becomes immaterial who files the bill, and a dissolution should be decreed, though the defendant claims that he is least in the wrong and does not want a dissolution: *Atwood v. Maude*, 3 Ch. Div. 369, 373; *Baxter v. West*, 1 Drew. & S. 173, 175; *Blake v. Dorgan*, 1 G. Greene, 537; *Stevens v. Yeatman*, 19 Md. 480. When the deportment of each partner is hostile to the harmony, prosperity, and continuance of the firm, the fact that he who complains for a dissolution committed the first wrong does not justify wrongs committed by the other partner, and should not prevent a dissolution: *Blake v. Dorgan*, 1 G. Greene, 537; and, when it is insisted that the conduct of one partner entitles the other to a dissolution, the court must consider, not merely the specific terms of the express contract, but also the duties and obligations which are implied in every partnership agreement: *Smith v. Jeyes*, 4 Beav. 503, 505.

Trifling Grievances.—A court of equity will not dissolve a copartnership unless cause is shown, and the mere desire of a partner for a dissolution is not a sufficient cause: *Bradley v. Harkness*, 26 Cal. 69. It is not for every act of misconduct on the part of one partner that a court of equity, at the instance of another partner, will dissolve the partnership and close up the affairs of the company. The court will require a strong case to be made, and it is laid down, as a general principle, that a court has no jurisdiction to make a separation between partners for trifling causes, or temporary grievances, involving no permanent mischiefs. For minor misconduct or grievances, involving no permanent mischief, a court of equity will, if they require any redress, ordinarily go no further than to act upon the faulty party by way of injunction: *Cash v. Earnshaw*, 66 Ill. 402; *Gerard v. Gateau*, 84 Ill. 121; 25 Am. Rep. 438; *Slemmer's Appeal*, 58 Pa. St. 168; 98 Am. Dec. 255; *Henn v. Walsh*, 2 Edw. Ch. 129; *Fischer v. Raab*, 57 How. Pr. 87; *Lafond v. Deems*, 52 How. Pr. 41; 1 Abb. N. O. 218; reversed on other grounds in the same case, 81 N. Y. 507; *Sieghortner v. Welssenborn*, 20 N. J. Eq. 172; *Loomis v. McKenzie*, 31 Iowa, 425; *Sloan v. Moore*, 37 Pa. St. 217; *Goodman v. Whitcomb*, 1 Jac. & W. 589, 593; *Page v. Vankirk*, 1 Brewst. 282; *Anderson v. Anderson*, 25 Beav. 190.

Thus, it is not sufficient cause for the dissolution of a firm that a loss occurs to it through a partner's mere error of judgment: *Cash v. Earnshaw*, 66 Ill. 402; *Gerard v. Gateau*, 84 Ill. 121; 25 Am. Rep. 438; or that there is a mere dissatisfaction between partners: *Henn v. Walsh*, 2 Edw. Ch. 129; or differences of opinion, ill-will, and bad temper: *Fischer v. Raab*, 57 How. Pr. 87; *Loomis v. McKenzie*, 31 Iowa, 425; *Lafond v. Deems*, 52 How. Pr. 41; 1 Abb. N. O. 218; 81 N. Y. 507; *Sloan v. Moore*, 37 Pa. St. 217; if these grievances do not result in lasting dissension. Where, by the partnership articles, one partner was to remain at the business place and attend to selling goods, the fact that he occasionally absented himself from the

state, and that he had been detained at home at other times by sickness of his family, and that he was not generally a very attentive partner, was held not to warrant a dissolution: *Howell v. Harvey*, 5 Ark. 270; 39 Am. Dec. 376. One member of a partnership accidentally allowed the protest of the firm paper, the bookkeeper, whose duty it was to attend to such matters, being ill. The court held that such partner had not, by his act, impaired the credit of the firm so as to authorize a dissolution: *Page v. Vankirk*, 1 Brewst. 282, 284. The use of the firm credit for private purposes is to be condemned, but it is not such gross misconduct as will authorize a dissolution, if the firm capital or credit is not impaired: *Page v. Vankirk*, 1 Brewst. 282. A failure to keep firm books at the partnership counting-house is no cause for dissolution: *Goodman v. Whitcomb*, 1 Jac. & W. 589, 593. Neither are small infractions of the partnership articles sufficient ground for a dissolution; as, where they provide that no partner shall give a written guaranty without the consent of the others, and one of them, without consent, in the course of eight years' dealings gives a single guaranty for fifty-two pounds: *Anderson v. Anderson*, 25 Beav. 190. A wide discretion is vested in courts of equity on the subject of the dissolution of partnerships, and on what grounds; and a dissolution will not be decreed on slight grounds, particularly where a valuable business has grown up by the labors and contributions of all: *Slemmer's Appeal*, 58 Pa. St. 168; 98 Am. Dec. 255; or, where a large operation has been commenced, which cannot be arrested without serious loss, thus rendering a dissolution inconvenient: *Richards v. Baurman*, 65 N. C. 162. A court of equity will not decree a dissolution of a partnership, unless it is shown that the defendant has substantially failed in the performance of his part of the partnership agreement, express or implied. It will not ordinarily enter into the consideration of mere partnership squabbles: *Wray v. Hutchinson*, 2 Mylne & K. 235.

The members of a voluntary association, instituted for moral, benevolent, or social objects, are not partners as between themselves: *Lafond v. Deems*, 81 N. Y. 508, reversing the same case, 52 How. Pr. 41; 1 Abb. N. C. 318; but such an association should not be dissolved for slight causes. It should only be dissolved when it is apparent that the organization has ceased to answer the end of its existence, and no other mode of relief is attainable; *Lafond v. Deems*, 81 N. Y. 507. So the infidelity or misconduct of some, or even of all, of the trustees or managers of a joint-stock association does not afford any ground for taking away the rights of the shareholders who constitute the company, either by dissolving it, or taking away its management, and placing it in the hands of a receiver: *Waterbury v. Merchants' Union Exp. Co.*, 50 Barb. 157.

Date of Dissolution.—In decreeing a dissolution of a partnership, the court may declare at what date the contract shall be at an end; but the date should not be fixed earlier than the date of the decree, except for good cause: *Dumont v. Ruepprecht*, 38 Ala. 175. Where

the dissolution is sought for the misconduct of a partner, it is said that the court should not fix an earlier day than the abandonment of the partnership by the aggrieved party: *Dumont v. Ruepprecht*, 88 Ala. 175; *Durbin v. Barber*, 14 Ohio, 311. As to the date of dissolution in cases of insanity, see "Incapacity," "Insanity," *supra*. A partnership will exist to the day of the decree, if not otherwise provided in the decree itself, though an injunction has been granted which operates to restrain the transaction of business: *Abraham v. Myers*, 40 Md. 499.

VINCENT v. FRELICH.

[50 LOUISIANA ANNUAL, 378.]

WITNESSES—OPINIONS OF BUILDERS—RECONSTRUCTION—REPAIRS.—If an insured building has been injured by fire, the opinion of skilled builders and contractors as to whether the work required to restore it is "repair" or "reconstruction" work is entitled to more weight than the judgment of persons inexperienced in such matters, however skillful they may be in their own business.

DEFINITIONS — RECONSTRUCTION — REPAIRS. — Work done on a building which has been merely damaged constitutes "repairs," but work done on a building which has been demolished as a whole, or in part, constitutes "reconstruction."

LANDLORD AND TENANT—RIGHT TO TERMINATE LEASE.—DAMAGE TO A BUILDING, different from partial destruction, gives to neither the lessor nor the lessee the right to terminate the lease.

LANDLORD AND TENANT—LIABILITY OF TENANT FOR RENT AFTER OCCUPANCY AND PREVENTING NEEDFUL REPAIRS.—If one rents two brick buildings, connected by an open archway, and a fire occurs, which damages one of the buildings in a small degree, but not enough to render the buildings in their un-restored condition unfit for the purposes for which they were leased, the work required to restore them consists of "repairs," and, if the tenant continues in their occupancy, after the fire, more days than it would take to make such repairs, he is answerable for rent, especially when he interposes hindrances and obstacles to prevent the lessor from making the needful repairs, for he has no right to do this.

LANDLORD AND TENANT.—THE TERMINATION OF A LEASE is not favored when the lessor is not at fault.

LANDLORD AND TENANT—TERMINATION OF LEASE—OFFER TO ACCOMMODATE TENANT.—A lessor does not manifest any desire to terminate a lease, after a fire, by offering to the lessee another building in which he may store his property left, during the time required for making needful repairs, especially where the offer is made to accommodate the tenant.

LANDLORD AND TENANT—TERMINATION OF LEASE—PUTTING UP SIGN "TO LET."—If a lessee, after a fire, abandons the premises, the act of the lessor in putting up a "to let" sign thereon, for the purpose of minimizing the damages, does not amount to a termination of the lease.

LANDLORD AND TENANT — ACTION FOR RENT — PLEADING—CORRECTION OF ERROR.—A petition and docu-

ment annexed thereto, and forming a part thereof, are construed together. Hence, an error in a petition to recover rent, as to the rate of interest to be allowed on a contract of lease, may be corrected by reference to the contract annexed to the petition.

F. L. Richardson and Rogers & Dodds, for the appellant.

E. Evariste Moise, for the appellee.

³⁷⁹ BREAU, J. This was an action for rental. The lease was entered into for five years, beginning May, 1893. The rental was one hundred and fifty dollars a month. Two four-story brick stores, Nos. 226 and 228 Decatur, of this city, was the property leased. They were connected by open arches in the dividing wall; one could step or move goods from one building to the other; they were fitted up for defendant's plant.

³⁸⁰ A fire on September 5, 1896, damaged one of the buildings leased, also the plant of the lessees. They were manufacturers of jeans clothing, and the buildings had been fitted up for the particular business in which the defendants were engaged.

Immediately after the fire, the tenants surrendered possession to the insurance companies in which they were insured, for adjustment of the loss and settlement. They held possession until the 23d of September, and during their possession they refused to permit the builder employed by the landlord to enter the building to work thereon as he had contracted. After the insurance adjuster had completed the adjustment of the loss of the tenants, the latter resumed their possession, and retained it a few days.

The contract of lease between the plaintiff and defendant contains the usual clauses of leases, save the following, which was also inserted in the contract: "Should the property be destroyed by fire, or should the lessee be deprived of the use of said premises by some other unfortunate event, not due to any fault or neglect on their part, then the lessee shall be entitled to a credit for the unexpired time of the lease"; and the following: "No repairs shall be due to the lessee except such as may be needed to the roof or floor, or rendered necessary by fire or other casualty, not occasioned by the lessee's fault or negligence."

Returning to the matter of the extent of the injury done to the building, the testimony shows that one of the roofs, that on building 228, was destroyed by the fire, and part of the building; a detail statement given shows that the injury (in

addition to the destruction of the roof was to the upper floors, stairway, and water-closets which were in the building 228.

The building adjoining, 226, was not as badly damaged. The builder, by whom the injury, after the fire, was carefully examined, to whose testimony much weight is given by all parties to the suit, testified that the defendants could have continued the operations of their plant after the damage, had they chosen so to do, until the end of their contract.

The plaintiff immediately after the fire offered another building to the defendants to store away their property until the repairs were made. He also, after they had refused to continue their lease, placed a notice "to let" on the buildings.

It also appeared that the defendants desired to lessen the extent ³⁸¹ of their business; that they became the lessees of a seventy-five dollars a month one-building place, instead of plaintiff's one hundred and fifty dollars a month two-building place; that defendants did not make the least inquiry of the builder, who was anxiously awaiting to begin the work of repairing. It is also in evidence that such was the condition of defendant's factory after the fire that it would not have been possible for them to resume operations in twice the number of days needed for the repair of the buildings. These are the prominent facts.

From an adverse judgment the defendants prosecute this appeal.

The damages to the building rendered them, in their unrepaired condition, unfit for the purpose for which they were leased. One of the buildings, however, was only in a small degree damaged. Experienced mechanics, who had carefully examined the leased property, were decidedly of the opinion that the less-damaged building could have been occupied by the tenant while the building badly damaged was being repaired.

The builder and contractor, who had bound himself to make needful repairs on these buildings in seventeen days, testified that he had examined the property thoroughly, to see how much the repairs would cost. That the work required consisted of repairs and not of reconstruction; that the defendants might, while he was at work in one of the buildings, have occupied the other; that such moving is a little inconvenient, but that it is done frequently. The testimony of this witness is corroborated by another builder and contractor. They had the experience rendering them competent to judge the extent of the damage, and the amount it was worth, and the time it would take; they also are presumed to have a practical knowledge of

the difference between repairs and reconstruction. Their evidence, in a case such as the one before us for determination, should evidently have more weight than that of the merchant or manufacturer of clothing, however skillful he may be in his business. The question involved is more particularly within the domain of the architect than of the juriconsult: Baudry-Lacantinerie, vol. 3, p. 409.

The following we translate from Laurent, volume 25, page 121: "The ordinary carpenter," said Laurent, "would have taught Troplong that his notion of repairs is not correct, and that no one ⁸⁸² has ever thought of releasing a lessor from making the repairs he mentions."

From another section of the work of the same commentator we translate: The facts in each case almost always rise to discussion: Laurent, vol. 1, p. 121, par. 41.

From Dalloz we glean: It is for the court as a matter of fact, and not strictly of law, to determine whether it is a matter of "reconstruction" and not of repairs, after having heard a report of expert builders. If the repairs require only a short delay within which it is possible to make them, and the proprietor offers to the tenant another house temporarily, the lessee has no ground of action to dissolve: Dalloz, vol. 30, p. 307, par. 181.

Here defendant's witness, Richard, corroborated by Mass, were the only witnesses in the case who had practical knowledge of building. They testified that the work consisted of "repairs," and not "reconstruction."

A building, as we understand, is repaired "after it has been damaged"; it is reconstructed after it has been demolished as a whole or in part. The cost of repairing in the case here was much less than the value of the whole building.

Marcade, volume 6, page 450, thus expresses his views under similar articles of the code to ours: When the fire of heaven or any other unforeseen cause of destruction strike a building, three things are possible:—it may be completely destroyed, it may be destroyed in part, or it may be only damaged. Without question, every demolishment is a destruction, and if a violent blast of wind causes the fall of a chimney, it might be said that there is a partial destruction of the house, the chimney being destroyed; but this reasoning is not exact, and when, as in the case supposed by M. Troplong, a gust of wind throws down the chimney, tears out the Persian blinds, or shatters the windows, or when unusually heavy snow weighs down the roof, it will not be said that for that reason the building is destroyed,

even in part, but that it was damaged, and that the work to be done as relates to the whole building will not constitute a reconstruction, even partial, but exclusively a repair. Damage to a building, different from partial destruction, gives to neither the lessor or the lessee the right to terminate the lease.

³⁵³ The following is in point: Even in a case important enough to give to the lessee the right of complaining, it may not be sufficiently important to sustain a demand for a dissolution of the lease. The lessee has a right of action to the extent only that he is subjected to a substantial loss; to the extent only that the injury renders the building not fit for the use for which it was leased: Dalloz, vol. 30, par.

We pass from a brief review of the French authorities to a consideration of the decisions of this court cited by the defendant's counsel. In *Higgins v. Wilner*, 26 La. Ann. 544, the facts were not stated at any length in the decision. We had recourse to the record of the case in the clerk's office, and found that one of the buildings leased had been entirely destroyed by fire, also scaffolding necessary to the tenant's business. New constructions were needed to restore the premises to the condition in which they were prior to the fire. Said the court in that case, "The thing leased was destroyed in part," alluding, as we infer, to the building and other property destroyed, as part of all the property leased. Here it is different; no building was entirely destroyed by the flames.

The dictum of the court in *Penn v. Kearny*, 21 La. Ann. 21, can have no weight here. The lease was not canceled, and the lessee was held bound despite the vigorous claim set up by him that he had been discharged because of destruction by fire.

It is true that in *Meyers v. Henderson*, 49 La. Ann. 1547, the lease was annulled. The facts in that case were that the injury to the building leased by plaintiffs from defendants made it entirely unfit for the purposes for which it was leased. "It was a wreck," said the court, "it was not habitable, it was unfit for the storage of goods and merchandise, and it took months to restore it to what it was."

In *Coleman v. Haight*, 14 La. Ann. 570, another case cited for defendants, the question related to the rental and the lease involved in the discussion was not annulled. In fact, there was no claim set up for the annulment of the lease.

The facts upon which the case here turns, is that the work consisted of repairs; that the tenants continued in their occupancy after the fire more days than it would have taken to make

the repairs; that during their occupancy, hindrances were interposed to prevent lessor from making needful repairs. The continued occupancy by the defendants, as a matter of necessity, perhaps, did not render less ³⁸⁴ prominent the reality that they did remain quite a length of time in the building more than actually required for the removal of their property from the leased premises.

The authorities we have consulted (we have consulted quite a number) are not inclined to countenance the dissolution of a lease when the lessor is not at fault: *Dussnau v. Generis*, 6 La. Ann. 279; *Penn v. Kearny*, 21 La. Ann. 23.

We are not impressed by the theory advanced on the part of defendants of abandonment of the lease by the lessor because of the offer made by him to the defendants, of a building to store their property during the time required to make needful repairs. The purpose, as we seize the offer, was to lessen as much as possible the inconvenience to which the tenant had been put by the fire.

With reference to the sign "to let" put up by plaintiff on the front of the building, we do not conclude that it had the meaning and effect contended for by the defendants; the plaintiff testified that his purpose was to minimize the damages—we have no reason to conclude that such was not the case. The plaintiff at all times opposed all indications of defendants' intention to leave the premises. In letters to and also in conversation with them, he declared that they should remain; that they had no cause to dissolve the lease. Putting up a sign "to let" was not good ground of itself under the circumstances; had he gone further and leased to new tenants, it would not have destroyed his recourse against his tenant, if the purpose was to allow for the rent collected: *Holden v. Tanner*, 6 La. Ann. 74.

In the answer to the appeal the appellant asks that the judgment be amended so as to increase the interest allowed from five to eight per cent on the principal allowed by the judgment. We are informed that it was an oversight. The contract of lease stipulating eight per cent was annexed to the petition and shows the amount due as interest and renders it manifest that there was error as stated in preparing the petition. Similar differences arising from error have been amended by reference to the document annexed to and forming part of the petition: *Brumfield v. Morteey*, 15 La. 116; *Smith v. Nash*, 5 La. Ann. 575.

It is ordered, adjudged, and decreed that the judgment appealed from be and it is amended, by increasing the interest al-

lowed from five to eight per cent. As amended the judgment is affirmed at appellee's costs.

DEFINITIONS.—TO REPAIR means to amend or renew, or to restore or make good, an existing thing, not to make a new one: *Wattles v. South Omaha etc. Coal Co.*, 50 Neb. 251; 61 Am. St. Rep. 554.

LANDLORD AND TENANT—DESTRUCTION OF PREMISES—TERMINATION OF LEASE—RIGHT OF ENTRY TO MAKE REPAIRS.—A tenant continues liable for the rent of premises injured by fire so long as any part thereof remains in existence capable of being occupied or enjoyed by him: *Smith v. Kerr*, 108 N. Y. 31; 2 Am. St. Rep. 362. A lease is not terminated by a partial destruction of the leased premises by fire: See monographic note to *Minneapolis etc. Co. v. Williamson*, 38 Am. St. Rep. 483, on what justifies the tenant in abandoning leased premises. The landlord has the right to enter premises injured by fire, to make repairs, if made within a reasonable time, and thereafter the tenant must pay rent: See monographic note to *Wattles v. South Omaha etc. Co.*, 61 Am. St. Rep. 572, on the rights and liabilities of a tenant upon the destruction of leased buildings.

NEW ORLEANS v. KERR.

[50 LOUISIANA ANNUAL, 418.]

MUNICIPAL CORPORATIONS.—THE POWERS AND OBLIGATIONS of municipal corporations are twofold in character—those which are of a public nature, and those which are of a private nature.

MUNICIPAL CORPORATIONS—OBLIGATIONS OF A PUBLIC NATURE.—A municipal corporation, as to the public character of its powers and obligations, represents the state, discharging duties incumbent on the state. Hence, where it acts as the agent of the state, it becomes the representative of sovereignty, and is not answerable for the nonfeasance or malfeasance of its officers.

MUNICIPAL CORPORATIONS—OBLIGATIONS OF A PRIVATE NATURE.—A municipal corporation, with respect to the private character of its powers and obligations, represents the pecuniary and proprietary interests of individuals, and the rules which govern the responsibility of individuals are properly applicable.

MUNICIPAL CORPORATIONS—MALFEASANCE OF OFFICERS—LIABILITY.—A municipal corporation is not answerable, in an action for damages, arising *ex contractu*, for the illegal arrest and imprisonment of the plaintiff, by the police, under the direction of the city officers. Such an act is a tort, and the action based thereon arises *ex delicto*.

MUNICIPAL CORPORATIONS—LIABILITY FOR BREACH OF CONTRACT.—If a city, having the right to impound cattle, grants such right by contract, stipulating therein, as part of the contract, that it will furnish police protection to enable its contractor to perform his duty and to carry out the contract, but fails to do so, it is answerable as for breach of the contract.

MUNICIPAL CORPORATIONS—ACTION UPON CONTRACT—CROSS-ACTION.—If a city sues one having a contract with it for money due upon the contract, the defendant may bring

a cross-action, and, so far as his claim is one sounding in damages arising ex contractu, he is entitled to be reimbursed for the loss he has sustained and the profit of which he has been deprived, to the extent that the proof substantiates the same. That is to say, he may recover such damages as were contemplated or may reasonably be supposed to have entered into the contemplation of the parties at the time of the contract.

MUNICIPAL CORPORATIONS—LIABILITY FOR DEBTS. A city is answerable for debts incurred through its officers, acting within the scope of their authority and the line of their duty.

MUNICIPAL CORPORATIONS—LIABILITY FOR BREACH OF CONTRACT—ELEMENTS OF DAMAGE.—If a city lets the privilege, for a consideration, of impounding cattle, and agrees to furnish whatever police protection is required to carry out the contract, but fails to do so, and by reason of such failure stock, while being driven to the pound, are forcibly taken from the contractor's possession by mobs and lawless people, the city becomes liable for breach of its contract obligation to furnish the protection necessary in the premises. It is also answerable for the rent of pounds, paid by the contractor, but which pounds he could not use, because of a lack of police protection, and for compensation paid by the contractor to employes, drivers, and poundkeepers, during the time that he was without police protection.

John C. Wickliffe and Joseph N. Wolfson, for the appellants.

James J. McLoughlin, assistant city attorney, and Samuel L. Gilmore, city attorney, for the appellee.

414 BLANCHARD, J. This is an action brought by the city of New Orleans against the defendants for a balance due upon a sale or lease of the franchise or right to impound stock within the city's limits, and to receive the fees therefor.

Defendant Kerr, who was the pound contractor, answered that while there was an apparent balance due the city on his contract, he was absolved from liability therefor by reason of flagrant breaches of the contract on the part of the city in failing to give him proper police protection in the discharge of his duties as pound-keeper, without which his contract was unavailing, and in harassing and annoying him through its officers and agents.

Then, assuming the character of plaintiff in reconvention, he set up a claim against the city for nine thousand three hundred and twenty-two dollars and thirty-seven cents for damages accruing to him by reason of the breaches of contract aforesaid. This claim is set forth with much detail. The judgment below was against both parties. It rejected plaintiff's original demand and that of defendant in reconvention. Defendant alone appeals, and the case is before us only as to the reconventional demand of the latter.

Defendant's contract with the city was entered into on the

first of May, 1891, and was for the term of one year. The mayor, who executed the contract on behalf of the city, was specially authorized thereto by ordinances of the city council, and the formal contract was in confirmation of a sale and adjudication of the pound franchise previously made to defendant.

The words used are that the city "does by these presents grant, bargain, sell, and confirm" unto the defendant "the revenues of the public pound" for the period named.

The ordinances of the city relative to the impounding of stock ⁴¹⁵ were referred to in the instrument, and the principal one was copied bodily into it as a part of the contract.

One section of this ordinance declares that all animals found upon the streets contrary to its provisions "are to be taken up by the police, the contractor or his assistants and placed in the nearest pound," et cetera.

Another section provides "that it shall be the duty of the city police to render such service or assistance as may be necessary to the pound-keepers in the discharge of their duty."

Some four or five months after the contract became operative, another ordinance was adopted by the city council, which, after first declaring that experience had shown the impracticability of enforcing the pound contract without proper police protection, and that it was the duty of the city police to render such assistance as was necessary to the pound-keeper, his assistants and employes in the discharge of their duty, proceeded to request the board of police commissioners to instruct the superintendent of police to make a permanent detail of two officers for the purpose.

Still later, and about a month before defendant's contract was to expire, further action was taken by the city council in the form of a motion adopted requesting the mayor to direct the superintendent of police to require the strict enforcement of the preceding ordinance relative to pounds, and calling upon the several recorders of the city to see to the enforcement of the same, and admonished them that in case of failure to do so they would be held amenable to the council for dereliction of duty.

These several corporate acts are practical admissions that theretofore the city ordinances relating to the impounding of stock and the city's obligation to the pound contractor with reference thereto had not been adequately enforced. And the testimony taken leaves no doubt upon the mind of the truth of this fact.

It was not possible to carry out the contract without police

protection and assistance. The contractor, his drivers, and assistants were threatened, assaulted, beaten, and driven off. Cattle and other stock taken up and on their way to the pounds were rescued by mobs. Frequent arrests of the defendant were made on charges of illegal ⁴¹⁶ conduct in carrying out the contract, on all of which charges, save one, he was acquitted, and as to the one upon which he was convicted he was subsequently released on a writ of habeas corpus. Once he was locked up all night and part of a day in the city prison on a trumped-up charge. One of his pounds was broken into by police officers claiming to act under order of the then acting mayor, and a horse impounded released. Other acts of misfeasance and nonfeasance of the police and other city officials, in reference to defendant and his contract with the city, are shown. He was not furnished the necessary police protection and assistance, and for the greater part of the time it was withheld from him entirely. Indeed, it is shown that the then mayor gave an order that no police protection be given defendant, and that because of this order the chief of police refused details of policemen. The record teems with evidence of application after application made by defendant and his attorney for police protection and assistance.

There is no room for doubt that the contractor was ready at all times to carry out his contract, willing and anxious to do so, and zealous in his efforts thereunto. So much so, in fact, that it resulted in numerous complaints lodged against him. That he may in instances have overstepped the limits of a just discretion in the manner of its execution is probable. But there was a proper way of meeting this and of dealing with him in regard thereto without withholding the protection and aid of the police necessary to the legitimate execution of his duties under the contract and guaranteed to him by the instrument evidencing the same.

The amount he was to pay to the city monthly under his contract was thirty-one dollars. That he did not pay all the monthly installments and owed a balance of two hundred and seventy-one dollars, which the city sued for herein, is explained by him on the ground of the city's failure to meet its obligations to him under the contract.

The way defendant was to be compensated for the work done under his contract was by fees collected on animals impounded, and the evidence shows the franchise was a valuable one, and, perhaps, ⁴¹⁷ lucrative, if adequate police protection and assistance had been extended to him.

The powers and obligations of municipal corporations, like the city of New Orleans, are twofold in character—those that are of a public nature and those that are of a private nature. This court by repeated decisions has recognized this distinction: *Egerton v. Third Municipality*, 1 La. Ann. 437; *Stewart v. New Orleans*, 9 La. Ann. 461; 61 Am. Dec. 218; *Lewis v. New Orleans*, 12 La. Ann. 190; *Howe v. New Orleans*, 12 La. Ann. 482; *Bennett v. New Orleans*, 14 La. Ann. 120; *New Orleans etc. R. R. Co. v. New Orleans*, 26 La. Ann. 478. As to the first, or public character of its powers and obligations, the municipal corporation represents the state—discharging duties incumbent on the state. As to the second, or private character of its powers and obligations, the municipal corporation represents the pecuniary and proprietary interests of individuals.

As to the first, where a municipal corporation acts as the agent of the state, it becomes the representative of sovereignty and is not answerable for the nonfeasance or malfeasance of its public agents. As to the second, the rules which govern the responsibility of individuals are properly applicable: 15 Am. & Eng. Ency. of Law, p. 1141; *Western College v. Cleveland*, 12 Ohio St. 375; *Rusher v. Dallas*, 83 Tex. 151; 16 S. W. Rep. 333; *Whitfield v. Paris*, 84 Tex. 431; 31 Am. St. Rep. 89; *O'Rourke v. Sioux Falls*, 4 S. Dak. 47; 46 Am. St. Rep. 760; *Gianfortone v. New Orleans*, 61 Fed. Rep. 64; *New Orleans v. Abbagnato*, 62 Fed. Rep. 240.

In the instant case one of the items of damage claimed by defendant is one thousand dollars for his illegal arrest and imprisonment by the police under the direction of the city officers. Under the distinction between the powers and obligations of the city above noted, no liability attaches to her on account of this act of malfeasance of her officers: *Stewart v. New Orleans*, 9 La. Ann. 462, 61 Am. Dec. 218; *Lewis v. New Orleans*, 12 La. Ann. 190; 2 Dillon on Corporations, sec. 975.

This was a tort and the action based thereon arises *ex delicto*. But as regards other items of damage claimed (to be noted later), the action to enforce same arises *ex contractu*; and the city is liable: *Vidalat v. New Orleans*, 43 La. Ann. 1122; 2 Dillon on Corporations, secs. 935, 980, 981, 983.

The city had the right to impound cattle; it comes within the police powers of the city: 10 Am. & Eng. Ency. of Law, 137. It is necessary to insure cleanliness and the public safety. Having the power to do this itself, it could let out by contract and did so, and stipulated as part of the contract that it would

furnish police protection to enable its contractor to perform his duty and carry out ⁴¹⁸ the contract. Failing to do this, it is liable as for breach of the contract.

While not liable for the nonfeasance of its officers in a general sense, it is liable for debts incurred through its corporate agents acting within the scope of their authority and the line of their duty. It is on this principle that it is liable to defendant for failure of its obligation to furnish him the means of fulfilling his contract, upon which depended alike the performance of his duty to the city and the realization to himself of the profits of the enterprise.

In *La Rosa v. Mayor*, 4 La. 24, it was held that when the city of New Orleans made an adjudication of a certain right, if done in reference to and conformity with an ordinance of the city council, it imposes all the obligations and confers all the rights created by the ordinance: See, also, *Johnson v. Municipality*, 5 La. Ann. 100; *McLaughlin v. Municipality*, 5 La. Ann. 504.

If we view the city as vendor of this franchise to the defendant, then she is liable for breach of the warranty respecting the buyer's peaceable possession of the thing sold: Civ. Code, secs. 2476, 2500 et seq. If we view the city as lessor of the right, then she is liable for breach of her obligation to cause the lessee to be in peaceable possession of the thing during the continuance of the lease: Civ. Code, secs. 2692, 2696.

So far as defendant's reconventional claim is one sounding in damages arising ex contractu, he is entitled to be reimbursed the loss he has sustained and the profit of which he has been deprived, to the extent that the proof substantiates the same. That is to say, he may recover such damages as were contemplated or may reasonably be supposed to have entered into the contemplation of the parties at the time of the contract: *Vidalat v. New Orleans*, 43 La. Ann. 1128; Civ. Code, sec. 1934; *Arrow-smith v. Gordon*, 3 La. Ann. 105; *Gobet v. Municipality*, 11 La. Ann. 300.

Defendant claims twenty-five dollars for the destruction of his pound in the fifth municipal district. The evidence does not establish this item with sufficient certainty, and it is disallowed. The same is true of the claim for twenty dollars, amount of pound fees said to have been collected in the fifth district, and which officers of the city are alleged to have compelled his representative to refund. and the claim for twenty-five dollars for pound fees on stock represented to have been turned out of said pound by the city's representative. ⁴¹⁹ Both items are disallowed.

The claim of one thousand and fifty dollars for pound fees upon four hundred and twenty head of stock, taken up by defendant, and which, while being driven to the pound, were rescued and taken from his custody by mobs and lawless people, is made out and must be allowed.

Under the pound ordinances of the city and under his contract, the moment stock running at large were apprehended by the poundkeeper, his right to the pound fees attached; and if, by reason of the lack of sufficient police assistance, such stock is forcibly taken from his custody, the city became liable for breach of its contract obligation to furnish the protection necessary in the premises. Moreover, the stock being apprehended and his claim to the fees having attached, the latter became a right of property, for damages to which by mobs and riotous assemblages the city is responsible under the statutory law: Rev. Stats., sec. 2580.

The claim of four thousand eight hundred and thirty-five dollars and thirty-seven cents for pound fees alleged to have been lost by reason of the city's failure to furnish police protection during two hundred and sixty-seven days of the contract cannot, on a review of the whole evidence, be held to be made out with sufficient certainty. This item is asserted under the head of "profit of which he has been deprived," and was calculated on the basis of the contractor's earnings on the days when he did have police protection: See *Schleider v. Dielman*, 44 La. Ann. 462.

On the next item, twelve hundred and eighty-seven dollars for the rent of the pounds during the two hundred and sixty-seven days when defendant could not use them because of lack of police protection, nine hundred and thirteen dollars is allowed, being the amount defendant testifies he actually paid out for such rent during that time. This is a damage for which the city must be held liable. The pounds were useless without the police protection necessary to enable defendant to impound stock, and defendant could not give up the pounds and save the expense, for he could not foresee that the policy of withholding police protection would continue. He was compelled to be ready himself to perform his duty at all times, and one of the requisites to this end was the maintenance of pounds for the detention of stock.

With regard to the last item, one thousand and eighty dollars, ⁴²⁰ compensation to employes, drivers and pound-keepers during the time defendant was without police protection, the evidence does not establish with certainty that this much is due.

We are satisfied, however, that defendant is entitled to an allowance under this head, and will put it at one-half of the sum claimed, or five hundred and forty dollars. The city is liable for this on the same principle that the claim for rent of the pounds is sustained.

We have given due consideration to the several defenses urged on part of the city against the reconventional demand, but are constrained to hold that so far as this claim is herein sustained they have not been found to be applicable.

It is, therefore, ordered, adjudged, and decreed that the judgment appealed from, in so far as the same rejects in whole the demand in reconvention, be annulled, avoided, and reversed, and it is now ordered that defendant, George P. Kerr, do have and recover of the city of New Orleans, on his demand in reconvention, the sum of two thousand five hundred and three dollars, with legal interest thereon from judicial demand, to wit, September 10, 1892, together with costs in both courts.

MUNICIPAL CORPORATIONS—TWOFOOLD NATURE OF POWERS AND OBLIGATIONS.—A municipal corporation has a dual character. It possesses two kinds of powers—one governmental and public; the other private. The former are given and used for public purposes; the latter for private purposes. While in the exercise of the former the corporation is a municipal government; in the exercise of the latter it is a corporate legal individual: Note to *O'Rourke v. Sioux Falls*, 46 Am. St. Rep. 765; *Springfield etc. Ins. Co. v. Kesseville*, 148 N. Y. 46; 51 Am. St. Rep. 667.

MUNICIPAL CORPORATIONS—LIABILITY ON CONTRACTS. With respect to the exercise of its governmental powers, a municipality is exempt from liability in an action by a private individual. It is otherwise with the exercise of powers of a private and nongovernmental character: *Springfield etc. Ins. Co. v. Kesseville*, 148 N. Y. 46; 51 Am. St. Rep. 667. A city when acting in its private capacity, as contradistinguished from its governmental capacity, is bound by its contracts, and may be estopped by the conduct of its proper officers when acting within the lawful scope of their powers: Note to *In re Pryor*, 49 Am. St. Rep. 284.

MUNICIPAL CORPORATIONS—MALFEASANCE OR NONFEASANCE OF OFFICERS—LIABILITY FOR.—The officers of a city are quasi civil officers of the government, although appointed by the corporation. They are personally liable for their malfeasance or nonfeasance in office, but for neither is the corporation responsible: See monographic note to *Goddard v. Harpswell*, 30 Am. St. Rep. 411, on the liability of cities for the negligence and other misconduct of their officers and agents; and compare note to *O'Rourke v. Sioux Falls*, 46 Am. St. Rep. 765.

MCGRAW v. TEXAS AND PACIFIC RAILROAD COMPANY.

[50 LOUISIANA ANNUAL, 466.]

RAILROADS — LEAVING OBSTRUCTING CARS ON TRACK WITHIN "YARD LIMITS"—NEGLIGENCE—LIABILITY OF COMPANY.—If cars have been switched, in the night-time, onto the main track of a railroad, even within the yard limits, so as to obstruct the track, menacing the lives and limbs of trainmen, and an extra freight train, dispatched to pass through the yard, at night, comes into it, at reduced speed, and collides with such obstruction, which was not seen until a few moments before the collision and too late to avoid it, the railroad company must be deemed to have been negligent where there was no preceding notice, or light displayed, or flagman posted, to make known the obstruction to the approaching train, and especially where the train was dispatched with an insufficient number of air-brake cars. The company is, therefore, answerable in damages to a fireman who jumped from the engine, in the presence of imminent danger, and was injured.

RAILROADS — TRAINMEN ARE ENTITLED TO NOTICE OF OBSTRUCTING CARS LEFT ON TRACK WITHIN "YARD LIMITS"—ASSUMPTION OF RISK.—The trainmen of an extra freight train, dispatched at night to pass through "yard limits," though at reduced speed, may well deem themselves entitled to notice of cars, blocking their way and menacing their lives and limbs, which have been switched onto the main track, particularly where it is customary to flag obstructed tracks in the daytime. Such obstructions are not one of the risks assumed as incident to their employment.

MASTER AND SERVANT—ASSUMPTION OF RISK—OBSTRUCTING CARS LEFT ON RAILROAD TRACK WITHIN "YARD LIMITS."—A master cannot invoke the servant's assumption of usual risks, where he has not complied with the obligations resting on him to secure the safety of the servant in performing his duties. Hence, if cars have been switched, at night, onto the main track of a railroad, though within the "yard limits," and an extra freight train, with an insufficient number of air-brake cars, is dispatched to pass through the yard at night, with no preceding notice of the obstruction blocking the way, and no warning given of it, and injury is caused to a fireman, who jumps from the engine a moment before a collision to avoid it, the company cannot invoke the defense, in an action for such injury, that the accident was one of the risks assumed incident to the fireman's employment.

Joseph N. Wolfson, J. F. Pierson, and T. M. Gill, for the appellant.

Howe, Spencer & Cocke, for the appellee.

466 MILLER, J. The plaintiff appeals from the judgment dismissing his suit for damages caused by bodily injuries he claims to have sustained **467** from the collision of the locomotive engine of which he was a fireman pulling one of defendant's freight trains, with a train of cars placed on the tracks by defendants' agents. The petition alleges the collision was due entirely to the gross negligence for which defendants are respon-

sible, and the answer is the general issue, and the averment that the negligence, if any, was that of defendant or his fellow-servant, for which defendants are not liable.

The train that collided with the cars placed on the tracks, as we understand the testimony, having the right of way except of passenger trains, was dispatched at a late hour of night from the depot or yard opposite the city to Boyce, Louisiana; proceeding on its route, the train, consisting of thirty-four cars, encountered the cars placed on the track by the switch-engine engaged in transferring cars to defendants' yard, and it is claimed the collision occurred in the yard limits; the engineer's testimony is, that his train was running about eight or ten miles an hour; that five of the eight cars with air brakes with which his train was provided had been cut out, of which he had no knowledge until the train had started, and there is no substantial variance in the testimony that the cars blocking the track were perceived but a few moments before the collision, and too late for its avoidance; the quick apprehension of that which must have occurred prompted the exclamation from the engineer: "We are in for it," and he as well as the plaintiff jumped from the engine, he thereby receiving the injuries of which he complains, and the jump, under the testimony, was none too soon. It is claimed by the defendants that the collision occurring in what are termed yard limits, the rule of the company was for trains to stop at the bridge west of these limits, and go through at reduced speed, and the neglect of the engineer, the fellow-servant of plaintiff, it is insisted, caused the accident, but it admits of no dispute that the signal was displayed for the approaching train to cross, that the speed was reduced, and that when the train came on the blocking cars there was no preceding notice or light displayed, or flagman posted to make known the obstruction, and the current of the testimony is that the plaintiff's jump was in the presence of the imminent danger, verified by the quickly following collision. As to the injuries to plaintiff, the testimony of his physician and others is, that his leg was injured; that he was bruised, confined for a few days, received medical attention; but on a careful consideration of all the testimony on this point ⁴⁶⁸ we are not impressed with the tendency of the testimony to show permanent injury.

Our attention is directed to the testimony that after the suit was brought and plaintiff had testified, he sought defendants to obtain money, or a position on the road, and made statements

he had sustained no injury and would withdraw his suit. We have his affidavit to the contrary, and the lower court was so impressed with the testimony that it declined to permit the plaintiff to go on the stand to testify to that which occurred. We have no power to dismiss the suit because of this episode. If plaintiff has any right to recover, it depends on facts connected with the accident resting on testimony of others, and in weighing that relating to his injuries we shall be careful to give his statements no weight greater than the force suggested by the testimony coming from the physicians and others cognizant of the actual facts.

It is contended on behalf of defendants that this accident, occurring within yard limits extending a distance of eight hundred feet, is to be considered in connection with the alleged rules of the company authorizing the switching, on the tracks in yard limits and in the night-time, of cars detached from the engine, without lights, signals, or notice of any kind to approaching trains and without instructions to those who must run trains, or to those who place such obstructions on the tracks, of the coming of the trains, that must eventually come in contact with the cars in the way. The rule contended for in argument is, in effect, that no other protection to the life and limbs of railroad employes of trains moving in the night-time, through yard limits, is required, to guard against obstructions on the tracks placed there by other employes, than the reduced speed at which the trains must run, or, as the witnesses express it, such trains must be under control. Any other or further protection under the rule as it is presented in argument must be found in the quickness of vision to see in the dark an obstructed track, and in stopping the train in the interval, however short, between perceiving and actual contact with the obstruction. The rule thus contended for, known, it is claimed, to plaintiff and all employes of the company, it is insisted, placed on him the risk of the accident, under the principle that the servant takes all the risks incident to his employment: *Thompson on Negligence*, 927; *Bailey on Master and Servant*, 152. The testimony fails to impress us that the rules of the defendant carried the significance ⁴⁶⁹ to their employes of the assumption by them of the risk of night obstructions of the tracks, even in the yard limits, with no lights displayed, or notice of any kind of such obstructions so menacing to life and limbs of trainmen. That the trains should move at slackened speed through yard limits, testified to as the rule of the company, could hardly be deemed to

carry the notice that trainmen required to pass over the tracks in the night-time must expect to encounter impediments in the way, of a character to endanger their lives, and with no notice or warning of the danger. Nor do we find the testimony supports the rule with the significance attached to it in the argument. As we read the testimony of the defendants' witnesses, we derive the impression that it was customary, when the main tracks in the yard limits were obstructed, to flag approaching trains, as we find it put by one of the witnesses "to send flags each way." As to night obstructions, there cannot be said to have been any custom, for, as we find it in effect from another of defendants' witnesses, no such obstruction as cars left on the main track had occurred in the four years of his employment. If customary to flag in the daytime obstructed tracks, manifestly the trainmen of this extra freight dispatched at night to pass through the yard limits, though at reduced speed, might well deem themselves entitled to notice of the cars blocking their way and menacing their lives. In our view, the defense fails that presents the accident that resulted in plaintiff's injuries as one of the risks he assumed incident to his employment.

Again, when the servant is deemed to have assumed the risk of the accident causing the injury, the law supposes the master has complied with the obligations resting on him to secure the safety of the servant in performing his duties. The failure of the master in this respect will leave him without defense on the ground of the servant's assumption of usual risks: 2 Thompson on Negligence, 970, 985. This obligation of the master in connection with the servant's assumption of risks has had frequent illustration, and as respects railroads, may be well applied, we think, to reasonable precautions to guard against obstructed tracks. In this case, we find as pertinent to the discussion that no notice is sent by the proper employes, not fellow-servants of the plaintiff, to those in charge of the yard of the coming of the extra freight that encountered the obstruction within an hour from the time it was dispatched at night to pass over the tracks; ⁴⁷⁰ nor was any notice given by those not fellow-servants of plaintiff to those who dispatched the night train of the cars placed on the track. These notices were reasonable precautions not within the plaintiff's duties, and which, it is to be presumed, would have averted the accident. Further, we have a freight train of thirty-four cars dispatched with but three air-brake cars, insufficient, it is our conclusion, to arrest in suitable time the train, if, indeed, the accident could have been avoided

with a greater number of cars provided with air-brakes. We think in these aspects the negligence of the defendant is also exhibited.

It is claimed that it was the negligence of the engineer with whom the plaintiff was associated in the duty of running the engine that caused the collision. We pass over the authorities cited in the brief to show that the engineer was the fellow-servant of plaintiff, and in law the negligence of one was equally that of the other. Accepting the legal conclusion, the inquiry remains, What was the asserted negligence? The canal bridge, crossed on entering the yard limits, it is claimed, called for a full stop. We find, however, it was not crossed until the appropriate signal was given. It is urged the movement of the cars through the yard should have been under the rules six or eight miles an hour. The testimony of the engineer and conductor, most reliable, we think, was, the cars were moving at reduced progress, eight or ten miles an hour. The difference between the asserted rule rate, and the actual movement, if any, in our opinion, based on the testimony, is not to be deemed a factor in causing the accident, inevitable, we think, irrespective of the rate at which the cars were pulled. In every point of view, we think the negligence of defendants must be deemed the cause of the contact, to avoid which plaintiff jumped from the engine, and the jump, under the circumstances, does not lessen defendants' responsibility, more serious, it might well be, if plaintiff had awaited the actual contact that quickly followed.

This record affords no warrant for other than actual damages. Under the testimony, it is our conclusion the plaintiff received no permanent injuries. The pain he suffered, the loss of time during the period of his confinement, the expenses of medicines and medical attention, make up the basis for damages. In our opinion five hundred dollars is adequate compensation for his injuries.

It is therefore ordered, adjudged, and decreed that the judgment of ⁴⁷¹ the lower court be avoided and reversed, and it is now ordered, adjudged, and decreed that the plaintiff do have and recover from the defendant five hundred dollars, with legal interest and costs.

RAILROAD COMPANIES AS MASTERS—SAFE PLACE TO WORK—ASSUMPTION OF RISK.—It is the duty of a railroad company to make such provisions for the safety of its employes as will reasonably protect them against the dangers incident to their employment: *Norfolk etc. R. R. Co. v. Houchins*, 95 Va. 398; 64 Am. St. Rep. 791, and note. A railroad company, like any other employer,

must use ordinary and reasonable care not to subject its servant to unreasonable danger by putting him at work on dangerous premises, or with dangerous appliances. If it fails in this respect, and the servant is injured in consequence of such failure, without fault on his part, and without having voluntarily assumed the risk of the company's negligence, with full knowledge, or competent means of knowledge of the danger, he is entitled to recover: *Whipple v. New York etc. R. R. Co.*, 19 R. I. 587; 61 Am. St. Rep. 796; note to *St. Louis etc. R. R. Co. v. Irwin*, 1 Am. St. Rep. 274. And an employé does not assume the risks of dangers which are known to, and can be avoided by, the exercise of reasonable care on the part of his employer: *Promer v. Milwaukee etc. Ry. Co.*, 90 Wis. 215; 48 Am. St. Rep. 905, and note.

RAILROAD COMPANIES—MOVING CARS—OBSTRUCTIONS LIABILITIES FOR INJURIES—STATION YARD.—It is the duty of a railroad company to frame, promulgate, and enforce such rules for the moving of its trains and cars, especially while its employés are working in its yard at night, as will afford reasonable safety to operatives engaged in moving them, and for a failure to do this it is answerable to an employé injured in consequence of such failure: *Promer v. Milwaukee etc. Ry. Co.*, 90 Wis. 215; 48 Am. St. Rep. 905, and note. An employé is not required to know all defects and obstructions of the road on which he is employed: *St. Louis etc. R. R. Co. v. Irwin*, 37 Kan. 701; 1 Am. St. Rep. 266.

STATE v. FONTENOT.

[59 LOUISIANA ANNUAL, 587.]

HOMICIDE—BAD CHARACTER OF DECEASED FOR PEACE AND QUIETNESS.—When one indicted for murder sets up in support of his plea of self-defense that the deceased was a man of violent and dangerous character, the testimony must be confined to proof of the general character of the deceased for peace and quietness, and particular acts of violence on his part must, therefore, be excluded.

HOMICIDE—OPENING THE DOOR FOR EVIDENCE OF PARTICULAR ACTS OF VIOLENCE ON THE PART OF THE DECEASED.—Although a witness in a murder case, where the plea is self-defense, and the bad character of the deceased for peace and quietness is relied upon, testifies as to particular acts of violence, on the part of the deceased, the prosecuting officer does not open the door for the admission of such testimony by merely asking the witness, on cross-examination, whether he ever heard that the deceased had harmed anyone.

HOMICIDE—EXPERT TESTIMONY—CUTS IN CLOTHING OF THE DECEASED.—Upon the trial of a person accused of murder, the question as to whether cuts in the clothing of the deceased indicate that he was stabbed while erect, confronting the accused, or after he had been pushed and had fallen backward into the arms of a witness, is not a proper one for expert testimony, and there is no error in excluding the opinion of a witness concerning it.

HOMICIDE—INSTRUCTIONS ASSUMING FACTS.—A request in a murder case which assumes that the accused has made out a case of self-defense is properly refused.

INSTRUCTIONS—CRIMINAL CASES—IDENTICAL LANGUAGE—REPEATING.—A court, in a criminal case, is not required to instruct the jury in the words requested by counsel for the ac-

cused, nor to repeat charges which have, in effect, already been given.

HOMICIDE — INSTRUCTIONS — REVERSAL.— After the jury, in a murder case, has been fully and correctly instructed as to the law of self-defense, its verdict will not be disturbed because the trial judge refused instructions, as to self-defense, requested by the accused, where they were covered by the general charge.

W. C. Perrault, E. P. Veazie, and P. S. Pugh, for the appellant.

M. J. Cunningham, attorney general, and R. Lee Garland, district attorney, for the appellee.

538 **MILLER, J.** The accused, sentenced for life imprisonment for murder, takes this appeal.

A number of bills of exception reserved on behalf of the accused are to the exclusion of questions seeking testimony of the character of the deceased for peace and quietness. It seems to be conceded that, under the circumstances detailed in the bills, testimony was admissible on behalf of the accused that the deceased was of violent character, but the discussion in this court is as to form of the questions propounded on this subject. We think it clear that when, in support of self-defense by the accused indicted for murder, the law permits testimony impugning the character of the deceased for peace and quietness, the testimony must be confined to his general reputation in that respect: 3 Rice on Evidence, secs. 476, 482. An examination of the questions under discussion show the purpose to elicit testimony of previous difficulties of the deceased, of violence displayed by him in saloons, and relating to other acts of the deceased claimed to be pertinent on the issue of his character for peace and quietness. But on that issue it is not competent to give in evidence particular acts of the deceased: 3 Rice on Evidence, secs. 476, 482. It is insisted the state had opened the way for such proof. The state had not sought to put any questions touching the character of the deceased, least of all referring to the particular acts the subjects of the questions propounded on behalf of accused. The questions as to particular acts were put to the witnesses for the state on their cross-examination. On their re-examination on the point thus introduced by the defense on cross-examination, the district attorney asked the witnesses who had testified to the dangerous character of the deceased whether they had "ever heard that deceased harmed anyone." We do not understand that this question to which the district attorney confined himself, on the issue of the charac-

ter of the deceased assailed by the defense, transcended the limit allowed him in re-examining witnesses on a point brought out on cross-examination, or entitled the defense to prove particular acts of violence on the part of the deceased. Nor can we perceive that the testimony of such acts were admissible, because of the ⁵³⁹ proof of the exclamation of the deceased to accused "You have stabbed me!" Therefore, in our view, the lower court did not err in excluding the testimony proposed to be given of such acts, and in confining the defense to proof of the general character of the deceased for peace and quietness.

Another bill reserved by the accused is to the exclusion of questions put to a witness who had examined the clothes worn by the deceased when he was killed, the opinion of the witness being sought whether, from that examination, the cuts exhibited by the clothing were received while the deceased was erect or reclining. The testimony of the state tended to show that the deceased, giving the first blow, was shoved by the accused, fell back in the arms of one of the testifying witnesses, and, while the deceased was in that position, was stabbed by the accused. It is claimed in the argument for the accused that the cuts in the clothes would have been higher if received when the accused had fallen back than the cuts would have been if the cuts had been received while the deceased was erect, confronting the accused. It was proper for the witness to have described the cuts in the clothing, from which the jury could have drawn any inference the cuts might be deemed to indicate. But the subject, in our view, was not one in reference to which expert testimony was admissible, and hence there was no error in excluding the opinion of the witness. There is another bill reserved to the statement of one of the witnesses, substantially, that the accused and deceased were angry, elicited by the question whether they were angry or cool and collected. We think the question referred to the fact, i. e., condition of the combatants, and not to the opinion of the witness, and question and answer were unobjectionable.

There are bills in the record to the refusal of certain requested charges. One instruction required the definition of the overt act of hostility by the deceased to be considered in connection with self-defense urged by the accused. The instruction asked was, that the overt act was a hostile demonstration of a character to create belief of the accused he was about to lose his life or suffer great bodily harm at the hands of deceased, and this belief could have been entertained honestly by accused, though

deceased did not strike or come within striking distance of the accused. The court had charged fully on the law of self-defense and in the course of which had stated, in effect, "to justify killing the accused must have been ⁵⁴⁰ in real or apparent danger existing at the time of the killing; the killing must have been absolutely or apparently necessary to protect the life or limbs of the deceased, and further, the court instructed that by imminent danger was meant such overt actual demonstration as makes killing necessary to self-preservation; that it was not necessary danger should, in fact, exist, but such actual danger as it might appear to defendant's comprehension as a reasonable man, and the apprehension of danger by the accused must be on grounds sufficient to satisfy a reasonable man his life or limbs were in peril or great bodily harm was about to be inflicted on him, or, in other words, the trial judge put it that the killing was the bona fide attempt to protect the accused from impending danger." Between the charge asked substantially, that the overt act of hostility to justify killing must be of a character to impress accused he was about to lose his life or suffer great bodily harm, and that given by the court, we think there is a difference only of language, not of substance, and in another part of the charge the instruction given was that to constitute self-defense the actual striking of the blow is not requisite, nor that the assailant should be in striking distance.

We are informed by the bills that the deceased and the accused became involved in a quarrel over a game of cards in a saloon; the deceased giving the first blow, the accused was shoved back against the wall; that in turn accused shoved deceased, who fell backward in the arms of one of the testifying witnesses, and the testimony, it is claimed, tends to show that in that position the deceased was stabbed by the accused, the deceased exclaiming at the moment, calling the accused by name: "You have stabbed me!" The bills show there was testimony that deceased was of superior strength and size, that he was of dangerous character; that the saloon, the scene of the difficulty, had but one door, that opening into the front room, and the testimony, it is claimed, tended to show the way to the door was obstructed.

In this condition of the proof, the charge of the court presented the law of self-defense, and dealt with particularly on the phase of the excuse for the mortal stab, when from the nature of the attack the life or limbs of the party assaulted is endangered, and when retreat is impracticable, or would add to that danger. On behalf of the accused, the special charge was asked,

substantially, that proof of the disparity of size and strength of the deceased and the ⁵⁴¹ accused, and of the dangerous character of the deceased, can only be offered when the prima facie case of self-defense is made, and after it has been shown the deceased was the attacking party. And that "proof of the size and strength of the two men tended to show the dangerous character of the deceased had been offered." The instruction requested, in our view, carried the implication the accused had made a case of self-defense, and we think was properly refused. On behalf of the accused, the charges were also requested, in substance, that a person free from fault, assaulted by another, who manifests his purpose by violence to take the life of the party assaulted, or to do him great bodily harm, and no retreat on his part is practicable, then the assaulted party is not obliged to retreat, but may pursue his adversary until secured from danger, and, if he kill the adversary in so doing, the killing is self-defense. Again, the charge was requested that "knowledge by the accused that deceased was violent, dangerous, and vindictive and of superior strength was sufficient to form the well-grounded belief of the accused of imminent danger of his life or of great bodily harm, and will excuse killing when, superadded to such knowledge, he is assailed and when the deceased shows an intent to take the life of the accused or subject him to great bodily harm"; and again, there was asked on behalf of the accused, the charge in substance, that even if the deceased did not intend to take the life of the accused, but only to beat him, yet if the beating was of a character to imperil life or limb, accused was justified in killing the deceased. Some portions of these requested charges, we think, manifestly deal with the effect of the proof stated to have been administered, and of that effect the jury and not the court was to determine. A careful examination of the charge of the court brings us to the conclusion the law of self-defense was fully given. Thus the court had instructed "that a person suddenly assaulted and in imminent danger of life or great bodily harm, and where such imminent danger would be the apparent consequence of waiting for the assistance of the law, and with no practicable means of escape, kills the assailant, the killing would be self-defense, and, therefore, if the slayer was closely pressed by the deceased, retreated as far as he could conveniently or safely in good faith, with the honest intent to avoid the violent assault, and believing himself in imminent danger of his life or great bodily harm, kills assailant, the killing is excusable homicide." The court further ⁵⁴²

instructed that a person need not avoid danger by flight, if not the "provoker" or aggressor; if in fault, "he is bound to retreat as far as practicable consistently with his own safety, unless prevented by the fierceness of the assault, when, if to save his life he kills his adversary, the killing is excusable homicide; that in case of personal conflict to justify homicide it must appear the party killing had retreated as far as he could, or as far as the fierceness of the attack permitted, but that retreat was not required where one stands on his own right nor where retreat would add to his danger," and the court continued on the same line its instruction as to self-defense. The charge as given was not excepted to, and in our view it substantially gives the law on the subject: 1 Archbold's Criminal Law, 225; State v. Chandler, 5 La. Ann. 489; 52 Am. Dec. 599. The requested charges present the law in different language, but the court is not required to instruct in the frame prepared by the counsel for the accused, nor repeat charges already in effect given: State v. Roberts, 10 La. Ann. 264; State v. Melton, 37 La. Ann. 77; State v. Garic, 35 La. Ann. 970; State v. Boasso, 38 La. Ann. 206. We can find no error in the refusal to instruct as requested on behalf of the accused.

The bill to the refusal to charge that whether a man is threatened with imminent danger he alone must determine the necessity of self-defense, we think too broad. The law is, there must have been reasonable ground to believe the life of the person assailed is in danger or great bodily harm threatened, with other qualifications unnecessary to be stated, to justify the killing of the assailant: 1 Archbold's Criminal Law, 225; State v. Chandler, 5 La. Ann. 489; 52 Am. Dec. 599.

Our attention has not been directed to that part of the charge respecting malice deemed objectionable. The special charge asked on that point we think fully covered by the general charge, and no insufficiency in it is pointed out to render special instructions requisite, nor does our examination discover any such necessarily.

It is therefore ordered, adjudged, and decreed that the sentence of the lower court be affirmed.

HOMICIDE—CHARACTER OF DECEASED FOR VIOLENCE. In a trial for homicide, where the plea of self-defense is set up, evidence of the character of the deceased for violence must be confined to evidence of his general character and reputation, and this cannot be established by proof of specific acts: Powell v. State, 101 Ga. 9; 65 Am. St. Rep. 277. and note; Miller v. Curtis, 158 Mass. 127; 35 Am. St. Rep. 469. Compare note to People v. Lennon, 15 Am. St. Rep. 263.

INSTRUCTIONS ASSUMING FACTS SHOULD BE REFUSED: Arneson v. Spawn, 2 S. Dak. 269; 39 Am. St. Rep. 783; note to Sharp v. State, 14 Am. St. Rep. 44; Western Union Tel. Co. v. Cooper, 71 Tex. 507; 10 Am. St. Rep. 772.

INSTRUCTIONS—EXACT LANGUAGE—REPEATING.—A court is not bound to instruct a jury in the exact language requested, even when the instruction requested is proper: State v. Hoxsle, 15 R. I. 1; 2 Am. St. Rep. 838. If an instruction has been given on a point, it is not error to repeat it: Joseph v. Smith, 39 Neb. 259; 42 Am. St. Rep. 571.

INSTRUCTIONS COVERED BY THE GENERAL CHARGE need not be given, and it is not error to refuse a request for such instructions: Galveston etc. Ry. Co. v. Gormley, 91 Tex. 393; 66 Am. St. Rep. 894; Gibson v. Minneapolis etc. Ry. Co., 55 Minn. 177; 43 Am. St. Rep. 482; Tyler v. Hall, 106 Mo. 313; 27 Am. St. Rep. 337.

WITNESSES.—EXPERT EVIDENCE SHOULD BE RESTRICTED to those cases where its use is wellnigh indispensable because of questions of science or skill being involved, in which a special and peculiar knowledge is desired, in order to arrive at the exact truth: McNally v. Colwell, 91 Mich. 527; 30 Am. St. Rep. 494.

STATE v. BELLARD.

[50 LOUISIANA ANNUAL, 594.]

TRIAL—CRIMINAL CASE—CONSTRUCTION OF VERDICT.—In construing a verdict, the court cannot go beyond the words used by the jury, giving to them their natural significance. Hence, a verdict of "striking with intent to kill" will not support a sentence for "striking with a dangerous weapon with intent to kill."

EVIDENCE—RES GESTAE—EXCLAMATIONS OF THIRD PERSONS.—When a difficulty occurs, resulting in a shooting, killing, or other alleged offense, the exclamations of bystanders, made at the time, are not admissible in evidence, as part of the res gestae, though it is claimed that they "characterized" the act, showing that it was not done by the accused, but by others.

CRIMINAL LAW—INCLUDING A LESSER OFFENSE WITHIN A GREATER.—A jury is not authorized to return a verdict of "assault," under an indictment for "striking with a dangerous weapon with intent to kill and murder."

INDICTMENT—STRIKING WITH A DANGEROUS WEAPON WITH INTENT TO KILL—SUFFICIENCY.—In an indictment for "striking with a dangerous weapon with intent to kill and murder," it is unnecessary to qualify both the striking and then the intent by the words "willfully, feloniously, and of his malice aforethought." If these words are used to qualify the intent, and the word "feloniously" to qualify the striking, the indictment is sufficient.

E. P. Veazie and E. S. Pugh, for the appellant.

M. J. Cunningham, attorney general, R. Lee Garland, district attorney, and P. A. Simmons, Jr., for the appellee.

594 MILLER, J. The accused, sentenced for "striking with intent to kill," under an indictment for striking with a dangerous weapon with intent to kill and murder, takes this appeal.

One of the bills of exception reserved on behalf of the accused presents the question whether the verdict "of striking with intent to kill" supports the sentence prescribed by the statute the lower court deemed applicable, defining the offense of striking, thrusting, stabbing, or cutting with a dangerous weapon with intent to kill: Acts 1890, No. 44. This act, as well as Act No. 43 of 1890 and sections 790, 791, 793, and 794 of the Revised Statutes, deals with the different ⁵⁹⁵ phases of shooting, stabbing, et cetera, with intent to kill or murder, but "with a dangerous weapon" is part of every definition of the offense. The verdict in this case entirely omits "with a dangerous weapon," and is a specific finding "guilty of striking with intent to kill." The serious question is, Can we sustain this verdict as conforming to the statute under which the lower court pronounced sentence; in other words, can we supply "with a dangerous weapon"? In a recent case of an indictment under Act No. 43 of 1890, where the verdict was "guilty with intent to kill," we held "guilty" was qualified only in respect to the intent; that is, there was a verdict of guilty of the charge, but a special finding as to the intent. Thus construed, the verdict conformed to Act No. 44 of 1890, which substitutes "intent to kill" for the more serious "intent to murder," used in section 791 of the Revised Statutes and Act No. 44 of 1890. In this case we cannot, in any reasonable interpretation of language, refer "guilty" to the crime charged of striking with a dangerous weapon with intent to kill or murder, for the finding is "guilty of striking with intent to kill." We are forbidden in construing the verdict to go beyond the words used by the jury, giving to the words their natural signifi-^{ance}; that is, in this case, we cannot read the verdict as guilty of striking with a dangerous weapon, when the verdict is simply "guilty of striking": 1 Archbold's Criminal Law, 608; State v. Patza, 3 La. Ann. 512; State v. Davis, 20 La. Ann. 354; State v. Burdon, 38 La. Ann. 357. In our opinion, the verdict does not support the sentence.

In view of the new trial that must occur, we deem it proper to express our views on the questions raised by the other bills. It is insisted the court erred in excluding questions to show exclamations contemporaneous with the shooting and coming from the group around the participants in the difficulty. The exclamations, the bill informs us, "characterized the act, showing it was not done by the accused, but by others." The questions were excluded on the ground the exclamations of third

persons were not admissible as "res gestae." While there are expressions in some of the text-writers that seem to favor the admissibility of the statements of third persons as constituting res gestae when accompanying the crime under investigation, it must be conceded the general rule is against the admissibility of such statements. Certainly, in this case, we find no basis to recognize an exception to the general rule. The ⁵⁹⁶ case of Lord George Gordon, put by Professor Greenleaf, cited in argument was his indictment for treason, and to illustrate the treason, it was essential to show the character of the mob he headed. On that view the cries of the mob were permitted to be shown. That case does not at all support the general proposition that the statements of mere bystanders when a difficulty occurs, resulting in shooting, killing, or alleged offense, are to be admitted as testimony. The exclamation of a participant contemporaneous with the event to which it refers carries its appropriate weight; what comes from a looker-on, "characterizing the act," as the bill in this case puts it, is apt to express merely his belief, or his sympathies or prejudices. His testimony, if he has any actual knowledge, is attainable, and reason prompts he should be put on the witness stand. Greenleaf, in stating the case of Lord George Gordon with other instances, affirming the general rule "that rejects all hearsay reports by persons not produced as witnesses": 1 Greenleaf on Evidence, secs. 108, 124; Roscoe on Criminal Evidence, 22 et seq. Our own jurisprudence is on the line excluding such statements. In one case, on the charge similar to that here, the exclamation at the time of the shooting, identifying the accused, and made in his presence, was admitted. In another case, the statements of the third person, manifestly conveying his opinions and narrative, were excluded, but the decision carries no implication the statements would have been admissible, if not opinions and statements of a past occurrence: State v. Ramsey, 48 La. Ann. 1407; State v. Desroches, 48 La. Ann. 430. We think the current of our jurisprudence, notwithstanding expressions in some cases exhibiting peculiar features, indicating a contrary tendency, is against the admissibility of the testimony sought to be introduced in this case and the ruling of the lower court on this point we hold to be correct: State v. Moore, 38 La. Ann. 66; State v. Oliver, 39 La. Ann. 470; State v. Riley, 42 La. Ann. 996.

Other exceptions relate to the refusal of instructions asked that under the charge in the indictment the jury might return

a verdict of assault, or of other offenses supposed by the argument to be included in the greater offense charged: Rev. Stats., secs. 793, 796, 797. We considered this question, or rather a question of similar character, quite recently. We reached the conclusion against the position assumed on behalf of the accused in this respect. We adhere to that decision: *State v. Robertson*, 48 La. Ann. 1067.

⁵⁹⁷ Another contention presented by the bills is, that the indictment is defective in not qualifying the striking, as well as the intent, by the words "willfully, feloniously, and of his malice aforethought." The line of authorities cited in this connection refer, we think, to the entire omission of such words, or to the question of equivalent import where one only of these words is used: *State v. Williams*, 37 La. Ann. 776; *State v. Green*, 42 La. Ann. 644. Here the pleader has used the word "feloniously" in qualifying the act and the appropriate words to mark the intent, thus: did feloniously strike with a dangerous weapon A B, with intent feloniously and of his malice aforethought to kill and murder him, the said C D. In our view, it is unnecessary to introduce twice the words supposed to be necessary—first, to qualify the striking and then to qualify the intent. The rule that the common-law elements of the crime must be used when the common-law designation of the offense is used in the statute is observed in this case. The common-law designation of the offense occurs in connection with the intent, and there the pleader has employed the words willfully, feloniously, and of his malice aforethought. Our own decisions have sustained the indictment in this form: *State v. Bradford*, 33 La. Ann. 921; *State v. Frances*, 36 La. Ann. 336.

It is therefore ordered, adjudged, and decreed that the sentence of the lower court be avoided and reversed, and that the accused be held for another trial and to abide the result thereof.

EVIDENCE—RES GESTAE.—WORDS SPOKEN while an affair is in progress are admissible in evidence in a narrative of the affair: *Trenton etc. Ry. Co. v. Cooper*, 60 N. J. L. 219; 64 Am. St. Rep. 592, and note showing what is necessary to make declarations a part of the *res gestae*.

EVIDENCE—RES GESTAE—DECLARATIONS OF BYSTANDERS.—Declarations accompanying an act are admissible as part of the *res gestae*: *Deming v. Carrington*, 12 Conn. 1; 30 Am. Dec. 591; and declarations or statements of third persons or bystanders are admissible when they constitute the *res gestae*: *Stovall v. Farmers' etc. Bank*, 8 Smedes & M. 305; 47 Am. Dec. 85; monographic note to *People v. Vernon*, 95 Am. Dec. 55.

STATE v. CALDWELL.

[50 LOUISIANA ANNUAL, 686.]

CONSTITUTIONAL LAW—CHANGES IN REMEDY ARE NOT EX POST FACTO.—Changes in a tribunal or method of procedure relate to the remedy. They are always within the discretion of the law-making power, and are in no sense *ex post facto*, so long as they deprive the accused of no substantial right.

CONSTITUTIONAL LAW—EX POST FACTO LAW—CRIMES.—An *ex post facto* law is one which is enacted after the offense has been committed, and which, in relation to it or its consequences, alters the situation of the accused in his disadvantage. The term relates to criminal and not to civil proceedings.

A CONSTITUTIONAL PROVISION IS SELF-OPERATIVE where no legislation is necessary, or could add to or take from it.

CONSTITUTIONS—PROVISIONS OF NEW CONSTITUTION AS TO TRIAL OF CRIME ARE NOT INVALID AS EX POST FACTO LAWS.—If a new constitution is adopted, under whose provisions a person is indicted for the past crime of burglary and larceny, by a grand jury composed of twelve persons, and is tried and convicted by a petit jury of twelve, nine of whom may find a verdict, while under the old constitution the defendant could be indicted only by a grand jury composed of sixteen, and convicted only by a concurrence of all twelve of the petit jury, the changes created by the new constitution affect methods of procedure only, relate to the remedy, and are not *ex post facto*. The new law is, therefore, applicable to the trial of the offense, for it does not impair any substantial right of the accused.

W. A. Wilkinson and J. M. Pincus, for the appellants.

M. J. Cunningham, attorney general, and C. C. Egan, district attorney, pro tem., for the appellee.

667 **BLANCHARD, J.** Defendants appeal from a conviction and sentence on a charge of burglary and larceny. The indictment was found by a grand jury composed of twelve, under the provisions of the recently adopted constitution of the state. It was met by a motion to quash, on the ground that at the date of the alleged commission of the crimes charged the constitution of 1898 had not been adopted, and, hence, the accused were entitled to have a grand jury empaneled, composed of sixteen of their countrymen, to pass upon the charges and return a true bill. It was further alleged as ground to quash that article 117 of the new constitution, authorizing a grand jury of twelve, is not self-operative and requires legislative action to carry the same into effect. The motion was denied and a bill reserved.

There was no error in this ruling. The law is well settled that changes in the tribunal or method of procedure relate to the remedy, are always within the discretion of the law-making

power, and are in no sense *ex post facto* so long as they deprive the accused of no substantial right: Cooley's Constitutional Limitations, 272, 273, 361, 362; 7 Am. & Eng. Ency. of Law, 531.

That article 117 of the constitution is self-operative is shown by its terms, which declare that its provisions shall "go into effect on the adoption of this constitution."

The court having charged the jury that nine of them concurring could find a verdict, defendants excepted and reserved a bill. The grounds of exception are that the crime is charged to have been committed at a time antecedent to the adoption of the present constitution, that the provisions of the constitution in reference to trial by jury are not self-operative, that they require legislative action, ⁶⁶⁸ and that the enforcement of the same in the instant case would be to deprive defendants of a substantial right. It is averred in the bill that one of the jury, upon a poll following the announcement of the verdict, refused to assent to the same, and from this it is insisted that no legal conviction has ensued.

In answer to this the trial judge says: "Article 116 of the constitution of 1898 requires only nine of a jury to find a verdict in a case not capital. This is not *ex post facto*. It is a mere change in the remedy, or mode of procedure, which does not deprive the defendants of any right. Formerly, no acquittal as well as no conviction could be had without the concurrence of twelve jurors. The change facilitates acquittals as much as convictions. It merely prevents mistrials. The change in the number of jurors who could convict is a mere change of remedy. This part of the constitution is clearly self-executory. No legislation is necessary, or could add to, or take from, the provisions of article 116 as to the number of jurors necessary to find a verdict.

"The first sentence of the article authorizes the legislature to provide for the selection of jurors, but this provision has no relation to the remainder of the article. The third paragraph of the schedule of the constitution of 1898 declares that the provisions of all laws inconsistent with it shall cease upon its adoption, except such as require legislation to enforce them, and the eighth paragraph declares that the new constitution is in full force and effect from and after May 12, 1898, except as otherwise provided in it. Article 116 is, therefore, now in force and was properly applied in this case."

This is the first time the question has been raised under the

recently adopted constitution and the views above, so tersely and clearly expressed by our learned brother of the district court, who was himself a distinguished member of the convention which framed the new organic law, meet our full approbation.

Mr. Cooley, in his work on Constitutional Limitations, pages 272, 273, states the law to be that so far as modes of procedure are concerned, a party has no more right, in a criminal than in a civil action, to insist that his case shall be disposed of under the law in force when the act to be investigated is charged to have taken place. Remedies must always be under the control of the legislature, and it would create endless confusion in legal proceedings if every case ⁶⁶⁰ was to be conducted only in accordance with the rules of practice, and heard only by the court in existence when its facts arose. The legislature may abolish courts and create new ones, and it may prescribe altogether different modes of procedure in its discretion, though it cannot lawfully dispense with any of those substantial protections with which the existing law surrounds the person accused of crime.

So, too, on pages 361 and 362, he declares the state may give a new and additional remedy for a right already in existence, and it may abolish old remedies and substitute new. If a statute providing a remedy is repealed while proceedings are pending, such proceedings will be determined thereby unless the legislature shall otherwise provide. Any rule or regulation in regard to the remedy which does not take away or impair the right itself cannot be regarded as beyond the proper province of legislation.

An *ex post facto* law is one which is enacted after the offense has been committed, and which, in relation to it or its consequences, alters the situation of the accused to his disadvantage: 3 Am. & Eng. Ency. of Law, 525. The term is a technical one and relates only to penal and criminal proceedings which impose punishments or forfeitures, and not to civil proceedings which affect private rights retroactively: 3 Am. & Eng. Ency. of Law, 886.

It has been held that a law is not *ex post facto* because it changes the manner of summoning and making up the jury, as applied to past offenses; nor because it reduces the number of peremptory challenges allowed the accused; nor because it increases the number of such challenges allowed the prosecution; nor because it permits amendments to pending indictments;

nor because it authorizes the jury to fix the punishment at the trial, which, under the law in force at the time the offense was committed, was fixed by the court; nor because it makes the court the judge of the law, whereas at the time of the offense the jury was: 7 Am. & Eng. Ency. of Law, 531, note.

In all these cases it was held the change affected the procedure only, and that the new law was applicable to the trial of the offense.

⁶⁷⁰ So, too, we must hold with regard to the case at bar. The accused, having committed the offense before the new law went into operation, cannot claim the impairment of any substantial right because of indictment, trial, and conviction thereunder. The new law does but relate to the remedy, or procedure, which it is the province of the law-making power to enact for the ascertainment, prosecution and conviction of crime: State v. Bates, 14 Utah, 293; Lynn v. State, 84 Md. 67; State v. Taylor, 134 Mo. 109; State v. Gay, 18 Mont. 51; Am. Dig. 1897, sec. 53, g, p. 962.

Another bill of exception is leveled at the ruling of the court a qua admitting the confession of guilt made by the accused to one Sol. Canningan, called as a witness for the state. The objection was that the confession was not free and voluntary, but brought about by inducements held out. Also, that the signature of one of the accused to the letter wherein the confession was made was not proven.

The trial judge states the confession was not offered or received as to Hagan Clark, one of the defendants, and that as to the other two, Amos Caldwell and William Clark, the evidence showed the note was written by Caldwell in presence of Clark, and was concurred in by the latter, who signed it; and that this note contained the same recitals the two had previously made voluntarily to Canningan, who was intrusted by them with the note for delivery to the person to whom it was intended. It seems that Canningan was the friend of the accused and went to the jail to see them, taking some tobacco for them. While there he said to Caldwell and William Clark: "If you will tell the truth about Mr. Carnes' money, probably he will help you." Whereupon they told him to tell one of the parties (not Carnes) whose money had been stolen to come to them, and they would tell him where his money was—that Hagan, meaning Hagan Clark, the other accused, had it. This was on Sunday. On Tuesday following, Canningan saw the party (Mr. Terry) to whom the message was sent and delivered it.

Whereupon Terry said to Canningan, "Tell them to tell you." Following this, Canningan again saw the parties and the incriminating note was written. All the parties accused and Canningan were colored. Canningan had nothing to do with the prosecution, was rather interested in getting the accused off as lightly as possible. He was the brother-in-law of William Clark. He was not commissioned by the prosecutors to see the accused and procure a confession from them. He merely expressed the opinion ⁶⁷¹ that Mr. Carnes would probably help them if they would tell the truth about the money. He made no promise and was authorized to make none. He was not in the service of either Carnes or Terry and did not live on their plantations, but across the river some miles away. We agree with the judge below that "coming from such a source the mere suggestion that the prosecutor probably would help them does not amount to such an inducement as ought reasonably to attach such doubt to the confession as would exclude it." Especially so when it occurred more than two months after the crime, when the accused parties were in no confusion and laboring under no excitement nor special dread, and were free from improper influences.

We find no sufficient warrant for reversing the verdict and sentence appealed from, and, accordingly, the same stand affirmed.

EX POST FACTO LAWS—CHANGES IN REMEDY.—An *ex post facto* law is one which renders an act punishable in a manner in which it was not punishable when committed: See monographic note to *In re Miller*, 64 Am. St. Rep. 379, on the constitutionality of statutes imposing a heavier penalty for a second offense; and to *People v. Hayes*, 37 Am. St. Rep. 583, on *ex post facto* laws. Such laws relate only to crimes or criminal prosecutions: Note to *People v. Hayes*, 37 Am. St. Rep. 584. The legislature may prescribe altogether different modes of procedure in its discretion, and reducing the number of grand jurors required to find an indictment affects only the remedy or procedure: Note to *People v. Hayes*, 37 Am. St. Rep. 595. Compare *State v. Baker*, 50 La. Ann. 1247; post, p. 472.

CONSTITUTIONS — SELF-EXECUTING PROVISIONS.—A provision of a state constitution must be regarded as self-executing if the nature and extent of the right conferred, and the liability imposed, are fixed by the constitution itself, so that they can be determined by an examination and construction of its terms, and there is no language indicating that the subject is referred to the legislature for action: *Willis v. Mabon*, 48 Minn. 140; 31 Am. St. Rep. 626.

STATE v. BUTTON.

[50 LOUISIANA ANNUAL 1071.]

NEW TRIAL ON GROUND THAT ONE OF THE JURY WAS A MINOR.—It is too late, after the verdict in a criminal case, to urge the disqualification of a juror, as ground for a new trial, where a full opportunity was afforded to make the objection when the juror was examined on his voir dire, and this rule applies where one of the jurors was a minor, although neither the accused nor his counsel knew of his minority at the time he was tendered, and did not, therefore, interrogate him on the point.

John N. Ogden, for the appellant.

M. J. Cunningham, attorney general, R. Lee Garland, district attorney, and P. A. Simmons, Jr., for the appellee.

1072 MILLER, J. The accused, indicted for murder, convicted without capital punishment, takes this appeal. The bills of exception present the question whether the verdict of the jury should be set aside and a new trial granted the accused on the affidavits and proofs submitted on the rule for new trial and motion in arrest, that one of the jurors was a minor, and that the fact of his minority was not known, when, without any interrogation on that point, he was accepted as a juror.

When the juror is tendered, the opportunity is afforded the accused to examine the juror as to his competency. To enable the accused to inform himself with respect to the jury by whom he is to be tried, the law requires the jury list to be served on the accused two entire days before the day of trial: Rev. Stats., sec. 992. With the right to challenge any juror not qualified to serve and full opportunity afforded to ascertain if there is cause for any such challenge, it deserves serious consideration whether the accused, after he has accepted a juror and taken the chance of an acquittal and after an adverse verdict, can claim that the verdict shall be set aside, because one of the jurors was a minor. It is urged on us that the juror had been **1073** drawn on a previous venire and had served on a previous jury, presented the appearance of one who had passed his majority, and hence it is contended the accused and his counsel may well be deemed to have been misled into accepting the juror. Besides, there are affidavits of the accused and of his counsel that they were ignorant of the juror's incompetency when he was called to the box. On this issue of diligence we cannot overlook the ample opportunity of the accused to learn before the trial that incompetency of the juror, quickly made the ground of objection after conviction. Accepting the entire sincerity of the affi-

davits, we cannot resist the conclusion that the diligence to be expected from the accused under the circumstances and suggested by the service itself upon him of the jury list, if exerted, would have discovered the fact now made the basis to set aside the verdict.

Our own jurisprudence has not favored applications to set aside verdicts on grounds like that urged here. Our courts have uniformly held that it was too late, after verdict, to urge the disqualification of one of the jurors; that the full opportunity was afforded to make such objections; that it should be made when the juror is presented and cannot be insisted upon after the trial. In some of the cases, the circumstance that the disqualification of the juror was not known when he was accepted by the accused, was considered and held to imply a want of diligence, fatal to the objection: *State v. Nolan*, 13 La. Ann. 276; *State v. Bower*, 26 La. Ann. 383; *State v. Sopher*, 35 La. Ann. 975; *State v. Garig*, 43 La. Ann. 370. The decision of our predecessors held that where the juror was examined on his voir dire and gave false answers to questions touching his qualifications, that in such case the objection to the juror's competency was a sufficient ground for a new trial: *State v. Nash*, 45 La. Ann. 1143. The decision proceeds on the ground that the accused could not be deprived of his right to a jury composed as the law directs by the fraud accomplished by the false answers of the juror. That decision, resting on the ground peculiar to that case, does not infringe on the line of our decisions on this subject. It is our conclusion the objection to the juror's competency came too late, and hence the rule for new trial was properly overruled.

It is therefore ordered, adjudged, and decreed that the sentence of the lower court be affirmed.

NEW TRIAL—CRIMINAL CASES—DISQUALIFICATION OF JUROR.—A person accused of crime is not entitled to a new trial on the ground that a juror was disqualified, if he was accepted as such juror without examination by the accused: *Smith v. State*, 59 Ark. 182, 43 Am. St. Rep. 20.

STATE v. BAKER.

[50 LOUISIANA ANNUAL, 1247.]

CONSTITUTIONS—INVALIDITY OF EX POST FACTO PROVISION OF NEW CONSTITUTION DEPRIVING A DEFENDANT OF A JURY TRIAL FOR A PAST OFFENSE.—The adoption of a new constitution does not, as to past offenses, have the effect of repealing the old one. Hence, if a new state constitution is adopted, making a past offense triable by the court, without a jury, which offense was triable under the old constitution by a jury, the law is void as ex post facto in its application to such offense; and a defendant, charged with a past offense, but tried after the adoption of the new constitution, cannot be deprived, by virtue of its provisions, of his substantial right to a jury trial.

Application for writs of certiorari and prohibition.

Chaffe & Bowers, for the relator.

John J. Finney, assistant prosecuting attorney, for the respondent.

1248 BREAU, J. The relator was arraigned, pleaded not guilty, and elected to be tried by a jury. Prior to his trial, the constitution of 1898 was adopted, limiting the jurisdiction in the trial of a certain class of cases to the court alone. When the case was called for trial, the relator urged that he was entitled to a trial by jury; that the act for which he was prosecuted was committed before the date of the adoption of the constitution. The court decided that he had no right to such a trial, proceeded to try the case, and found the accused guilty as charged. He, averring that the new law would operate ex post facto if his conviction remains unreversed, invoked the supervisory jurisdiction of our court.

The constitution of 1879, guaranteeing to the defendant the right of trial by jury, was in force at the date the act was committed. There is weighty argument in support of the proposition that the convention had the power to change the method of trial, as relates to minor offenses, of a date anterior to the constitutional article in the constitution of 1898, by transferring all judicial power of trial to the court alone, without a jury.

It is true that this court has passed upon questions similar to this, upholding such power. In *State v. Carter*, 33 La. Ann. 1214, the court expressly announced that the legislature was competent to change judicial proceedings regarding trial for offenses committed prior to the change. In *State v. Caldwell*, 50 La. Ann. 666, ante, p. 465, it was decided that the constitutional inhibition regarding the enactment of ex post facto laws did not

apply as to the question therein raised. The facts were not absolutely similar to those in the case before us for determination. The case before us is a stronger case for the accused.

¹²⁴⁹ There are at least two decisions, in other jurisdictions, in which the question now before us was presented, and a conclusion arrived at similar to the decision in the cited cases: *McCarty v. State*, 1 Wash. 377; 22 Am. St. Rep. 152; *In re Wright*, 3 Wyo. 478; 31 Am. St. Rep. 94.

In the early days of the jurisprudence of the supreme court of the United States it was decided that the words *ex post facto* had a technical and restricted meaning in matter of law, and that they refer only to "crimes, pains, and penalties," and do not include questions exclusively of remedy: *Calder v. Bull*, 3 Dall. 386, 401. Such, in substance, was the definition of the correct and judicious Story, in his Commentaries on the Constitution. He cited a number of authorities in support of his text. A law, unless it applied to crime itself, or unless in some way it aggravated the offense, would not be *ex post facto* in its effect if the foregoing definition be taken as correct and complete, and if as such it be closely followed. But in course of time the definition of *ex post facto* was somewhat broadened in its effect or scope by the federal courts. They recognized as prohibited enactments when they attempted to make an act done before the passing of the law criminal which was not criminal when done, or when they sought to aggravate a crime or inflict a greater penalty, or to amend the rules of evidence that would make worse and more difficult the defense of an act of prior date.

This latter definition of the courts gave rise to argument different to that which we have heretofore characterized as of weight. It led to a different conclusion from that arrived at in the decisions cited *supra*. The use of juries in criminal cases from time immemorial, a system of trial always referred to as being of the greatest importance in the administration of justice, the palladium of liberty, as it is sometimes alluded to, all tended to give to the claim of trial by jury an inviolable character as related to acts preceding any substantial change in the law.

The last utterance of the supreme court of the United States is contained in *Thompson v. Utah*, 170 U. S. 343-355. It is a case of recent date, to which our attention was lately invited. It was rendered only in April of this year, and was not before us when we decided the case in June last. ¹²⁵⁰ The accused in

the last cited case was indicted for larceny, but he was tried after Utah had been admitted into the Union. The defendant was found guilty. He moved for a new trial on the ground that the jury that tried him was composed of only eight persons, whereas, by the law in force at the time of the commission of the offense charged, the lawful number was twelve. His application having been overruled, he excepted. He was sentenced. The judgment was affirmed by the supreme court of Utah.

The supreme court of the United States, on a writ of error, which that court had issued to the supreme court of Utah, said that by statutes of the territory of Utah, in force when the offense charged was committed, a jury consisted of twelve persons, and held that twelve being the number, the state of Utah did not acquire as to offenses previously committed the power to enact that the accused should be tried by a jury composed of less than twelve persons.

The court said: "It is not necessary to review the numerous cases in which the courts here determined, whether particular statutes come within the constitutional prohibition of *ex post facto* laws. It is sufficient, then, to say that a statute belongs to that class which by its necessary operation and its relation to the offense, or its consequences, alters the situation of the accused to his advantage": Citing several decisions in support of the text. In that view, the law, as sought here to be applied, is *ex post facto*.

Some of the methods of trial may be changed, even as to offenses of a prior date, but the law securing to the accused the right of trial by jury cannot be repealed as relates to acts which had been done at the time of the repeal. The courts of the United States concluded that the provision of the constitution of Utah for the trial of cases committed before the territory became a state could not deprive the accused of the right of trial by jury of twelve persons, the number required by the statutes of Utah while it was a territory, and at the time that the offense charged was committed.

The right guaranteed to the accused in the cited case was equally as well guaranteed to the accused in the case here. The jury were the judges of the law and the facts of the case at the date he was indicted—i. e., under the constitution of 1879. The decisions of the supreme court of the United States are always entitled to consideration, especially those relating to questions here involved.

1251 The accused in the case before us for decision had, in

our view, a right to trial by jury, after the convention had adopted the articles of the constitution. The accused, we think, could, at the time his case was called for trial in the district court, have been compelled to stand his trial before a jury as constituted; but not before the district court without a jury. In other words, the law did not, as to past offenses, have the effect of repealing the old law.

It is therefore ordered, adjudged, and decreed that the writs of certiorari and prohibition be and they are sustained to this extent: the judgment and sentence in this case are annulled and quashed as not good in law, and the verdict found is set aside, and the case is remanded to the district court of the parish of Orleans, to be proceeded with according to law.

EX POST FACTO LAWS—CHANGE OF REMEDY.—The legislature may prescribe different modes of procedure in its discretion, but it cannot, in so doing, dispense with any of those substantial protections with which the existing law surrounds a person accused of crime: See monographic note to *People v. Hayes*, 37 Am. St. Rep. 595; and compare *State v. Caldwell*, 50 La. Ann. 666, ante, p. 465.

METROPOLITAN BANK v. MULLER.

[50 LOUISIANA ANNUAL, 1278.]

NEGOTIABLE INSTRUMENTS—REGULAR INDORSEMENT—WHAT IS.—A regular indorsement is where a payee, acquiring a note from the maker, indorses it to convey title to another, who, in turn, transfers the note by placing his name upon it.

NEGOTIABLE INSTRUMENTS—IRREGULAR INDORSERS—WHO ARE—SURETIES.—If a person makes a note to his own order and indorses it, and it is then indorsed by others for the accommodation of the maker, who hands it to his creditor, the latter having full knowledge of all the facts, such other persons are irregular indorsers, and are regarded as sureties for the maker.

SURETYSHIP—RIGHT TO DEMAND DIVISION OF DEBT. While several persons who become sureties for the same debt are liable in solido, they have the right, in Louisiana, upon being sued, except in case of renunciation or insolvency, to demand a division of the debt, so that each shall pay only his proportional part; and where such division is claimed, the court must allow it.

Harry H. Hall, E. E. Moise, Buck, Walshe & Buck, Carroll & Carroll, Theodore G. Spitzfaden, and J. B. Rosser, Jr., for the appellants.

Dinkelspiel & Hart, for the appellee.

1279 **MILLER, J.** This appeal is by six defendants, sued as indorsers of a promissory note. The defense is, omitting exceptions not insisted upon, that the defendants are sureties, lia-

ble each only for his virile share, and the answers insist the plaintiff's demand be restricted to the portion of each defendant, i. e., one-sixth of the debt. The petition claimed judgment against defendants in solido, the judgment in solido was rendered, and the appeal presents the single question of the character of the obligation incurred by defendants in placing their names on the back of the paper sued upon.

We have in the record the agreed statement that at one and the same time, the note sued on was made by the Brewing Association to its own order, by it indorsed, indorsed also by the six defendants; that it was thus indorsed for the accommodation of the maker, and by the maker, with the names of defendants upon it, was delivered to the plaintiff, acquiring with full knowledge of all the facts incorporated in this agreed statement.

The argument for the defendants that they are to be viewed as joint indorsers, hence only liable jointly, is based upon decisions arising on promissory notes made by two or more parties to their own order, expressing no obligation in solido, and hence creating a ¹²⁸⁰ joint liability not changed by the indorsement of the makers: *Chadwick v. Waters*, 3 Mart. N. S., 437; *Baggett v. Rightor*, 4 Rob. (La.) 18; *Mayor etc. of New Orleans v. Ripley*, 5 La. 122; 25 Am. Dec. 175; 1 Hennen's Digest, 177, No. 4. This line of decisions does not, in our view, furnish the solution of the question here of the liability, not of a note of joint makers who indorse it, but of the liability of parties not makers or payees, but who place their names on the back of negotiable paper, while in the hands of the maker, who hands it to his creditor acquiring with full knowledge of all the facts.

The indorser under the commercial law is the payee, who, acquiring from the maker, indorses the note to convey title to another, the indorsee, and the indorsee becomes indorser when he, in turn, places his name on the note to transfer it. This is the general rule, though there are cases in which the party is deemed an indorser merely, because his name is on commercial paper after that of the payee. It is obvious, however, that the parties, defendants here, who put their names on the back of the paper while in the hands of the maker, who thereupon handed it to his creditor, the plaintiff, the holders acquiring the paper with knowledge of all the facts, are not indorsers under the law merchant. Their indorsements belong to the class known as irregular indorsements. In the jurisprudence of some of the states they would be deemed joint makers. Our own courts, dealing with these irregular indorsements given under circumstances

falling within the principle of the decisions of our courts, have held the indorsers are to be treated as sureties: 1 Randolph on Promissory Notes, sec. 66; Story on Promissory Notes, secs. 133 et seq.; Gilbert v. Cooper, 4 Rob. (La.) 161; Smith v. Gorton, 10 La. 374; Good v. Martin, 95 U. S. 90, and line of decisions collated in 1 Hennen's Digest, p. 172, No. 1. We understand the plaintiff places the liability of the defendants on the footing of sureties, recognized by our own, and in our view, by the general jurisprudence.

If these defendants are to be deemed sureties for the Brewing Association, they are entitled to the rights arising out of their contract. The code declares that several persons who become sureties for the same debt are liable in solido, but they have the right of being sued to demand that the creditor shall reduce his demand to the share or portion of each of the sureties. This right of division is excluded only when the sureties have renounced it, or when one or more of the sureties are insolvent, and their insolvency has occurred ¹²⁸¹ before the division of the debt has been demanded by the other sureties: Civ. Code, arts. 3049, 3050; McCausland v. Lyons, 4 La. Ann. 273; Gordon v. Succession of Diggs, 9 La. Ann. 422; Rawlins v. Barham, 12 La. Ann. 630. In this case there is no renunciation by the sureties of the benefit of division, nor is there any issue of the insolvency of any of them. The right of division is wholly distinct from the exception of discussion to which reference is made in the plaintiff's argument. To preserve the benefit of division, it suffices, in our opinion, that on being sued the sureties demand that division. To exact more is to go beyond the requirement of the code. We find in each of the answers of the defendants the demand that the plaintiff be restricted in his recovery to the virile share of the defendants. In the case from 4 Louisiana Annual we cite, the suit was on a promissory note against two parties deemed to be irregular indorsers, and hence sureties. The court in that case epitomized the law thus: Sureties for the same debt are liable in solido, but that solidarity ceases when, being sued, the sureties claimed the division of the debt. It was solidarity tempered with this right of division. The right was in facultate, as the court expressed it, and was to be allowed whenever the sureties chose to claim it. In that case the sureties made no such demand except in argument, and, as a consequence, lost the right. Here, the division is claimed, and under the imperative requirement of the law must be allowed.

It is therefore ordered, adjudged, and decreed that the judgment of the lower court be and it is hereby avoided and reversed, and it is now adjudged and decreed that each of the defendants, E. Muller, Peter Blaise, Theodore Brunner, Joseph D. Taylor, E. F. Hoppe, and Charles J. Babst, do pay plaintiff one-sixth of the amount of the note sued upon, with interest on said one-sixth as stipulated in the note, and that plaintiff pay costs.

Nicholls, C. J., and Breaux, J., dissent.

NEGOTIABLE INSTRUMENTS—PAYABLE TO MAKER'S ORDER—IRREGULAR INDORSEMENT—SURETIES.—A third person's indorsement on the back of a note payable to the maker's order belongs to that class known as irregular or anomalous indorsements, whose obligation depends upon the agreement of the parties. The presumption is, that he intended to be liable as surety for the payment of the note, and he is answerable accordingly, unless he shows a different agreement or understanding: *Ewan v. Brooks-Waterfield Co.*, 55 Ohio St. 596; 60 Am. St. Rep. 719, and note. Compare *Schultz v. Howard*, 63 Minn. 196; 56 Am. St. Rep. 470; *First Nat. Bank v. Payne*, 111 Mo. 291; 33 Am. St. Rep. 520. The contract and liability of an accommodation party are, in general, those of a surety for the party accommodated: See monographic note to *Altoona etc. Nat. Bank v. Dunn*, 81 Am. St. Rep. 745.

STATE v. DAVIDSON.

[50 LOUISIANA ANNUAL, 1297.]

MUNICIPAL CORPORATIONS—ORDINANCES—POWER TO REGULATE SALE OF FOOD COMMODITIES—PLACE.—A municipal corporation has power to fix by ordinance the places at which food commodities, in quantities adapted for the daily wants of the community, may be sold, and such sales may be restricted to the markets designated by the city council.

MUNICIPAL CORPORATIONS—ORDINANCES VALID IN PART AND VOID IN PART—SEPARATE CONSIDERATION OF. An ordinance, like a statute, may be valid in part and void as to the residue, and the valid part may be considered separately from the other.

MUNICIPAL CORPORATIONS—ORDINANCES—SALE OF PERISHABLE FOOD COMMODITIES AT RAILROAD DEPOTS MAY BE PROHIBITED.—That portion of an ordinance which prohibits the sale of onions, cabbages, potatoes and other perishable food commodities in the railroad depots or landings of a city is valid, whatever may be the validity of other prohibitions of the ordinance.

MUNICIPAL CORPORATIONS—ORDINANCES—VALIDITY OF—EXTENT OF INQUIRY BY THE COURTS.—Courts will not inquire into the motives which may have prompted an ordinance. The only inquiry is whether its declared purpose is lawful, and whether the ordinance is restricted within the scope of that purpose.

MUNICIPAL CORPORATIONS—ORDINANCES—SALE OF PERISHABLE FOOD COMMODITIES AT RAILROAD DEPOTS—OPPRESSIVENESS OR UNREASONABLENESS—POLICE POWER.—An ordinance to prohibit the sale of onions, cabbages,

potatoes, and other perishable commodities of food at landings or railroad depots in a city is not an oppressive or unreasonable municipal regulation, but a mere exercise of the police power, presenting no conflict with the constitution, state or federal.

Denègre, Blair & Denègre, for the appellant.

James J. McLoughlin, assistant city attorney, Samuel L. Gilmore, city attorney, and Bernard Bruenn, for the City of New Orleans, appellee.

¹²⁹⁸ MILLER, J. The defendant, fined for the violation of an ordinance of the common council, entitled, "An ordinance to prohibit the sale of onions, cabbages, potatoes, and other perishable articles at railroad depots and public landings," prosecutes this appeal.

The defense is the ordinance violates the commerce clause of the constitution of the United States, is violative of article 1, section 155, of the constitution of the United States, is oppressive and unjust, and that the ordinance exceeds the power of the council.

The ordinance prohibits "the receivers of onions, potatoes," and other perishable fruit from selling their commodities at railroad depots and public landings in other than the original packages, and prohibits the receivers or consignees from selling at all except to licensed dealers; the ordinance further prohibits the sale at the depots by those who purchase the commodities, and prohibits all ¹²⁹⁹ sales at any other depot than that where the commodities were received.

It may well be that this ordinance, in some respects, transcends the authority of the council. But as this controversy is presented the defendant complains of the fine imposed on him for selling potatoes, not in the package in which they were imported, in a railroad depot. We are not called on to deal with the ordinance in any other aspect than that presented of the fine imposed on defendant for selling potatoes, a perishable food commodity, in the railroad depot. The question then is, whether the ordinance authorizes the fine, and the further question is, whether the council possesses the power to prohibit such sales in the depots of the railroads of this city.

The ordinance, like a statute, may be valid in part, and void as to the residue. The title of this ordinance, to regulate sales of perishable commodities, such as potatoes, onions, et cetera, at railroad depots and public landings, is followed by a section of the ordinance prohibiting such sales in other than the origi-

nal packages, i. e., the packages brought on the cars. In this aspect the ordinance seeks to prohibit the conversion of the depots of this city into markets for the display, keeping, and sale of perishable food commodities apt to become offensive and to menace the public health. In all cities the places of sale of such commodities, that is, in quantities adapted for the daily wants of the community, is, we believe, restricted to the markets designated by the council; at least we have always had such ordinances. This court has sustained the power of the council to enact such ordinances: *State v. Namias*, 49 La. Ann. 618; 62 Am. St. Rep. 657.

The argument for the defense that this ordinance has no relation to the public health or cleanliness of the city, but was passed to serve other purposes, has had our attention. In support of the argument, it is urged or implied that private interests or rivalry in the business of selling these food commodities dictated the ordinance. It is not for the court to ascertain the motives that may have prompted the ordinance; the inquiry is, whether its declared purpose is lawful, and whether the ordinance is restricted within the scope of that purpose. It may be that, in the exercise of the police power of the city, private interests may suffer, but the private interests that may be affected by this class of ordinances regulating the places where perishable food commodities may be exposed for sale and sold must yield to the public interest of health and cleanliness the ordinance is designed to subserve.

¹³⁰⁰ It is claimed the ordinance is unreasonable and oppressive. The argument is aimed at the provision forbidding the sales of perishable commodities to any but licensed dealers, even in the original packages. We are not now dealing with that part of the ordinance, and no view is required to be expressed as to that prohibition clearly separable from the inhibition that the railroad depots shall not be used for the sale of these food commodities taken from the original package and disposed of in the quantities that may be desired by the purchasers. Nor are we called on to consider that other provision of the ordinance invoked to sustain this branch of the defendant's argument, prohibiting those who purchase in the original package from selling at or in the depots the commodity in the original package, and that extends the prohibition so as to prohibit such sales at depots other than that where the article was originally received. Again, our attention is called to an exception in the ordinance that exempts from its operation the vendors who ped-

able fruits in the depots from baskets. We cannot appreciate that forbidding the exposure for sale and sale in railroad depots of onions, potatoes, and similar articles, because they are perishable and apt to result in filth and offensive odors, is to be deemed unjust and oppressive, for the reason that the "basket vending" of fresh fruit is permitted. If this ordinance had undertaken to prohibit these "itinerant venders" from "peddling fruit in baskets," in our view such a prohibition might well have been deemed oppressive. We have given attention to all these and other phases of the argument designed to attack this ordinance as unreasonable. In the restricted view we take of the ordinance already stated, we are unable to hold the ordinance exposed to this line of attack.

The article 155 of the constitution and the bill of rights in the constitution are supposed by the pleadings of the defendant to be involved in the consideration of the ordinance. We presume, however, the argument that the ordinance is unreasonable and unjust, and an unwarranted interference with the business done at depots and landings, the ordinance is aimed to prohibit, embodies all that it is supposed can be urged, based on the provisions of the organic law cited in defendant's pleadings. The objection that the ordinance is an interference with interstate commerce and violative of the commerce clause of the constitution of the United States is, we think, answered by the ordinance: U. S. Const., art. 1, ¹³⁰¹ sec. 8. The ordinance imposes no restriction on the sale of the commodities in the original package, i. e., in which the commodity is imported. When the transportation is completed, the articles taken from the package and offered for sale, the ordinance then operates to regulate the places of sale. It is settled that when the importation is complete, the property no longer in the original package, but removed therefrom, and mingled with the property in the state, the mass becomes subject to the police as well as the taxing power of the state: *Brown v. Maryland*, 12 Wheat. 436, and the line of cases of that type.

Viewed only as an ordinance to prohibit the sale of perishable commodities at landings or railroad depots, and excluding from consideration all other portions of the ordinance, in our opinion we have before us a municipal regulation within the competency of the council and the mere exercise of the police power presenting no conflict with the constitution, federal or state.

It is therefore ordered, adjudged, and decreed that the sentence of the lower court be affirmed, with costs.

Nicholls, C. J., dissents.

MUNICIPAL CORPORATIONS—REGULATION OF MARKETS—ORDINANCES—POLICE POWER.—A city has power, by ordinance, to regulate markets by confining the business to certain localities or buildings within its limits, and in doing so it is a valid exercise of the power by the city: *State v. Namias*, 49 La. Ann. 618; 62 Am. St. Rep. 657. It is clearly within the legislative power of the state to authorize city councils to pass ordinances regulating the sale of commodities: *Note to People v. Wagner*, 24 Am. St. Rep. 146; though such ordinances must be reasonable in their provisions: *Note to Kosciusko v. Slomberg*, 24 Am. St. Rep. 283.

MUNICIPAL CORPORATIONS—ORDINANCES GOOD IN PART AND BAD IN PART.—The good part of an ordinance, which is good in part and bad in part, may be enforced, where the valid and invalid parts are distinct and independent of each other. Otherwise, the whole ordinance is void: *Notes to Eureka City v. Wilson*, 62 Am. St. Rep. 910.

MUNICIPAL CORPORATIONS—ORDINANCES—REASONABLENESS.—COURTS DO NOT INQUIRE into the reasonableness of city ordinances, when power to pass them exists. The inquiry must be confined to the existence of such power: *Note to Grand Rapids v. Brandy*, 55 Am. St. Rep. 479. A city ordinance cannot be pronounced unreasonable as a police regulation without some data or evidence showing its unreasonableness: *Denver City Ry. Co. v. Denver*, 21 Colo. 350; 52 Am. St. Rep. 239.

CASES
IN THE
SUPREME COURT
OF
MAINE.

BAKER v. WALDRON.

[92 MAINE, 17.]

MECHANIC'S LIEN—BUILDING LEFT UNCOMPLETED. A statute giving a lien upon a building, and the land upon which it stands for labor done or materials furnished creates a lien, where the foundation of the building is commenced, but not completed, and the work is then abandoned. The reason for the statute applies just as strongly to a building partially completed as to one wholly finished.

MECHANIC'S LIEN—OWNER OF BUILDING—WHEN CONSIDERED AS ASSENTING TO.—If a contract for the purchase of land requires that the purchaser shall construct a building thereon, the landowner must be considered as assenting to the purchasing of material and the hiring of labor for the purposes of the contemplated building, and hence his interest in the land is subject to a lien for labor done and materials furnished for such building under such contract with the purchaser.

MECHANIC'S LIEN—INTEREST OF PURCHASER WITHOUT A CONVEYANCE OF THE TITLE MUST BE TREATED AS REALTY.—If the owner of land contracts to sell it, and provides that the purchaser shall erect a building thereon, and the statute creates a lien on any interest which the owner has, the owner's consent to the erection of the building estops him from denying that the purchaser is the owner, and an attachment against the latter is properly levied upon the land as real estate instead of against the materials and the land as personal property.

Suit to enforce a mechanic's lien for materials furnished and labor performed on certain land under a contract with E. C. Waldron. He had an oral contract with the owner of the land, H. L. Seekins, to purchase it, and agreed to build a dam and erect a mill thereon, to be used for manufacturing woolen goods. The dam was completed and the foundation for the mill commenced, and a part of the dam was also used as a part of the foundation of the mill. Before any part of this foundation,

other than that embraced in the dam, was finished, the purchaser discontinued the work. The landowner claimed that the lien did not attach, and that there was no valid levy of the writ for the reasons stated in the opinion of the court. The case was submitted to the court on an agreed statements of facts.

J. W. Manson and G. H. Morse, for the plaintiff.

D. D. Stewart, for the landowner Seekins.

²⁰ PETERS, C. J. This is a suit to enforce a lien. Defendant bargained for land upon which to erect a dam and a mill. He contrived to have the foundation for the mill serve as a section of the dam. Before the foundation was entirely completed defendant failed, and no mill was built. Plaintiff furnished labor and materials for the foundation, and now asks a lien for the same on the foundation and land upon which it stands.

²¹ It is objected by the owner of the land that the lien does not attach, because, as he contends, no superstructure had been built, the statute giving a lien only upon a building and the land upon which it stands, and that the existence of a building, a superstructure, is necessary before any lien can attach—it then attaching both to the building and the land, that is, to the whole property.

We think the point untenable. The reason for the statute applies just as strongly to a building partially completed as to one wholly so. Otherwise, very many contractors and laborers might be wronged out of their wages by designing or improvident builders and owners. The fallacy of the defendant's argument consists in his assumption that the foundation walls of a structure are not a part of the structure itself. It is too fine a distinction to attempt to draw a line, in the meaning of the statute, between substructure and superstructure. It is all superstructure. The foundation walls of a building, though lowered into the earth, are just as much a part of the building as its upper story or roof is, and even a more essential part. Is the mason to lose his lien and the carpenter to secure his on the same unfinished building? Or shall both mason and carpenter lose their lien when, without fault on their part, the building has not been completed? Such has not heretofore been the interpretation of the statute.

We have no doubt that the owner of the land must be considered as assenting to the purchasing of materials and the hiring of

labor for the purpose of erecting the contemplated mill, inasmuch as the contract of sale of the land between him and the principal defendant (Waldron), who hired the plaintiff's services, made it a condition of the sale that Waldron should erect just such a mill as he was undertaking to construct when, by reason of his failure, the work of construction became suspended.

The above views are, we think, a full answer to the criticism that one section of the dam at the same time is made to serve, pro tanto, as one of the walls of the mill.

It is urged that the attachment on the writ is void because it is an attachment against the land as real estate instead of against the ²² materials on the land as personal property. But the owner's consent that the mill might be erected on his land is a consent that a lien for materials and services procured for erecting the same may be established on his land. He is estopped from denying defendant's ownership. His consent is equivalent to defendant's ownership. The lien, as said by Emery, J., in *Shaw v. Young*, 87 Me. 275, "attaches to the res, the fee." That being so, the res, or fee, or land must be attached as real estate in order to execute the lien. And to this effect are other decisions: *Dustin v. Crosby*, 75 Me. 75; *Skillin v. Moore*, 79 Me. 554.

But it is contended that the earlier cases are overturned by an alteration of the statutes in 1891. Chapter 21 of the Laws of 1891 merely adds a new subject of lien to such rights of lien as already existed, and that is for labor and materials in moving a building as well as in erecting it. The alteration discloses nothing more.

Great stress is put on the clause in the statute that a claimant shall have a lien "on any interest that such owner has in the same," as repugnant to the idea of an attachment of realty, the clause with its context reading as follows: "Whoever performs labor in erecting a house or building, by virtue of a contract with or by consent of the owner, has a lien thereon, and on the land on which it stands, and on any interest that such owner of the land has in the same." The words "the same" refer to the house or building and not to the land, to meet a case where the owner of the land also owns some interest in the building, a clause that appears a little blind, for the reason that it is difficult to see any utility in it.

Judgment against defendant, and property attached.

MECHANIC'S LIEN—BUILDING LEFT UNCOMPLETED—DESTRUCTION OF BUILDING BEFORE COMPLETION.—These questions are fully treated in the monographic note to *Goodman v. Baerlocher*, 88 Wis. 287; 43 Am. St. Rep. 893.

MECHANIC'S LIEN—VENDOR'S INTEREST—CONTRACT TO PURCHASE.—Persons who have sold land and reserved the title as security for the purchase price are not, from the fact that they know of the purpose of the purchaser to erect a building thereon, and that he is proceeding to accomplish such purpose, deemed to have consented to such building, so as to make their title subject to a mechanic's lien for work done or material furnished in its construction: *Courtemanche v. Blackstone Valley etc. Ry. Co.*, 170 Mass. 50; 64 Am. St. Rep. 275. This is true, and a vendor cannot be charged as the owner, even though the agreement is in parol and void under the statute of frauds: See monographic note to *Loonie v. Hogan*, 61 Am. Dec. 689. See *Avery v. Clark*, 87 Cal. 619; 22 Am. St. Rep. 272.

KINGSLEY v. SIEBRECHT.

[92 MAINE, 28.]

STATUTE OF FRAUDS—ASSIGNMENT OF LEASE.—A contract for the transfer of a lease is a contract for an interest in or concerning land, and hence within the statute of frauds.

STATUTE OF FRAUDS.—A memorandum sufficient to satisfy the statute of frauds must contain within itself, or a reference to other written evidence, the names of the vendor and vendee and the essential terms and conditions of the contract expressed with such reasonable certainty as may be understood from the memoranda and other written evidence referred to without any aid from parol testimony.

PRINCIPAL AND AGENT.—An undisclosed principal may sue upon a contract made in the name of his agent. Where a contract is in writing and otherwise sufficient to satisfy the statute of frauds, parol evidence is admissible to prove that one of the parties named therein contracted as agent of an undisclosed principal, and such evidence being adduced, he may sue upon a contract in his own name.

STATUTE OF FRAUDS—SUFFICIENCY OF MEMORANDA.—If a writing relied upon as a sufficient memorandum of a contract for the assignment of a lease did not state when the leasehold term began or was to end, it is fatally defective, and the defect cannot be supplied by parol evidence and by producing a lease in writing and testifying that it was the one referred to by the parties.

STATUTE OF FRAUDS—LEASE—WHEN SO REFERRED TO AS TO BECOME PART OF A WRITTEN CONTRACT.—Where it is claimed that a contract was made for the assignment of a lease, and the letters relied upon as constituting sufficient memoranda of the contract refer to a lease of property, stating its dimensions and the street on which it fronted, that the lease was for ten years, and naming the monthly rental, if a lease is produced of that property and for that rental and duration, it must be regarded as so referred to as to make it part of the memoranda, and if it is so treated, it supplies the missing elements, and the contract is complete and perfect.

DAMAGES—MEASURE OF FOR FAILURE TO ASSIGN LEASE.—If one who agrees to assign a lease refuses to do so, the

measure of damages for which he is answerable is the difference between the agreed price and the fair value of the leasehold interest, subject to the payment of the rent reserved.

Action to recover damages for the breach of a contract to purchase a leasehold interest. The case was withdrawn from the jury and reported to the law court to decide on questions of law and fact.

L. B. Deasy and B. E. Clark, for the plaintiff.

A. W. King and E. S. Clark, for the defendant.

²⁵ SAVAGE, J. The plaintiff alleges in her declaration that the defendant contracted to pay her six hundred dollars for the assignment to him of a written lease of a certain parcel of land in Bar Harbor from T. L. Roberts to her, dated April 27, 1895, for the term of ten years from that date, at a rental of two hundred and fifty dollars per year, with the privilege of buying the land at any time within the ten years for three thousand dollars; that she has tendered to the defendant an assignment of the lease, but that the defendant refused to receive the lease, and refused to pay the six hundred dollars.

The defendant pleads the statute of frauds. He also alleges that if any such contract was made as is alleged by the plaintiff, "the same became inoperative by reason of a subsequent and independent contract made between the parties in relation to the transfer of said leasehold interest, by which subsequent agreement the defendant agreed to purchase of the plaintiff the said leasehold interest, together with a strip of land one foot wide and extending along the side of the lot covered by the lease, and to pay therefor the sum of six hundred dollars," and that the plaintiff agreed to sell to the defendant both the leasehold interest and the one-foot strip for ²⁶ six hundred dollars; and the defendant says that he has always been ready to perform the substituted contract, but that the plaintiff has refused.

So far as the latter contention of the defendant is concerned, it is sufficient to say that we think the proof is otherwise.

The plaintiff's agent having general charge of this business was Mr. T. F. Moran. After certain correspondence between Mr. Moran and the defendant, which ended in a proposition by Moran and an acceptance of the proposition by the defendant, Moran and the defendant arranged for a meeting in Boston to consummate the trade. Moran telegraphed to the defendant to

"come prepared to buy the one-foot lot," to which reference had been made in their correspondence. Instead of going to Boston himself, Moran intrusted the lease and assignment which had been the subject matter of their correspondence, and a deed of the "one-foot lot," to Mr. E. H. Greely to deliver to the defendant. Greely met the defendant in Boston, and the defendant claims that the new and substituted contract was there made between himself and Greely. From the testimony of the defendant himself, it is not clear that the new contract which is set up was made. The defendant testified, in substance, that he claimed to Greely that the trade between him and the plaintiff covered both the lease and the one-foot strip, that both were to be conveyed to him for the six hundred dollars, but he also testifies that Greely told him that he had no instructions at all from Mr. Moran in regard to the "extra foot." Mr. Greely, testifying, denies that any new contract was made, and says that he named to the defendant a price for the one-foot strip, and that the defendant "thought he would do nothing about that at the time." But whatever may have been attempted in the way of making a new contract, there is no evidence that Greely had any authority to make a new contract, or that, if any was made, it was ever ratified by the plaintiff.

It appears that when the assignment of the lease was examined by the defendant in Boston, it was discovered that the original lessor, Roberts, had not consented in writing to the assignment as was stipulated in the lease itself, and thereupon it was mutually agreed that the paper should be sent back to Bar Harbor, in order ²⁷ that Mr. Roberts' consent might be obtained. And this, we are satisfied, was the only arrangement entered into in Boston between the defendant and Greely.

We now recur to the other contention of the defendant, that the contract on which this action is brought is a contract for the sale of an interest in land, and that the action cannot be maintained for want of a sufficient memorandum to satisfy the statute of frauds. The subject matter of the contract is the lease itself, not the land. Still the contract is for "an interest in or concerning" land, and hence is within our statute of frauds: Rev. Stats., c. 111, sec. 1, par. 4. And the contract being within the statute we must now inquire whether there is a sufficient "memorandum or note thereof in writing."

The plaintiff relies upon certain letters and telegrams between T. F. Moran and the defendant as a sufficient memorandum to satisfy the statute. She also offers a lease from T. L.

Roberts to herself, and claims that it is the lease referred to in the correspondence between Moran and the defendant, and that it should be taken as a part of the memorandum. The defendant contends that the lease is not admissible as a part of the memorandum, because it does not appear upon its face, and without the aid of parol evidence, to be the lease referred to, and because the plaintiff, named as lessee in the lease, is not in any way referred to in the correspondence; in other words, that in the correspondence Moran appears to be the owner of the lease, while the lease offered shows the plaintiff to be the owner. And it is contended that parol evidence is inadmissible to connect the two. Then the defendant contends that the letters and telegrams alone do not constitute a sufficient memorandum, because the plaintiff's name nowhere appears, nor is she described, in the correspondence, and because the correspondence is silent as to when the leasehold term began or when it was to end.

It is well settled that "to satisfy the statute, the memorandum must contain within itself, or by some reference to other written evidence, the names of the vendor and vendee, and all the essential terms and conditions of the contract, expressed with such ^{as} reasonable certainty as may be understood from the memorandum and other written evidence referred to (if any), without any aid from parol testimony": *Williams v. Robinson*, 73 Me. 186; 40 Am. Rep. 352. In this case, it is true that the plaintiff's name does not appear anywhere in the letters and telegrams. They are all between the defendant and T. F. Moran, and Moran is apparently negotiating as owner of the lease. But the case discloses, by parol testimony, that Moran was the plaintiff's agent, and that the plaintiff herself was an undisclosed principal. Two questions arise: 1. May the undisclosed principal sue upon a contract made in the name of her agent? and 2. Is it competent for the undisclosed principal to show by parol that the party appearing in the memorandum to be the contracting party was her agent only, and contracted in her behalf, and thus be enabled to maintain an action on the contract?

We think both questions must be answered in the affirmative. The authorities are numerous and decisive that the contract of the agent is in law the contract of the principal, and the latter can come forward and sue thereon, although at the time the contract was made the agent acted and appeared to be the principal.

In *Wilson v. Hart*, 7 Taunt. 295, Parke, B., said: "It is the

Mass. 308; 25 Am. St. Rep. 633. "The trouble with the memorandum in the case before us is that the seller is not named nor described. Sullivan Brothers were indicated in one corner of the paper as the auctioneers, and it cannot be fairly considered that they were anything else. Their function as auctioneers was recognized in the memorandum, as something distinct from that of parties contracting for unnamed principals."

³¹ Grafton v. Cummings, 99 U. S. 100, was decided on the authority of Sherburne v. Shaw, 1 N. H. 157, 8 Am. Dec. 47, in which it is stated that the "writings disclose the name of no person to whom the defendant was liable." This was also the case of an auctioneer's memorandum. So were Nichols v. Johnson, 10 Conn. 192; O'Sullivan v. Overton, 56 Conn. 105, which were cited by the defendant. When such a memorandum fails to show who the contracting party was, the auctioneer's signature does not aid, for the auctioneer is not a party nor liable. It is not a case of an undisclosed principal, for in such a case the agent is liable.

Salmon Falls Mfg. Co. v. Goddard, 14 How. 446, is doubted in Grafton v. Cummings, 99 U. S. 100, and the dissenting opinion of Mr. Justice Curtis is referred to with approval. But examination shows that these two cases rest upon entirely different grounds, and that Mr. Justice Curtis dissented in the former case only on the ground that the memorandum in question failed to show which party was vendor, and which was purchaser. And the learned justice used this significant language: "It is one thing to show that a party who appears by a writing to have made a contract made it as an agent, and quite a different thing to prove by parol that he made a purchase, when the writing is silent as to that fact."

There is no question but that the memorandum must name or describe two contracting parties, as in this case, a seller and a buyer, but the doctrine of the cases we have cited is to the effect that if one of the parties named is merely an agent, the undisclosed principal may be shown by parol. Accordingly, we hold that the plaintiff may show by parol that she was the real principal, although Moran appeared to be such in the memorandum.

We are next confronted by the objection that it does not appear in the correspondence when the leasehold term began or when it was to end. The letters and telegrams are indeed silent on this subject. In order to constitute a sufficient memorandum, the subject matter, the lease in this case, must be so cer-

tainly described that no oral testimony is needed to supply any necessary terms or conditions. The date of a lease for years, the remaining time it has to run, is obviously an essential item in the description of the ³² interest created by it. Without that being fixed, the whole interest under the lease is indeterminate. It is an essential element of the contract, and must be completely stated in the memorandum. The want of it cannot be supplied by parol.

This point, therefore, is well taken by the defendant, and must prevail, unless the lease offered by the plaintiff can be read into the memorandum.

The letters and telegrams refer to a lease. The plaintiff contends that the lease thus referred to is the lease she offers, and that it is to be read as a part of the memorandum. If this be so, the lease, which is itself a writing, discloses the missing terms, the time when the leasehold interest began and when it was to end. Can this lease be connected with the letters and telegrams so as to become a part of the memorandum, without the aid of parol testimony? Parol evidence can only bring together the different writings. It cannot connect them. They must show their connection by their own contents. The connection must be apparent from a comparison of the writings themselves: *Freeport v. Bartol*, 3 Me. 340; *O'Donnell v. Leeman*, 43 Me. 158; 69 Am. Dec. 54. We will now apply this test.

The defendant in a letter to Moran, dated December 18, 1895, inquired: "What are the best terms you can make us on the lot next to the Brick block on Main street, on a lease, with privilege of buying before the lease expires, at a price with or without that extra foot, which I believe you own next adjoining the Brick building?" The context shows that the property was in Bar Harbor. December 20, 1895, Moran answered: "I think I gave you price on the lot adjoining the Brick block. . . . I think I told you I would sell you the lease for a small bonus (ten year lease.)" January 9, 1896, defendant wrote to Moran: "I asked you to give me the amount of rent, the lowest price at which it can be purchased for, within the time you have the lease; also what bonus you want for your option." In answer to this, Moran wrote to the defendant, January 11, 1896: "Yours received, and in reply will say that the lot twenty-five by sixty on Main street is leased for ten years at two hundred and fifty dollars a year, with privilege of buying at any time during the term for ³³ three thousand dollars. I have paid one year's rent in advance, and will turn over my lease to

you for six hundred dollars." Thereupon the defendant telegraphed Moran, January 13, 1896:

"I accept your offer. Meet me with all necessary legal papers at Quincy House, Boston, Wednesday morning.

H. A. SIEBRECHT."

All these writings refer, on their face, to the same lease. It was a ten-year lease of a lot in Bar Harbor, with a rental of two hundred and fifty dollars a year, and an option of purchase at any time during the term for three thousand dollars. The lot was twenty-five by sixty feet in size. It was situated on Main street, and was on the same side of the street as the Brick block, for it "adjoined" it. It was one foot distant from the Brick building, "that extra foot, which," the defendant in his letter of December 18, 1895, says, "I believe you [Moran] own next adjoining the Brick building."

Now if we turn to the lease offered by the plaintiff, we find that it answers every particular called for by the correspondence. On its face it shows that it was a ten-year lease of a lot of land in Bar Harbor, on Main street, twenty-five feet by sixty feet in dimensions, adjoining and one foot distant from the lot known as the Brick block lot. It yielded a rental of two hundred and fifty dollars per annum. It contained an option of purchase at any time during the term for three thousand dollars. Can there be any doubt that the lease offered by the plaintiff is the lease referred to in the correspondence? We think not. The writings connect themselves. The only other possible lot to which the description in the correspondence could apply would be a lot on Main street on the other side of the Brick block. But the court in *Hurley v. Brown*, 98 Mass. 545, 96 Am. Dec. 671, answering a similar hypothesis, said: "We think the presumption is strong that a description which actually corresponds with an estate owned by a contracting party is intended to apply to that particular estate, although couched in such general terms as to agree equally well with another estate which he does not own": See, also, *Mead v. Parker*, 115 Mass. 413; 15 Am. Rep. 110.

The lease, therefore, may be read into the memorandum. It supplies all the missing elements. It shows particularly that the ³⁴ leasehold interest contracted for was for a term of ten years from April 27, 1895.

The contract alleged, and the failure of the defendant to perform it, are both proved by the requisite evidence. The plaintiff is entitled to recover her damages, that is, the difference be-

tween the agreed price and the fair value of the leasehold interest, subject to the payment of the rent reserved. On this point the testimony is conflicting. The rent had been paid in advance to April 27, 1896. The testimony discloses estimates of the value of the leasehold interest, ranging from nothing to six hundred dollars.

Upon the whole, we think the plaintiff's damages may be fairly assessed at four hundred dollars.

Defendant defaulted.

STATUTE OF FRAUDS—SUFFICIENCY OF MEMORANDA—SUBLEASE.—The memorandum of a contract for the sale of lands is not sufficient unless it contains substantially the whole agreement, so that its essential terms may be ascertained from the writing without a resort to parol evidence: *Kopp v. Relter*, 146 Ill. 437; 37 Am. St. Rep. 156. As to what is a sufficient memorandum of the terms of a sublease to satisfy the statute, see *Freeland v. Ritz*, 154 Mass. 257; 26 Am. St. Rep. 244. See monographic note to *Atwood v. Cobb*, 26 Am. Dec. 661.

STATUTE OF FRAUDS.—"REASONABLE CLEARNESS" with which the terms of a contract must appear: See *Siemers v. Siemers*, 65 Minn. 104; 60 Am. St. Rep. 430, and note.

PRINCIPAL AND AGENT—PAROL EVIDENCE.—An undisclosed principal may maintain an action on a written contract made by his agent in his name alone: *Powell v. Wade*, 109 Ala. 95; 55 Am. St. Rep. 915, and note thereto. When one contracts as agent for an unknown principal, parol evidence is admissible to show who the principal was: *Waddill v. Sebree*, 88 Va. 1012; 29 Am. St. Rep. 766.

MEASURE OF DAMAGES FOR BREACH OF CONTRACT TO PURCHASE PROPERTY is, in general, the difference between the actual contract price and the actual value of the property at the time of the breach: See *Murray v. Doud*, 167 Ill. 368; 59 Am. St. Rep. 297; *Drew v. Pedlar*, 87 Cal. 443; 22 Am. St. Rep. 257.

NEAL v. COBURN.

[92 MAINE, 129.]

BANKING.—A check is in the nature of a bill of exchange, and is, pro tanto, governed by the same rules.

BANKING—PAYMENT OF FORGED CHECK TO AN INNOCENT HOLDER FOR VALUE.—A bank paying a forged check purporting to be signed by one of its depositors to an innocent indorsee for value cannot recover from him the amount so paid on discovering the forgery.

CONSIDERATION.—A verbal promise to refund made under a misapprehension of law is without consideration, and hence not binding.

BANKING—RECOVERY OF MONEY PAID TO UNDER A MISAPPREHENSION OF LAW.—If a bank pays to an innocent indorsee for value a check purporting to be drawn by one of its depositors, but which is proved to be forged, and such innocent

indorsee repays to the bank the moneys so paid under a misapprehension of law, believing himself to be liable, he may, in an action of assumpsit, recover the moneys so paid by him.

BANKING—FORGED CHECK—ONE INNOCENT INDORSEE, WHEN NOT LIABLE TO ANOTHER.—If an innocent indorsee of a forged check indorses it to another, who receives payment thereon from the bank on which the check purported to be drawn by one of its depositors, and, on the demand of the bank, refunds the money received, he cannot maintain an action against his innocent indorsee, because the payment was voluntary and without liability to the bank.

Assumpsit to recover moneys paid by the plaintiffs on account of a check which was found to be forged.

F. E. Timberlake, J. C. Holman, and F. W. Butler, for the plaintiffs.

H. L. Whitcomb and J. P. Swasey, for the defendant.

¹⁴⁵ EMERY, J. Haven was a depositor in the Bay State Trust Company, a bank in Boston. A written instrument purporting to be his check upon that bank, payable to Crew; or order, was by Crew indorsed for value to Coburn, the defendant. Coburn indorsed it for value to Neal and Quimby. That firm indorsed it for value to Furbish, Butler & Oakes. The latter firm indorsed it for collection to the Phillips National Bank. The Phillips Bank indorsed it for collection to the Commonwealth Bank of Boston, which bank presented it for payment through the clearing-house to the Bay State Trust Company, the bank upon which it was drawn. The Bay State Trust Company paid it as Haven's check, marked it paid and charged the mount to Haven's account. Three days afterward it was discovered that the drawer's (Haven's) signature was forged, and the paper was returned through the same channel to Neal and Quimby, the plaintiffs, who refunded the amount and in their turn presented it to Coburn, the defendant, and demanded of him to refund the amount in his turn, which he refused to do. Hence this action for money had and received to enforce such refunding.

It is conceded that Neal and Quimby cannot maintain this action unless the Bay State Trust Company could do so had all the intermediate indorsers refused to refund. The question therefore is—assuming the good faith of all parties—who shall bear the loss in such case, the first innocent indorser for value or the bank which accepted the paper as genuine and paid it as the check of its depositor?

Since a check belongs to that class of written instruments called commercial paper, the question stated is not so much

one of abstract justice in the particular case, as it is of what is the established or workable rule in this case of cases. Commercial paper has long been governed by special rules, which, while designed to insure justice, are also designed to insure the free and safe use of an indispensable commercial agency. The commercial world needs ¹⁴⁶ and seeks for the plain workable rule rather than for the somewhat uncertain abstract right in each case. We think such a rule decisive of this case has been long and firmly established.

A check is in form and nature a species of bills of exchange and is pro tanto governed by the same rules: *Foster v. Paulk*, 41 Maine, 425; hence, decisions as to bills of exchange upon this question are applicable to this case. In 1715, in an action by an indorsee against the acceptor of a bill of exchange, tried before Lord Raymond in the king's bench court sitting at Guildhall to hear commercial cases, it was held that the acceptance sufficiently proved the signature of the drawer. Evidence offered by the acceptor to affirmatively prove the bill to be a forgery was rejected, one of the reasons given being "the danger to negotiable notes": *Jenys v. Fowler*, 2 Strange, 931. In 1762, before Lord Mansfield, in the king's bench then also sitting at Guildhall, was tried an action for money had and received to recover back money paid to an innocent indorsee of a bill of exchange by the drawee. The signature of the drawer was forged. Lord Mansfield stopped the defendant's counsel, saying the case could not be made plainer by argument, and ordered judgment for the defendant: *Price v. Neal*, 3 Burr. 1355. In 1815 the question came before the common pleas, also then sitting in London. The banker sought by an action for money had and received to recover back money paid by him to an innocent holder of a bill of exchange bearing a forged acceptance of a correspondent of the banker's. The plaintiff was nonsuited: *Smith v. Mercer*, 6 Taunt. 76. In 1882 the English "bills of exchange act" was passed "to codify the law relating to bills of exchange, cheques and promissory notes." In section 54 it was enacted that, "the acceptor of a bill, by accepting it, is precluded from denying to a holder in due course the existence of the drawer, the genuineness of his signature, and his capacity and authority to draw the bill": 4 Eng. Rul. Cas. 159, 160. The rule stated by Lord Raymond, in 1715, seems to have become firmly established in that great commercial country.

In this country the earliest published judicial decision upon

the question appears to have been made in 1802 by the supreme¹⁴⁷ court of Pennsylvania. An innocent holder of a check for value presented it for deposit to his credit in the bank upon which it was drawn. The bank received it, and credited the amount to the holder and debited the same to the supposed drawer. It soon proved to be a forgery, whereupon the bank charged the amount back to the holder's account. The holder then brought an action against the bank, and recovered judgment: *Levy v. Bank of United States*, 1 Binn. 27. In 1825, a case similar in principle came before the United States supreme court, which always decides for itself questions of general commercial law as applicable to the whole country. The Bank of the United States remitted to the Bank of Georgia papers purporting to be banknotes of the latter bank, which were received and credited to the account of the former bank. Some days afterward, the supposed notes were found to be counterfeit, and the Bank of Georgia tendered them back to the United States Bank and charged the amount back to that bank, and refused to acknowledge any indebtedness for them. The United States Bank brought an action for balance of account stated, and for money had and received, and was held entitled to recover the amount so deposited: *United States Bank v. Bank of Georgia*, 10 Wheat. 333. This decision does not appear to have been questioned in any federal court. The applicability of this decision is manifest when it is recalled that the acceptor of a bill of exchange is in the same category as the maker of a note. If one who pays what purports to be his note cannot recover the money back, no more can one who pays what purports to be a bill of exchange or check drawn upon him.

In 1820, five years earlier than the case in *Wheaton*, a similar case occurred in Massachusetts between two banks as to the counterfeit bill of one of them which it received from the other and paid as genuine. It was held that it could not recover back the money paid: *Gloucester Bank v. Salem Bank*, 17 Mass. 33. As late as 1890 the supreme court of Massachusetts stated the rule as follows: "In the usual course of business, if a check purporting to be signed by one of its depositors is paid by a bank to one who, finding it in circulation or receiving it from the payee by indorsement, took it in good faith for value, the money cannot be recovered back on the¹⁴⁸ discovery that the check is a forgery": *First Nat. Bank v. First Nat. Bank*, 151 Mass. 282; 21 Am. St. Rep. 450.

In a New York case in 1850 the bank upon which a draft

was drawn refused payment for want of funds of the drawer, whereupon Goddard, the correspondent of the supposed drawer, being informed of the draft but without seeing it, left his own check for its payment, which amount was remitted to the holders of the draft. The next day, Goddard, on seeing the draft, found it to be forged. Held, however, that he could not recover back the amount of the holder: *Goddard v. Merchants' Bank*, 4 N. Y. 149. In 1871 a bank in New York paid to an innocent holder a forged draft drawn upon it and then sought to recover the money back. The court rendered judgment for the defendant as in the earlier case, using this language: "For more than a century it has been held and decided without question that it is incumbent upon the drawee of a bill to be satisfied that the signature of the drawer of the bill is genuine—that he is presumed to know the handwriting of his correspondent; and, if he accepts or pays a bill to which the drawer's name has been forged, he is bound by the act and can neither repudiate the bill nor recover the money paid. . . . A rule so well established and so firmly rooted in the jurisprudence of the country ought not to be overruled or disregarded": *National Park Bank v. Ninth National Bank*, 46 N. Y. 80, 81; 7 Am. Rep. 310.

Other courts have also recognized the rule more or less explicitly: *Commercial Bank v. First Nat. Bank*, 30 Md. 11; 96 Am. Dec. 554; *Germania Bank v. Boutell*, 60 Minn. 192; 51 Am. St. Rep. 519; *St. Albans Bank v. Farmers' Bank*, 10 Vt. 141; 33 Am. Dec. 188; *Star Fire Ins. Co. v. New Hampshire Nat. Bank*, 60 N. H. 442; *Dipont Bank v. Fayette Bank*, 90 Ky. 22.

The only allusion to the rule we have found in the published opinions of this court is in *Belknap v. Davis*, 19 Me. 457, in 1841, where, in an action by the holder against the acceptor of a bill of exchange, it was held that "the acceptance admits the signature of the drawer and the authority to draw." So far as it goes this would seem to be in the same line with the decisions above cited and quoted from, and would seem to indicate that the rule so long and firmly upheld by those decisions is in harmony with the law of commercial paper in this state.

¹⁴⁹ In some cases, the courts have been led to inquire whether the condition of the holder had changed between the payment of the check and notice to him of the forgery, and to hold that if the holder had suffered no loss by reason of the payment he should refund the amount to the bank or drawer. The rule

cited does not make any such distinction—does not call for any inquiry into the condition of the holder. To do so is to abandon the rule, and with it all certainty. It would leave every person receiving payment on a check in complete uncertainty as to whether and when it was in fact finally paid. It would be a destructive blow to the usefulness of checks as an instrumentality of trade. It is also against the reason and equity of the rule as stated by the courts recognizing it, and hence is inconsistent with the rule. Wherever the rule is upheld, the doctrine of such cases must be rejected.

The reason usually given for the rule is, that it is impracticable for the indorsee or holder of a bill of exchange or check to know or learn whether the signature of the drawer is genuine, and that the bank or other drawee has the best means of knowing or learning the fact; or, as sometimes expressed, the bank may be presumed to know the signature of its depositor, and the acceptor the signature of his business correspondent. Lord Mansfield, in *Price v. Neal*, 3 Burr. 1355, compared the equities. He said that the action for money had and received could not be maintained unless it was against conscience in the defendant to retain it, and that it was not against conscience for an innocent holder to retain money paid to him by the drawee of a bill of exchange which he had in good faith paid value for. As between parties equally innocent, there seems to be no more equity in throwing off the loss from one to the other, than in leaving it where it fell. In cases like these, however, where the loss fell in the regular course of business upon the bank which could have known and should have known the forgery, it seems positively inequitable to throw off that loss upon an innocent man who had much less opportunity of knowing. As also said by Lord Mansfield in *Price v. Neal*, 3 Burr. 1355, if negligence is to be considered, it was as much, if not more, in the drawee or bank as in the holder. But whatever the reason or equity of the rule, and however much it ¹⁵⁰ may be criticised by text-writers and theorists, it has been so long established and so explicitly recognized by the courts in commercial communities it should stand as the rule until modified by legislative action. It evidently has been found to be a workable rule, and its plainness and certainty should not be obscured by fine judicial distinctions confusing to the lay mind.

It has been suggested that this rule breaks against another rule of the law of commercial paper, viz: that the defendant, by indorsing the check, guaranteed to every subsequent holder

the genuineness of the signature of the drawer. But the bank upon which the check was drawn did not become a holder. It did not purchase the check. The bank paid it—extinguished it. It was no longer a check, and could no longer have a holder as such. It had become merely a voucher: *First Nat. Bank v. Maxfield*, 83 Me. 576.

The plaintiff cites cases in which it was found that the bank was induced by the conduct of the holder to assume the check to be genuine without investigation. In other cases it was found that the holder knew or had reason to know of the forgery or was put upon inquiry before taking the check. In these cases it was held that the holder was without the rule.

In this case, however, no such facts can be found. Haven, the supposed drawer, was occupying a summer cottage in the neighborhood. The check was written upon one of his blanks taken from his check-book. The signature was so good an imitation that the bank accepted it. Crew, the forger, had previously received genuine checks from Haven. He was a boarder at the defendant's hotel or boarding house. While after the event the defendant now believes Crew to have been an impostor, nothing in the case shows that he so believed or had reason to so believe before the event. It is true he was told by Crew that Haven desired the check to be held about three weeks before presentment, but that was no reason for suspecting the genuineness of the signature. It might have generated a doubt as to the solvency of Haven, but no more. While, perhaps, a banker would have hesitated to accept the check under the circumstances, we find in them nothing that would naturally ¹⁵¹ have deterred a man like the plaintiff. In the New York case, *Goddard v. Merchants' Bank*, 4 N. Y. 149, the circumstances surrounding the transfer of the check from the forger to the first holder were even more suspicious than here, and were held to be insufficient to affect the holder.

We find the plaintiff was an innocent holder for value, and that the loss by the forgery fell in the course of business upon the bank. We hold that the defendant, though he has suffered no loss, is protected by the rule cited, and that under the rule the loss cannot be thrown off the bank upon him.

It is conceded that the defendant's verbal promise to refund made under a misapprehension of the law was without consideration, and hence not binding.

Plaintiffs nonsuit.

BANKS AND BANKING—CHECKS.—A check payable to order is a bill of exchange payable to order on demand: *First Nat. Bank v. Northwestern Bank*, 152 Ill. 296; 43 Am. St. Rep. 247. Difference between a check and a bill of exchange: *Industrial Bank v. Bowea*, 165 Ill. 70; 56 Am. St. Rep. 228.

BANKING—PAYMENT OF FORGED CHECK TO INNOCENT HOLDER FOR VALUE.—The drawee of a check or bill of exchange is held bound to know the signature of his drawer, and the banker, even more, to know that of his depositor; and if they fail to discover the forgery before payment, they must stand the loss: *First Nat. Bank of Belmont v. National Bank of Barnesville*, 58 Ohio St. 207; 65 Am. St. Rep. 748. See extended note to *People's Bank v. Franklin Bank*, 17 Am. St. Rep. 890.

CONSIDERATION.—Where one, through mistake as to his legal rights, acknowledges himself under an obligation, which the law will not impose, he will not be bound thereby: *Warder v. Tucker*, 7 Mass. 449; 5 Am. Dec. 62.

RECOVERY OF MONEY PAID UNDER A MISTAKE OF LAW.—The general rule seems to be that money paid under a mistake of law cannot be recovered back: *Painter v. Polk County*, 81 Iowa, 242; 25 Am. St. Rep. 489; *Alton v. First Nat. Bank*, 157 Mass. 341; 34 Am. St. Rep. 285. The true doctrine was well stated in the note to *Storrs v. Barker*, 10 Am. Dec. 325: "When it is said that money paid under a mistake of law can be recovered back, there is a further assumption made, that the party so recovering it had no kind of right, moral or legal, to the money. He would then be guilty of a fraud in retaining it, and the cases hold that here the action will lie. The rule is different where a party received the money under a claim of right, but against which there was a valid legal defense, of which the party paying was ignorant. In this case the latter cannot avail himself of the mistake to recover the money back."

BANKING—LIABILITY OF PRIOR INDORSER.—Where an indorser is compelled to pay any money on account of the indorsement, the law implies a request and a promise of repayment by the prior indorser: *Wright v. Butler*, 6 Wend. 284; 21 Am. Dec. 823.

SOUTH PORTLAND v. CAPE ELIZABETH.

[92 MAINE, 828.]

MUNICIPAL CORPORATIONS—DIVISION OF LIABILITY.—If a part of a town is set off and incorporated into a new town, the old town, though shorn of that part of its territory, still retains all the property, powers, and rights, and remains subject to all the obligations of the old town, unless it is otherwise provided in the act. If it is provided that the town debt shall be borne by the towns in proportion to the valuation of taxable property in each, it is the duty, primarily, of the old town to liquidate the liability of the original town, and the creditors must look to it alone, the new town being liable, after demand, to refund its proportion.

MUNICIPAL CORPORATIONS—DIVISION OF—ASSETS—PUBLIC PROPERTY, WHETHER TO BE TREATED AS.—Where, upon division of one town into two, the statute provides that the town debt shall be borne by such towns in proportion to the valuation of taxable property in each, neither is entitled, on ascertaining its liability, to have a setoff in its favor for the value of schoolhouses and like property situate in, and retained by, the other town. Prop-

erty not available for the payment of debts cannot be considered as offsetting or reducing gross liabilities.

MUNICIPALITIES—DIVISION OF PROPERTY BY THE LEGISLATURE—EQUITABLE ACCOUNTING—LIABILITY TO. If the legislature, in authorizing the division of one town into two, declares that public property situate in each town shall belong thereto, the courts have no power to revise this division. Hence, one of the towns cannot be compelled to go into an equitable accounting in regard to public property retained by it in excess of the property of like character remaining to the other town.

MUNICIPAL CORPORATIONS—DIVISION OF—DELAYING ACCOUNTING AS TO LIABILITIES.—If a statute provides for the creating of two towns out of one, and that each shall be liable for the town's indebtedness in proportion to the taxable property remaining within its limits, the ascertaining of the liability of the new town for its share of the indebtedness need not be postponed, at its request, until all available assets shall be realized and all debts of the old town paid.

Nathan and Henry B. Cleaves, Stephen C. Perry, and Edward C. Reynolds, for the plaintiff.

J. W. Symonds, D. W. Snow, C. S. Cook, and Elgin C. Verrill, for the defendant.

⁸²⁹ STROUT, J. This cause was submitted to the presiding justice with right of exception. To his ruling that plaintiff was entitled to recover, exception was taken.

The legislature, in 1895, in chapter 194 of Special Laws, set off and incorporated a portion of the old town of Cape Elizabeth into a new town by the name of Cape Elizabeth, and the remaining portion of the old town was given the name of South Portland.

The act provided, section 3, that "the existing liabilities of the present town of Cape Elizabeth shall be divided as follows: The town debt shall be borne by said towns in proportion to the valuation of taxable property and estate within their respective territories, as taken by the assessors in April, 1894; and shall continue to pay the same proportion of the ⁸³⁰ state and county taxes assessed upon the present town of Cape Elizabeth, until a separate valuation shall be made by the state assessors. All paupers now supported or aided by the present town of Cape Elizabeth, or that may hereafter become chargeable as paupers, shall, after division, be chargeable to and maintained and supported by the new town of Cape Elizabeth, or the town of South Portland, according as their last settlement may fall within the respective territories of said towns."

Section 4 provided that "all town property, real and personal, now situated within the limits of said new town of Cape

Elizabeth, shall become the property of said new town, and all town property, real and personal, now situated within the limits of said town of South Portland, shall become the property of said town of South Portland."

It will be observed that these two sections treat South Portland, though under another name, as the old town from which the new town is set off, and the Cape Elizabeth created by the act, as a "new town." This distinction is important, as it shows the primal relation which South Portland bears to the debts and duties of the old town of Cape Elizabeth. Where part of a town is set off and incorporated as a new town, the old town, though shorn of part of its territory, still retains all the property, powers, and rights, and remains subject to all the obligations, of the original town, unless otherwise provided in the act: *Frankfort v. Winterport*, 54 Me. 250; *North Yarmouth v. Skillings*, 45 Me. 133; 71 Am. Dec. 530; *Poland v. Strout*, 19 Me. 121; *Windham v. Portland*, 4 Mass. 384.

As the act treated South Portland as the old town from which the "new town of Cape Elizabeth" was set off, it became the duty of South Portland primarily to liquidate the liabilities of the original town; the new town of Cape Elizabeth, by the act, being responsible to refund its proportion of such liabilities to South Portland. Creditors of the old town could require payment from South Portland; they could not from the new town.

Both towns have acted in accordance with this view. Taxes assessed before division upon inhabitants of the new town were collected ³³¹ and paid into the treasury of South Portland. All other available assets, except some tax deeds and sewer assessments which were divided by agreement, have been turned in to that town, and that town has paid all the debts of the original town which have been paid.

Shortly after the division, each town appointed a committee to confer with each other, to adjust the financial affairs between the two towns. These committees met and acted as a joint committee, and appointed a subcommittee from its members to examine and report to the joint committee the assets and liabilities of the old town. The subcommittee made its report to the joint committee, which was adopted by the latter unanimously, and each town committee reported the result to the annual meeting of each town in March, 1896. These reports gave the amount of liabilities and assets, both agreeing, and each town, at that March meeting, accepted the report, and contin-

ued its committee to make further progress, by way of final settlement. The vote of defendant town was to "adopt" the report of the committee.

At the March meeting, in 1897, each committee again reported to its town, both agreeing upon the amount of liabilities paid by South Portland, and amount of assets received by it, and the share of the excess of payment which devolved upon the defendant town, which is the amount sued for in this action. Defendant town at that meeting accepted the report of its committee; but the committee of defendant town claimed that public property, such as schoolhouses, ferry wharf, gravel banks, and like property should be treated as assets for the payment of debts. They had not been so treated by the joint committee.

The committee of defendant town claimed that to ascertain its liability under section 3 of the act, all this class of property should be valued and treated as an asset, and together with available assets, which the joint committee had ascertained, should be deducted from the gross liability, and that the result thus obtained would constitute the net debt to be apportioned according to the valuation of 1894; while South Portland claimed that this class of property was divided by section 4 of the act, and should not enter into the calculation.

³³² We do not understand that the parties disagree as to these amounts, nor is it denied that the payments were made upon legal claims against the original town. But defendants insist that no promise on the part of the new town of Cape Elizabeth can be implied in favor of South Portland, because it was not consulted about the payments, and because they were not made at its request.

And counsel say, that the writ declares upon an accounting by the committees of the two towns, and adoption by them of the result, and a promise to abide and pay, and that the evidence fails to show such adoption or promise. However this may be, the writ contains a money count under which sums equitably due may be recovered. South Portland was bound to pay these debts in the first instance; then the liability of the new Cape Elizabeth attached. In such case, payment by South Portland was not a voluntary payment of another party's debt, without his request or consent, but it was a payment of its own debt, to which defendant was bound by law to contribute its proportion. Defendant's liability does not depend upon express agreement, or previous request of payment. The duty of pay-

ment was upon South Portland; and when it had paid, and as fast as it paid, the duty to reimburse its proportion was imposed upon the new Cape Elizabeth. Where the law imposes the duty of payment, it implies a promise to pay: *Farwell v. Rockland*, 62 Me. 301; *Mt. Desert v. Tremont*, 72 Me. 348; *Brewster v. Harwich*, 4 Mass. 278.

But there is another ground more strongly relied on in defense. It was claimed, and offered to be proved by the defendant, that at the time of the division of the towns, there was property of the old town of the value of nearly \$88,000, a schedule of which appears on page 35 of the case, consisting of schoolhouses and school property, gravel banks, ferry wharf and landing, and like property, all of which was subject to the provisions of section 4 of the act of division; that of this property nearly \$75,000 in value was in South Portland, and nearly \$13,000 in the new town of Cape Elizabeth; that if South Portland received of this property all that was within its territorial limits, as provided by section 4 of the act, ³²³ that town would receive about \$10,000 more than its proportional share; and that this excess should either be set off against plaintiff's claim, or that it should be adjusted in equity as prayed for in the brief statement, and allowed to defendant to make the division of the property equal, under the proportion established by section 3 of the act of division. This evidence was excluded and exception taken.

It may be said, in passing, that if the claim of the committee of defendant town, that the debt to be apportioned under section 3 was the net debt, after deducting all town assets, and that the property mentioned in this schedule should be treated as an asset, this inequitable result would follow. The committees of both towns found the gross liabilities of the old town to be \$78,690.38; the assets they found to be \$37,894.42. If to these assets is added the school and other property in the schedule, valued at \$87,746.70, there would be a total of assets of \$125,641.12, an excess of \$46,950.74 over the gross liabilities. South Portland would thus be required to pay the entire indebtedness without contribution from defendant town, and the property mentioned in the schedules would go to each town according to its location in each, under the provisions in section 4. The statement proves the fallacy of the claim.

Counsel for defendant do not press this bald proposition in terms, but they do say that "the town property is a fund which must justly be considered as offsetting or reducing gross liabili-

ties, and it is a fund in which each part of the town, upon division, should share proportionately." If limited to property available for payment of debts, the proposition is true.

Schoolhouses and other like property built, maintained, and used for public purposes, and necessary thereto, are not to be converted into cash for payment of debts. If it was done, the town would be obliged at once to replace them, and nothing would be gained. Such property, therefore, cannot be treated as an asset when debts and resources for their payment are considered.

But it is strenuously urged that, notwithstanding the provisions of section 4, by which this property is specifically divided, and ³³⁴ the impracticability of treating it as an asset, the court should go into an equitable accounting in regard to it, and adjust for itself its fair and equitable division; and that, when this is done, it is claimed that the payments therefor made by South Portland are not in excess of its proportion, and therefore it cannot recover; that the division of this property made by section 4 leaves to South Portland about \$10,000 in value in excess of its proportion under the ratio established by section 3, and that to equalize this South Portland should pay upon the debts of the old town that amount, in excess of its proportion fixed by the statute.

Upon the division of a town, the legislature is presumed to take into consideration all the equities when it divides this class of property. Questions of public policy and expediency enter in, and of these the legislature is the exclusive judge.

Towns derive existence only from the will of the legislature, and by it may be divided or destroyed, as it shall deem for the interest of the state or the inhabitants of the town. The court cannot stay its hand, or control or modify its exercise.

In this case, the legislature has said that all of this class of property within the territorial limits of each town shall belong to such town. It was competent for the legislature to so determine; we have no power to revise that decision: *North Yarmouth v. Skillings*, 45 Me. 141; 71 Am. Dec. 530; *Frankfort v. Winterport*, 54 Me. 250; *Agawam v. Hampden*, 130 Mass. 530; *Kingman, Petitioner*, 153 Mass. 573; *Whitney v. Stow*, 111 Mass. 372; *Rawson v. Spencer*, 113 Mass. 45.

The language of section 4 is plain and explicit. No apparent equity can be imported into it to modify its express declarations. It gave to each town absolutely the property situated in each. Section 3 apportions "the town debt"; section 4 divides "town

property." It is the plain duty of the court to give effect to these provisions, according to their terms and the evident intention of the legislature. The evidence offered was rightfully excluded.

But if the evidence is considered, it is not apparent that South Portland has received the large excess of property claimed by the defendant. In its schedule, defendant includes the ferry wharf and ³³⁵ landing, which it values at \$10,000, about the excess claimed. But this wharf and landing is a highway. It was laid out as such by the old town under authority of chapter 602 of the Special Laws of 1871, for the purpose of a ferry to the city of Portland, and has always been used as such and is not likely ever to be used for other purposes. It is said that no income is derived from it; no evidence of any was offered. The burden of maintaining it falls upon South Portland, while its use, like other highways, is for the public generally. It can in no just sense be treated as an asset.

It is also urged that judgment should be postponed until all available assets shall be realized and all debts of the old town paid, and then the proportions of the two towns should be adjusted; that there are still outstanding debts, and doubtful assets that may be realized, and that only when these are ascertained can the proportion be adjusted. It may be many years before the whole debt shall mature, and it is manifestly a hardship to require South Portland to await that event before being reimbursed for the outlay it was compelled to make, for which the defendant is by law responsible. Such a result is not required by law, nor is it necessary to protect the rights of defendant.

The committees of both towns agreed upon the amount of available assets and the liabilities. Their report of that agreement was accepted by both towns. Those reports stated that South Portland had paid of the debts of the old town, in excess of all the available assets found by the committees, the sum of \$25,150.09, and that the share of the new town of Cape Elizabeth of that excess was \$6,053.69. No question of the correctness of these figures appears to have been made by the defendant town at the time of the committee's report, nor at any time since, nor that the payments were not properly made upon legal debts of the old town. If any farther assets shall be realized by South Portland, they must be applied toward the extinguishment of the debts of the old town, or ratably divided, if the two towns so agree. Farther payment of debts of the old town can easily be apportioned.

It is also objected that a lump sum is sued for, and the items not given. If defendant had desired a specification of items, the ³³⁶ court would have ordered it. It is now too late to make the objection. But if it were not, the action of defendant town upon the report of its committee and ever since may well be treated as an assent to the accuracy of the amount of payments for the old town. The justice who heard the cause decided that plaintiff was entitled to recover the amount which the committee had reported as the share belonging to defendant to pay. That ruling necessarily was based upon a finding of the fact that that sum was the defendant's share. Such finding of fact is conclusive.

The plaintiff is entitled to recover of defendant its share of plaintiff's payment in excess of plaintiff's proportional share, as established by section 3, of the act of division.

The decision below was correct.

Exceptions overruled.

MUNICIPAL CORPORATIONS—DIVISION OF—POWERS OF LEGISLATURE—EFFECT ON PROPERTY RIGHTS.—Property owned by municipal corporations is public property, and is under the control of the legislature: *Darlington v. Mayor*, 31 N. Y. 164; 88 Am. Dec. 248. The legislature, on changing, dividing, or annexing municipal corporations, may make provision concerning existing indebtedness, and its power so to do, unless restrained by a special constitutional provision, is clear and ample: *Mayor v. Shattuck*, 19 Colo. 104; 41 Am. St. Rep. 208; *Mount Hope Cemetery v. Boston*, 158 Mass. 509; 35 Am. St. Rep. 515. The legislature may divide a municipal corporation into two separate municipalities, and may also direct a division of the property of the original town, held under its original charter in its corporate and municipal capacity, and which was to be used for municipal purposes: *Montpelier v. East Montpelier*, 29 Vt. 12; 67 Am. Dec. 748. Where part of the territory of one municipal corporation is taken from it and annexed to another, the former corporation retains all its property, including that which happens to fall within the limits of such other corporation, unless some other provision is made by the act authorizing the separation: *Winona v. School Dist. No. 82*, 40 Minn. 13; 12 Am. St. Rep. 687.

MUNICIPAL CORPORATIONS—PUBLIC PROPERTY NOT TAXABLE.—As a general rule, public property, of whatever nature, whether of the United States or of a state, or of any of its subordinate political divisions, is not liable to taxation for the purposes of revenue: see note to *Board of Commrs. v. Ottawa*, 33 Am. St. Rep. 400.

McMULLIN v. McMULLIN.

[92 MAINE, 836.]

LIEN FOR THE VALUE OF THE WORK OF A HORSE OR TEAM.—If a statute provides that a person may have a lien for personal services and services performed by his team, one who lets his horse by the month to another, to work in hauling lumber, is not entitled to any lien on the lumber hauled, the horse, by virtue of the hiring, becoming the horse of the lessee for the time being, and he is the one entitled to the lien.

E. O. Greenleaf, for the plaintiff.

Frank W. Butler, for claimant.

337 HASKELL, J. Assumpsit for the use of a horse in hauling logs, upon which a lien therefore is claimed. The presiding justice ruled **338** in favor of the lien, and the owner of the logs has exception. It appears that plaintiff let his horse to the defendant by the month to haul lumber. The horse thereby became the defendant's horse for the time being, and he it was who might have a lien for "personal services and the services performed by his team," not the plaintiff: *Richardson v. Hoxie*, 90 Me. 227. Moreover, the case does not show that any services by anybody were performed in hauling claimant's logs.

Exceptions sustained.

LIEN FOR VALUE OF WORK OF HORSE OR TEAM.—One who furnishes teams and teamsters at a gross price per month employed in skidding, hauling, and banking logs, is entitled to a lien under a statute providing that any person who may do or perform any manual labor in cutting, banking, driving, rafting, cribbing, or towing any logs shall have a preferred lien thereon as against the owner thereof and all other persons for the amount due for such services: *Breault v. Archambault*, 64 Minn. 420; 58 Am. St. Rep. 545. Under a statute giving lumbermen a lien on lumber cut and hauled by them for their "personal services," there is no lien for labor performed by their servants and teams: *Hale v. Brown*, 59 N. H. 551; 47 Am. Rep. 224; *McCrillis v. Wilson*, 84 Me. 286; 56 Am. Dec. 655.

McMULLIN v. McMULLIN.

[92 MAINE, 838.]

INFANCY OF PLAINTIFF.—The defense of the infancy of the plaintiff must be pleaded in abatement, and if not pleaded within the time allowed for pleas of that class, is waived, and cannot afterward be urged by a plea in bar.

INFANCY—JUDGMENTS—WHEN NOT REVERSIBLE BECAUSE OF.—A judgment in favor of an infant in a personal action is not reversible on the ground of infancy, where it was not pleaded in abatement. The want of *prochein ami* may be cured by amendment, even when pleaded in abatement.

Assumpsit to recover on a lien claimed for plaintiff's personal services. The defendant moved to dismiss on the ground that the plaintiff was a minor and the action had been without the appointment of any guardian and also without *prochein ami*. The trial judge ruled that, as the defendant had not pleaded the infancy in abatement, the action should not be dismissed.

E. O. Greenleaf, for the plaintiff.

Frank W. Butler, for the claimant.

³⁴⁰ **HASKELL, J.** Infancy of plaintiff was pleaded in bar, by way of brief statement, among other defenses. The court ruled that the defense could not be allowed; that it came too late; that it was matter of abatement that could only be pleaded within the first two days of the return term, and that it had been waived by plea in bar. The ruling was the law.

It was once resolved that judgment in ejectment or other personal action for an infant, who prosecuted the suit by attorney only, was error, and might be reversed: *Bartholemew v. Dighton*, Cro. Eliz. 424; *Rew v. Long*, Cro. Jac. 4, 43 Eliz. But the statute of 21 Jacobus, chapter 13, section 2, enacted that, after verdict, judgments should not be stayed or reversed for infancy of the plaintiff, nor when rendered on default, 4 Anne, chapter 16, section 2, leaving that defense, as Williams says in his notes, to be in abatement: *Foxwist v. Tremaine*, 2 Saund. 212.

These statutes became our common law, and in courts proceeding according to the course of the common law, infancy of the plaintiff not pleaded in abatement is waived by a plea to the merits: 1 Chitty on Pleading, 435; *Gully v. Dunlap*, 24 Miss. 410; *Schemerhorn v. Jenkins*, 7 Johns. 373; *Drago v. Moso*, 1 Spear, 212; 40 Am. Dec. 592; *Smart v. Haring*, 14 Hun, 276; *Smith v. Van Houten*, 9 N. J. L. 381. The want of a *prochein ami* may be cured by amendment (*Blood v. Harrington*, 8 Pick. 552), even when pleaded in abatement: *Young v. Young*, 3 N. H. 345.

Exceptions overruled.

INFANCY OF PLAINTIFF—DEFENSES.—The objection of infancy in a plaintiff can only be made by a plea in abatement, and

cannot be given under the general issue: *Drago v. Moso*, 1 Spear, 212; 40 Am. Dec. 592. When an infant, without the intervention of a guardian or next friend, undertakes to prosecute his suit in his own name, the debtor has a right to object to his recovery because the judgment, like the contract, may be repudiated, or affirmed and enforced, at the election of the infant, if rendered before his majority. But such objection must be interposed in apt time by plea in abatement or by answer before the trial on the merits, and if not so pleaded it will be considered as waived: *Hicks v. Beam*, 112 N. C. 642; 34 Am. St. Rep. 521.

INFANCY OF PLAINTIFF—APPOINTMENT OF GUARDIAN DURING TRIAL.—If the appointment of a guardian ad litem was void, the court may, during the trial, permit another petition to be filed, and make another order appointing such guardian, and the trial may then proceed: *Foley v. California Horseshoe Co.*, 115 Cal. 184; 56 Am. St. Rep. 87.

MERROW v. GOODRICH.

[92 MAINE, 393.]

EVIDENCE—AGENT—DECLARATIONS OF.—The declaration of an agent is not admissible against his principal when not made in the presence of the latter, nor as a part of any business transaction. It is not material whether such declaration is sought to be proved by the agent himself or by another witness.

Tascus Atwood, for the plaintiff.

Edgar M. Briggs, for the defendant.

³⁹⁴ **HASKELL, J.** Assumpsit upon account annexed to recover thirty-five dollars. The defendant offered to prove an admission by plaintiff's agent, made after the debt had been contracted but before suit, that there was only about twenty dollars due plaintiff. It was properly excluded. It was not an admission of plaintiff, for it was neither made in his presence, nor as a part of any business transaction. It was purely hearsay. "What one man says, not upon oath, cannot be evidence against another man": *Franklin Bank v. Steward*, 37 Me. 519, and cases cited; *Heath v. Jaquith*, 68 Me. 433; *Craig v. Gilbreth*, 47 Me. 416.

The agent, being recalled as a witness by plaintiff, was asked by defendant whether he made the admission before referred to. The question was properly excluded. If the admission was incompetent as evidence, it could not become so, by the agent's own testimony that he made it. The method of proving it could not change its quality. Had the case shown that the inquiry was pertinent cross-examination, it might have been admissible, as contradictory of some prior statement of the wit-

ness and thereby affecting his credibility. Nothing of that sort appears, however.

Exceptions overruled.

EVIDENCE.—DECLARATIONS OF AN AGENT are inadmissible to bind his principal, unless they constitute an agreement he is authorized to make, or relate to and accompany an act done in the course of his agency: *Plymouth County Bank v. Gilman*, 4 S. Dak. 265; 46 Am. St. Rep. 786. See *Summers v. Hibbard*, 153 Ill. 102; 46 Am. St. Rep. 872; *Albert v. Mutual Life Ins. Co.*, 122 N. C. 92; 65 Am. St. Rep. 693. Declarations made after a transaction is completed are not admissible: *Giberson v. Patterson Mills Co.*, 174 Pa. St. 369; 52 Am. St. Rep. 823; *Jammison v. Chesapeake etc. Ry. Co.*, 92 Va. 327; 53 Am. St. Rep. 813. See note to *Moore v. Bettis*, 53 Am. Dec. 773-778.

PALMER v. MAINE CENTRAL RAILROAD COMPANY.

[92 MAINE, 399.]

RAILWAY FARE—FRAUDULENT EVASION OF, WHAT IS NOT.—If one having a thousand-mile ticket, and owing the duty of identifying himself as the person to whom it was issued, presents it to a conductor of a train, but refuses to state that he is the person named therein, or to otherwise identify himself, and on the conductor's refusing to accept the ticket, leaving the train without payment of any fare, such ticket-holder is not guilty of the crime of fraudulently evading payment of his fare, but only of willful, unreasonable obstinacy.

ARREST FOR MISDEMEANOR WITHOUT A WARRANT—LIABILITY FOR.—A private individual who procures the arrest of an innocent person for a misdemeanor by an officer without a warrant cannot justify, in an action for false imprisonment, by proof that he acted in good faith, without malice, and upon belief of guilt founded upon reasonable grounds.

FALSE IMPRISONMENT—LIABILITY FOR.—One procuring the arrest of an innocent person upon a charge of misdemeanor is liable in an action for false imprisonment, unless he can show a legal justification for causing the arrest. It is not sufficient that he acted in good faith, without malice, and upon his belief in guilt founded upon reasonable cause.

ARREST BY PRIVATE INDIVIDUAL WITHOUT WARRANT—WHEN JUSTIFIABLE.—A private person arresting for a felony does so at his peril, and to justify himself must, at least, prove that he had reasonable ground for believing the person arrested to be guilty. He may arrest for an affray or breach of the peace committed in his presence and while it is continuing, but not for a misdemeanor on suspicion, no matter how well grounded, unless the person arrested is in fact guilty.

CRIMINAL PROSECUTION—WHEN NOT A BAR TO A CIVIL ACTION.—One who is prosecuted for fraudulently evading the payment of his fare on a railway train, and who thereupon pays his fare and the costs of prosecution, is not thereby estopped from maintaining an action for false imprisonment and from proving therein that he was not guilty of the offense charged.

CRIMINAL PROSECUTION—JUDGMENT IN—EFFECT OF IN A CIVIL ACTION.—One prosecuted and convicted of a criminal charge is not thereby estopped from maintaining a civil action

and proving therein that he was innocent of the offense of which he was convicted.

DAMAGES—MEASURE OF FOR AN UNLAWFUL ARREST. Where the justification for an arrest fails, the plaintiff is entitled to recover at least compensatory damages for the necessary consequences of the act complained of, although the defendant may have acted in good faith, without malice, and upon reasonable ground to believe that the plaintiff was guilty. If punitive damages or damages for injured feelings are claimed, the spite and conduct of the defendant may be inquired into, to enhance or aggravate, and the conduct of, and prosecution by, the plaintiff, to mitigate damages.

DAMAGES—PUNITIVE—LIABILITY TO OF PERSON ACTING IN GOOD FAITH.—Where a passenger on a railway train refuses to answer questions properly asked by a conductor respecting the ticket presented, and thereby causes him to believe that such passenger is attempting to evade the payment of his fare and to procure his arrest without a warrant on that charge, he is not entitled to recover damages for injury to his wounded sensibilities.

J. E. Hanly and J. F. Libby, Levi Turner, T. J. Boynton, for the plaintiff.

J. H. and J. H. Drummond, Jr., for the defendant.

⁴⁰⁵ **SAVAGE, J.** Trespass for false imprisonment. The verdict was for the plaintiff for five hundred and fifty dollars. The case comes up on exceptions by the defendant, and on motion to set aside the verdict on the grounds that it was against law, and against the weight of evidence, and that the damages are excessive. Substantially the same legal propositions are presented under the motion as under the exceptions. It will be more convenient to consider the motion first, for the conclusion which we think must be reached under the motion will necessarily dispose of the exceptions.

There is little dispute as to the essential facts. The questions at issue are chiefly legal ones. In January, 1896, the plaintiff ⁴⁰⁶ purchased from the defendant, and there was issued to him, a mileage-book or ticket with coupons, one to be detached for each mile the purchaser should travel. By the purchase of this book, the plaintiff became entitled to travel one thousand miles on the defendant's railroad. Upon the ticket was a contract, which was signed by the plaintiff at the time of purchase. This contract discloses that one of the conditions under which the ticket was sold was the following: "That it is good only for the person in whose name it is issued, and, if presented by any other person, the right to any remaining rides to which the purchaser might have been entitled shall be forfeited, and the conductor shall be authorized to take up this ticket and return the same to the general ticket office as forfeited, and conductors are au-

thorized to obtain the signature of the holder of the ticket for identification."

In June, 1896, the plaintiff was a passenger on the defendant's train from Rockland to Brunswick, and, in payment of his fare, tendered to the conductor the mileage ticket above referred to. The conductor was not personally acquainted with the plaintiff, and, for identification, he asked the plaintiff if the name upon the ticket, "Jona. P. Palmer," was his name. The plaintiff refused to say whether it was or not, though he told the conductor that the ticket was his own. The conductor then declined to accept the ticket, and asked the plaintiff to pay a cash fare, which the plaintiff refused to do. As the plaintiff was leaving the train at Brunswick, without further payment or tender of his fare, the conductor caused him to be arrested by a constable, without a warrant, for fraudulently evading the payment of his fare; and this is the arrest complained of. The plaintiff was immediately taken before the municipal court of Brunswick, where the conductor made a complaint, under oath, against him, under Revised Statutes, chapter 51, section 78, which provides that whoever "fraudulently evades the payment" of fare over a railroad "by giving a false answer, or by traveling beyond the place to which he has paid, or by leaving a train without paying, forfeits not less than five, nor more than twenty dollars, to be recovered on complaint." The plaintiff pleaded "not guilty."⁴⁰⁷ The plaintiff then paid his fare and the costs of prosecution to the judge of the court. An acknowledgment of "complete satisfaction" was filed by the conductor, and the plaintiff was thereupon discharged without further prosecution. No question is raised but that the conductor was acting within the scope of his authority as a servant of the defendant corporation.

The defendant endeavors to justify the arrest. It claims that the conductor had a lawful right to ask the plaintiff, as a means of identification, if the name on the ticket was his name, and that it was the plaintiff's duty to answer truly; and further, that if the conductor had reasonable cause, from the plaintiff's conduct, to believe that he was fraudulently evading the payment of his fare, and did so believe, the conductor was justified in causing the plaintiff's arrest by an officer, as he was in the act of leaving the train, although the officer had no warrant.

The discussion will be simplified somewhat, if we state, at the outset, two propositions about which we think there can be no real controversy: 1. The offense for which the plaintiff was arrested was simply a misdemeanor; 2. The plaintiff was not

guilty in fact. It cannot be said, in any view of the case, that the plaintiff fraudulently evaded the payment of his fare. He owned the mileage ticket. He had a right to travel upon it. He tendered it to the conductor. There was no fraudulent evasion of payment. There was on his part, only a willful, unreasonable obstinacy, which arose, perhaps, from a mistaken sense of pride.

The precise question to be decided, therefore, is whether a private individual who has procured the arrest of an innocent person for a misdemeanor, by an officer without a warrant, can justify by showing that he acted in good faith, without malice, and upon a belief of guilt founded upon reasonable grounds. We think the question must be answered in the negative.

This is a suit, not for a malicious prosecution, but for a false imprisonment. It is not for a misuse or an abuse of legal process, but for an arrest without legal process. The action must be sustained, unless the defendant can show a legal justification for causing the arrest to be made.

⁴⁰⁸ The principles which, by the common law, regulate the right to arrest, or cause an arrest, without warrant, have been long settled both in this country and England, and by these principles the rights of these parties must be determined. Unless modified by statute, they are recognized by the courts, almost without exception. They are designed to promote the safety of the public, and the due administration of public justice on the one hand, and on the other, to afford the citizen security against unwarrantable restraints upon his personal liberty. We shall state these principles somewhat more fully, perhaps, than the particular question under consideration requires; but a full statement is valuable by way of illustration, and for the purpose of showing the clear distinction between the powers of an officer and those of a private individual.

By the common law, an officer may arrest for felony, without warrant, upon reasonable grounds of suspicion: 2 Addison on Torts, sec. 802; Samuel v. Payne, 1 Doug. 360; Davis v. Russell, 5 Bing. 354; 1 Hale's Pleas of the Crown, 567; Burke v. Bell, 36 Me. 317; Rohan v. Sawin, 5 Cush. 281; Holley v. Mix, 3 Wend. 350; 20 Am. Dec. 702; Commonwealth v. Carey, 12 Cush. 246; Wills v. Jordan (R. I., July 15, 1898), 41 Atl. Rep. 233; Doering v. State, 49 Ind. 56; 19 Am. Rep. 669; Eanes v. State, 6 Humph. 53; 44 Am. Dec. 289; Kurtz v. Moffitt, 115 U. S. 487; Holden v. Hall, 4 Hurl. & N. 423. And for making such an arrest, the officer is justified, although it turns out that no felony

has, in fact, been committed: *Beckwith v. Philby*, 6 Barn. & C. 635; *Simmons v. Vandyke*, 138 Ind. 380; 46 Am. St. Rep. 411; and the cases cited above. But an officer may not arrest on information or suspicion, without a warrant, for a misdemeanor, unless it was committed in his presence: 2 Addison on Torts, sec. 804; 4 Blackstone's Commentaries, 292; 1 Hale's Pleas of the Crown, 567; *People v. McLean*, 68 Mich. 480; *Kurtz v. Moffitt*, 115 U. S. 487; *Ross v. Leggett*, 61 Mich. 445; 1 Am. St. Rep. 608; *Commonwealth v. Ruggles*, 6 Allen, 588; *Commonwealth v. McLaughlin*, 12 Cush. 615; *State v. Lewis*, 50 Ohio St. 179; *Pow v. Beckner*, 3 Ind. 475; *Webb v. State*, 51 N. J. L. 189; *Krulevitz v. Eastern R. R. Co.*, 143 Mass. 228. In the last-named case, the plaintiff had been arrested, at the request of a conductor, by an officer, without ⁴⁰⁰ a warrant, for a refusal to pay fare. We have cited these cases in extenso, because nearly all of these contain valuable discussions of this subject. In many of these cases, it seems to have been held that the authority of an officer to arrest for misdemeanor, without warrant, is limited to breaches of the peace or affrays, committed in his presence: See, also, *Commonwealth v. Wright*, 158 Mass. 149; 35 Am. St. Rep. 475; though the offense has actually been committed, but elsewhere: *Scott v. Eldridge*, 154 Mass. 25. But in still other cases, the authority is extended to all crimes committed in the presence of the officer: *Baltimore etc. Ry. Co. v. Cain*, 81 Md. 87, and cases cited there.

But the authority of a private individual is much more limited and confined. He may arrest for felony, but he does it at his peril. If called upon to justify, it has been held by some courts that he must show that the felony had actually been committed, and that he had reasonable grounds for believing the person arrested to be guilty: *Wakely v. Hart*, 6 Binn. 316; *Davis v. Russell*, 5 Bing. 354; *Allen v. Wright*, 8 Carr. & P. 522; *Reuck v. McGregor*, 32 N. J. L. 70; *Holley v. Mix*, 3 Wend. 350; 20 Am. Dec. 702; *Keenan v. State*, 8 Wis. 132; *Beckwith v. Philby*, 6 Barn. & C. 635; *Russell v. Shuster*, 8 Watts & S. 308; *Burns v. Erben*, 40 N. Y. 463; 2 Addison on Torts, sec. 803; *Cooley on Torts*, 2d ed., 202. But it has been held by other courts, and perhaps with better reason, that he must show that the person arrested was actually guilty of the felony: *Rohan v. Sawin*, 5 Cush. 281; *Commonwealth v. Carey*, 12 Cush. 246; *Morley v. Chase*, 143 Mass. 396. So he may arrest for an affray or a breach of the peace committed in his presence, and while it is continuing: 1 Russell on Crimes, 272; 1 Archbold's

Criminal Practice and Pleading, 82; *Timothy v. Simpson*, 1 Crompt. M. & R. 757; *Knot v. Gay*, 1 Root, 66; *Mayo v. Wilson*, 1 N. H. 53; *Phillips v. Trull*, 11 Johns. 486; *Kurtz v. Moffitt*, 115 U. S. 487; *Ross v. Leggett*, 61 Mich. 445; 1 Am. St. Rep. 608. But a private individual may not arrest for misdemeanor, on suspicion, no matter how well grounded. And, as in case of felony, he is bound to show that the felony has been committed, so in case of affray or breach of the peace committed in his presence, he must show that the party arrested by him was guilty. Nor can ⁴¹⁰ a private individual justify, if he procure the arrest of an innocent person for a misdemeanor, by an officer, without warrant. In such case he is answerable. He can no more lawfully cause such an arrest than he can make it himself: *Hobbs v. Branscomb*, 3 Camp. 420; *Hopkins v. Crowe*, 7 Car. & P. 373; *Derecourt v. Corbishley*, 5 El. & B. 188; *Price v. Seeley*, 10 Clark & F. 28; *Collett v. Foster*, 2 Hurl. & N. 356; *Veneman v. Jones*, 118 Ind. 41; 10 Am. St. Rep. 100; *Holley v. Mix*, 3 Wend. 350; 20 Am. Dec. 702; *Samuel v. Payne*, 1 Doug. 360. In *Baltimore etc. Ry. Co. v. Cain*, 81 Me. 87, a case analogous in some respects to the one at bar, the plaintiff, by the procurement of the conductor, was arrested as he left the train, by an officer, without warrant. The charge was disorderly conduct on the train. The railroad company was permitted to justify by showing that the charge was true in fact, and that the disorderly conduct amounted to a breach of the peace, for which the conductor as a private individual would have been authorized to arrest, had he been physically able to do so. The court said that "the act of the conductor in telegraphing for a policeman and in a short space of time thereafter turning the plaintiff over to the officer was in no respect different from a formal arrest by the conductor in the midst of the riot and disorder." In the case at bar, however, the charge was not true, and herein lies one distinction at least, and a vital one. Furthermore, the alleged offense here was not a breach of the peace.

Revised Statutes, chapter 133, section 4, provides that every officer shall arrest and detain persons found violating any law of the state until a legal warrant can be obtained. But this statute does not aid the defendant. The plaintiff was not found violating any law of the state. The constable had no lawful authority to arrest him for a misdemeanor of which he was not guilty, on information merely, without a warrant.

We conclude, therefore, that the arrest of the plaintiff was unlawful. And, as already intimated, this conclusion disposes of

the first two of the defendant's exceptions. For, assuming that the conductor had a right, as a matter of law, to make the inquiry he did as a means of identification, and assuming that, by the ⁴¹¹ plaintiff's conduct, the conductor had reason to believe and did believe that the plaintiff was fraudulently evading the payment of his fare, still, as we have seen, all this would have afforded no justification, in law.

But the defendant further contends that the proceedings had before the municipal court of Brunswick should operate as a bar to this action. The plaintiff paid his fare, which he owed, and the costs of prosecution. The conductor acknowledged "complete satisfaction to Jonathan F. Palmer for evading his railroad fare as per my complaint," and thereupon the plaintiff was discharged. The defendant claims that this settlement should be regarded as an admission by the plaintiff of his guilt. If it were so, we do not see how this could aid the defendant, in view of the uncontroverted facts in this case, or under the law. But it seems to us rather that the settlement was equivalent to an entry of "nolle prosequi upon payment of costs." If this settlement could be regarded as authorized by the Revised Statutes, chapter 133, section 18, which may well be doubted, it would operate only as a bar to a civil remedy by the railroad company for the injury for which the plaintiff was prosecuted criminally: Rev. Stats., c. 133, sec. 19. The plaintiff "settled" with the state, but the defendant did not settle with the plaintiff. The defendant relies upon *Caffrey v. Drugan*, 144 Mass. 294, and *Joyce v. Parkhurst*, 150 Mass. 243. In those cases, it was held that parties who had been arrested without warrant for intoxication and had been released without formal complaints having been made against them, had by their requests and agreements waived the right to maintain actions for false imprisonment against the officers. But in this case there is no evidence of any agreement on the part of the plaintiff to waive or release his claim against the defendant.

There was no judgment in the criminal case against this plaintiff. If there had been, it would not have estopped him from maintaining this civil action: *Bigelow on Estoppel*, 100. It is the opinion of the court, therefore, that the plaintiff's remedy is not barred, and has not been waived. This conclusion disposes of the defendant's third and last exception.

⁴¹² The verdict for the plaintiff was not against law, nor against the weight of evidence. Are the damages excessive? The principles upon which damages are to be assessed in this

class of cases were elaborately discussed by this court in *Prentiss v. Shaw*, 56 Me. 427; 96 Am. Dec. 475. We need state here only the conclusions. Where the justification for an arrest fails, as in this case, the plaintiff is entitled to recover at least compensatory damages, damages for the necessary consequences of the act complained of, although the defendant may have acted in good faith, without malice, and upon reasonable grounds to believe that the plaintiff was guilty of the offense for which he was arrested. If the plaintiff claims punitive damages, or damages for his injured feelings, the spirit and conduct of the defendant may be inquired into, to enhance or aggravate, and as well, the plaintiff's own conduct, and the provocation by him, if any, to mitigate, the damages: *Prentiss v. Shaw*, 56 Me. 427; 96 Am. Dec. 475; *Phillips v. Trull*, 11 Johns. 486; *Reuck v. McGregor*, 32 N. J. L. 70; *Beckwith v. Bean*, 98 U. S. 266; *Chinn v. Morris*, 2 Carr. & P. 361; 2 Greenleaf on Evidence, sec. 267.

Tested by these principles, we think the verdict in this case is unmistakably too large. In his charge, the presiding justice permitted the jury to assess "a fair and just compensation for the injured pride, the wounded sensibility, the humiliation, and mortification of a public arrest." These are, indeed, proper elements of damage, but, in view of all the circumstances of this case, the jury made an undue allowance for them. The damages to the plaintiff in his person, and for loss of time and expenses, were little more than nominal. Nearly the whole of the verdict must have been given as punitive damages, or as damages for the injury to the plaintiff's feelings. But whichever it was, it is too large. The fault in the first instance was the fault of the plaintiff. He was traveling on a mileage ticket which could be lawfully used by no other person than the one to whom it was issued. It was the right, as it was the duty, of the conductor, if in doubt, to make himself reasonably certain of the identity of the person presenting it. As one means of identification, the contract upon the ticket itself provided that the conductor might require the signature of ⁴¹³ the holder of the ticket. But this provision did not exclude other simpler and easier, and equally reasonable, methods of identification. The method adopted by the conductor was a reasonable and lawful one. He simply asked the plaintiff if the name on the ticket was his name. This was asked on three several occasions; and three times the plaintiff refused to give the information desired. He says he told the conductor he was under no obligation to give his name. The uncontradicted testimony of bystanders is to the

effect that he also told the conductor that it was "none of his business." A frank and truthful answer, such as it was his duty to make, would have prevented all trouble. No question is made but that the conduct of the conductor was gentlemanly. The plaintiff was willful, obstinate, evasive. He chose to regard the inquiry of the conductor as an affront to his honesty or dignity. His wrong was, however, only fancied. We think the plaintiff's conduct gave the conductor reason to believe—and he says he did believe—that the plaintiff was attempting to ride upon a ticket not his own, and which he had no right to use. This, of course, is not a justification, but it deserves full consideration, in determining whether punitive damages are allowable, or in estimating the injury to the plaintiff's wounded sensibilities.

Under all the circumstances, we think ten dollars will be ample compensation. The entry will be, exceptions overruled.

If the plaintiff files a remittitur of all the verdict in excess of ten dollars within thirty days after the rescript is received, motion for new trial overruled; otherwise, motion sustained.

ARREST BY A PRIVATE PERSON WITHOUT A WARRANT—JUSTIFICATION.—At common law, a private person had the right to arrest, without a warrant, any person who committed, or attempted to commit, a felony in his view, but he did not have such right where the offense was a misdemeanor only: *State v. Davis*, 50 S. C. 405; 62 Am. St. Rep. 837. The utmost good faith and the firmest belief that a person has stolen goods and secreted them about his person will not justify the owner of the goods in arresting, detaining, and searching, by the aid of a policeman, the suspected person; and in an action for damages therefor, good faith is only material on the question of damages: *Mall v. Lord*, 39 N. Y. 381; 100 Am. Dec. 448. See, also, *Maliniemi v. Gronlund*, 92 Mich. 222; 31 Am. St. Rep. 576. See extended note to *Hawkins v. Commonwealth*, 61 Am. Dec. 151-164.

FALSE IMPRISONMENT—DAMAGES.—It is proper to instruct the jury that the damages awarded must be compensatory for the loss of time, for suffering, bodily and mental, sustained by reason of the wrongful act or acts, and for expenses incurred in procuring discharge from restraint, including a reasonable attorney's fee, and that if the act was committed with malice, punitive damages may be awarded: *Bolton v. Vellnes*, 94 Va. 393; 64 Am. St. Rep. 737. Punitive damages cannot be recovered in Washington: *Spokane Truck etc. Co. v. Hoefer*, 2 Wash. 45; 26 Am. St. Rep. 842. See, also, *Fay v. Parker*, 53 N. H. 342; 16 Am. Rep. 270. Effect of good faith on the recovery of punitive damages: See note to *Spellman v. Richmond etc. R. R. Co.*, 28 Am. St. Rep. 875.

CRIMINAL PROSECUTION—JUDGMENT IN—EFFECT OF IN A CIVIL ACTION.—A judgment of conviction in a criminal prosecution cannot be given in evidence in a civil action: *Steel v. Cazeaux*, 8 Mart. 318; 13 Am. Dec. 288. See, also, *Fowle v. Child*, 164 Mass. 210; 49 Am. St. Rep. 451.

ANDERSON v. STANDARD GRANITE COMPANY.

[92 MAINE, 429.]

SATISFACTION — RECEIPT OF MONEYS — WHEN AMOUNTS TO.—If an offer is made to one as full payment of a claim, and the party to whom it is made takes the money, though without any words of assent, or even with words of protest, the acceptance is an assent de facto, and he is bound by it.

SATISFACTION—CHECK—WHEN DEEMED ACCEPTED AS.—If a check purports to be in full payment of a specified demand due to the payee, his acceptance and collection of the check precludes him from claiming that a balance of the demand remains unpaid.

F. W. Brown, for the plaintiff.

R. F. Dunton, for the defendant.

⁴³⁰ WISWELL, J. Prior to the payment hereinafter referred to, and relied upon by the defendant as a full satisfaction of the plaintiff's claim, a controversy existed between these parties as to the amount due the plaintiff for a quantity of granite paving blocks made by the plaintiff and delivered by him to the defendant. The original written contract fixed the price at \$45 per thousand for blocks to be delivered by the plaintiff "on board vessels at Lane's wharf, in Searsport, Maine, at which wharf there is ten feet of water or more." But after the first cargo had been shipped, which, so far as the case shows, was paid for without dispute, the defendant complained that there was not the depth of water at the wharf where the blocks were to be delivered by the plaintiff on board vessels provided by the defendant that the contract called for; and that by reason thereof it was put to additional expense in relation to the first cargo, and could not procure vessels for subsequent cargoes at reasonable freight rates.

Considerable correspondence between the parties resulted. In the first letter thereafter, the president of the defendant company, C. J. Hall, wrote the plaintiff: "I cannot afford to pay rates to get vessels to load with the detention you gave the Oliver." Later he wrote the plaintiff: "You may charter a vessel to your own liking so that the blocks will not cost me exceeding \$58 per M. alongside of the dock in Philadelphia, exclusive of insurance. I will insure them myself. You can have a chance to get a vessel of the draught you desire, and the size, and to come on a high tide, et cetera." Still later, and shortly before the cargo in dispute was shipped, ⁴³¹ Hall again wrote: "The only alternative I can give you is the same I gave Gray &

Martin, that is to charter a vessel yourself, and that the price of the blocks, added to the freight you pay, shall not exceed \$58 per M."

After this, on November 22, 1894, the plaintiff procured a vessel and shipped to the defendant the cargo of blocks sued for, consisting of 26,748 blocks according to the count in New York, about which there is no dispute. On December 20, 1894, the defendant sent a statement of account to the plaintiff, charging itself with this quantity of blocks at \$58 per M., less \$17 per M. freight paid, leaving \$41 per M., amounting to \$1,096.67 due the plaintiff. In the same statement of account the plaintiff was charged with the sum of \$50, about which there is no controversy, and with a check on the Belfast National Bank for \$1,046.67 to balance the account, which amount did balance the account according to the statement and contention of the defendant. Accompanying this statement the defendant sent to the plaintiff a check dated the same day for \$1,046.67, which check contained these words written into the body of the check: "Being payment in full balance for cargo Gr. pav. Blks. per schr. J. Henry Edmunds, shipped Nov. 22, 1894." The plaintiff received this check, indorsed it, and collected it on December 25, 1894, and has since retained the amount. He now sues to recover the balance of \$4 per thousand upon this cargo of blocks, amounting to \$106.99. The suit is brought in his name as assignee, because of the fact that he subsequently went into insolvency and later bought of the assignee and took an assignment of this and other claims for a consideration of \$6.

It is unnecessary to here investigate the merits of the controversy between the parties as to whether the plaintiff was entitled to the sum of \$45 per thousand for the blocks, as he claims, or to only \$41 per thousand, which amount he received. The payment by the check of December 20th, in view of all of the circumstances of the case, must be considered a full satisfaction of the claim. That it was so intended by the defendant company was made as clear and emphatic as it could well be. Before the blocks were ⁴³² shipped the plaintiff was notified most distinctly of the defendant's position, that it was willing to pay \$58 per thousand, including freight, and nothing else. The plaintiff procured a vessel and shipped the blocks, knowing perfectly well the defendant's position, and subsequently he was notified by the statement of account and by the check that the latter was sent in full payment.

If an offer of money is made to one, upon certain terms and

conditions, and the party to whom it is offered takes the money, though without words of assent, the acceptance is an assent de facto, and he is bound by it. The acceptance of the money involves the acceptance of the condition. Under such circumstances, the assent of the creditor to the terms proposed by the debtor will be implied, and no words of protest even can affect this result: *Reed v. Boardman*, 20 Pick. 441; *Donohue v. Woodbury*, 6 Cush. 148; 52 Am. Dec. 777; *Fuller v. Kent*, 138 N. Y. 231; *McDaniels v. Bank of Rutland*, 29 Vt. 230; 70 Am. Dec. 406.

The amount having been offered in full settlement, and having been accepted as such, impliedly at least, the plaintiff cannot treat this sum as a payment pro tanto and recover the balance as due on the original claim: *Bisbee v. Ham*, 47 Me. 543. And under our statute (Rev. Stats., c. 82, sec. 45), payment so made and accepted is in full satisfaction, whether the claim is liquidated or unliquidated.

It is true that the plaintiff claims in his testimony that he was unable to read writing very well and didn't know of the language above quoted in the check; but, in view of all of the circumstances and correspondence between the parties, we are unable to believe that the plaintiff was not aware that this check was sent him upon the condition that if accepted it would be in full payment of the claim.

Judgment for the defendant.

SATISFACTION—RECEIPT OF MONEY—WHEN CHECK DEEMED ACCEPTED AS SATISFACTION.—If a check is sent to a person, and the claim is then made that it is for the entire sum due him, and he is requested to return a receipt in full, and he, knowing that the sender of the check still claims it is for the whole sum due, collects such check and sends a receipt on account, such acceptance and collection operate as a full accord and satisfaction, and he cannot maintain an action to recover the balance claimed to remain unpaid: *Nassoly v. Tomlinson*, 148 N. Y. 326; 51 Am. St. Rep. 695. Payment of a part of a demand extinguishes the whole only where the demand is unliquidated: *Tanner v. Merrill*, 108 Mich. 58; 62 Am. St. Rep. 687. Contra, *Clayton v. Clark*, 74 Miss. 499; 60 Am. St. Rep. 521. It is the general rule that the payment of a less sum, though accepted in full, where there is a certain amount due, cannot be taken as a good accord and satisfaction: *Tanner v. Merrill*, 108 Mich. 58; 62 Am. St. Rep. 687; *Rose v. Hall*, 26 Conn. 392; 68 Am. Dec. 402. See the monographic note to *Jones v. Perkins*, 64 Am. Dec. 138-143. Contra, *Clayton v. Clark*, 74 Miss. 499; 60 Am. St. Rep. 521. As to effect of accepting a check purporting to be as payment in full, see monographic note to *Meyer v. Green*, ante, p. 344.

CONARY v. SAWYER.

[[92 MAINE, 462.]

PARTNERSHIP—INFANT MEMBER—WHETHER RETAINS PROPERTY ON INSOLVENCY OF.—If a partnership exists between an adult and a minor, the latter cannot, on an adjudication of the insolvency of the firm, disaffirm his personal liability for its debts, and maintain that he has an undivided interest in the property of the partnership, which had been fully paid for when the insolvency proceedings were instituted. Though a minor, he has no interest except in the assets which remain after the payment of the debts of the partnership.

AN INFANT MEMBER OF A PARTNERSHIP cannot, by disaffirming his liability for its debts, prevent the application of all the assets of the partnership to the satisfaction of its liabilities.

INFANTS—GUARDIAN AD LITEM FOR—WHEN UNNECESSARY.—Where proceedings in insolvency are commenced against a partnership, one of whose members is a minor, it is not necessary to appoint a guardian ad litem to represent his interest.

INSOLVENCY—INFANT PARTNER.—On an adjudication of insolvency against a partnership, one of whose members is an infant, and the assignment by a proper officer pursuant to such adjudication, the title to the entire personal property vests in the assignee. The infant cannot disaffirm his liability and recover a share of such property.

H. E. Hamlin, C. H. Drummey, F. H. Appleton, and H. R. Chaplin, for the plaintiff.

A. W. King, for the defendant.

462 FOGLER, J. This is an action of trover in which the plaintiff sues to recover the value of certain goods which were part of the assets of the former firm of Conary & Dow. The plaintiff, a minor, and one Dow, an adult person, were engaged in trade at Bluehill as copartners under the above-named style. June 9, 1897, certain creditors of the firm filed in the insolvent court, for the county of Hancock, a petition alleging that said firm was insolvent, and praying that a warrant of attachment and injunction issue against the estate of said firm and that other proceedings be had in accordance with the insolvent statutes of the state. Upon such petition, on the tenth day of June, 1897, a warrant of attachment and injunction was issued from the insolvent court, addressed to the sheriff of said county, directing him to attach the estate of said firm and of Dow, the adult copartner; and the sheriff, on the same day, attached and took possession of all the property of said firm, including the goods described in the plaintiff's declaration. On the 14th of July, 1897, the insolvent court adjudged the copartnership insolvent, and the defendant was duly chosen assignee, and the judge of the in-

solvent court executed and delivered to him an assignment of all the assets of the firm, in pursuance of which the defendant received from the sheriff and took possession of all the property of the firm, including the goods sued for in this action. The plaintiff seasonably notified the petitioning creditors, and also the sheriff and the defendant, that he was a minor, and disaffirmed all and every liability and responsibility for the debts and contracts of the firm and of the individual members thereof; and that he claimed to hold, and did hold, all his interest in the copartnership property free and exempt from any and all claims of copartnership creditors, and at the hearing on the 14th of July protested against any action by the court upon the creditors' petition. The plaintiff demanded of the sheriff, and of the defendant, possession with them, respectively, of all the goods and effects of the firm and particularly of the goods sued for and described in the declaration. ⁴⁰⁶ The defendant took and held exclusive possession of all the property of the firm, including the goods sued for, and, prior to the date of the writ, sold all said property, and still retains exclusively the proceeds thereof. It is admitted by the agreed statement that all the goods described in the declaration were fully paid for by the firm prior to the commencement of said insolvency proceedings, and were partnership assets at the time when the insolvency proceedings were instituted. The plaintiff claims to own thirteen-fourteenths, undivided, of the property described in the declaration, and that he owned such fractional interest during all the proceedings above named.

The case is reported to the law court upon the stipulation that if, upon the evidence, pleadings, and agreed statement, assuming that the defendant did own an interest in the goods described in the declaration, the action is maintainable, the case is to be sent back to us nisi prius for trial upon the question of the plaintiff's actual title and interest thereto; otherwise judgment is to be for defendant.

The question to be determined is: Can an infant member of a partnership, who has disaffirmed his liability for the partnership debts, maintain an action against an assignee duly appointed under insolvency proceedings instituted by creditors against the partnership, for goods of the partnership which had been fully paid for by the firm prior to the commencement of such proceedings and which were at such time partnership assets?

By the adjudication of the insolvency of the firm, the copart-

nership was dissolved: Story on Partnership, sec. 313. The plaintiff, having disaffirmed all liability for partnership debts because of his minority, became absolved from any personal liability to the creditors of the firm. Upon the issuance of the warrant of insolvency, all the property and estate of the partnership came into the hands and possession of the messenger, and were properly returned by him to the assignee: Rev. Stats., c. 70, sec. 57. The net proceeds of the partnership property are to be appropriated to pay the creditors of the partnership: Rev. Stats., c. 70, sec. 58. The assignee had, therefore, the right of possession and disposal of all the partnership property, ⁴⁶⁷ including that involved in this suit, for the benefit of partnership creditors.

The plaintiff, however, contends that inasmuch as he was a minor and had disaffirmed his personal liability for the debts of the firm, he has an individual interest in such of the partnership property as had been fully paid for at the time when the insolvency proceedings were instituted.

We do not think such contention is maintainable either upon principle or authority. A partner has no individual property in any specific assets of the firm. He has an interest in partnership property to receive therefrom only what remains after partnership debts are satisfied.

Partnership property cannot be applied, as against creditors of the firm, to the payment of the private debts of a partner: *Johnson v. Hersey*, 70 Me. 74; 35 Am. Rep. 303. It cannot be attached as the property of a partner: *Sanborn v. Royce*, 132 Mass. 594. The equities of parties in the partnership property are subservient to their partnership creditors. The latter have in equity an inherent priority of claim to be discharged from the joint property: *Menagh v. Whitwell*, 52 N. Y. 165; 11 Am. Rep. 683. The interest of the plaintiff in the partnership assets was in what might be remaining of such assets after the payment of the debts of the firm. The fact that the plaintiff was a minor does not take his case out of the general principles above stated. It will be observed that he did not and does not disaffirm his contract of copartnership, but only his liability for firm debts. He claims title to the goods sued for as a partner, such goods having been paid for by the firm, and being partnership assets.

The case of *Pelletier v. Couture*, 148 Mass. 269, is directly in point and practically decisive of the case at bar. In that case, as in this, the firm and the adult partner were declared insolvent and warrants were issued against the firm assets and the prop-

erty of the adult partner, but no adjudication was made or warrant issued against the infant partner or against his individual estate. The court held that the property of the partnership, including the share of the infant partner, may, after its dissolution and his ⁴⁸⁸ repudiation of its debts, be devoted to the payment of partnership debts upon proceedings in insolvency instituted by his copartner. The court says: "If he [the infant partner], enters into business with another as a partner, and contracts are made and assets thus obtained, he may deny his liability on the contracts by which they have been obtained, and relieve himself from the debts thus incurred. He will thus throw the liability for the whole debts on his partner, and make such partner solely responsible, but the assets thus obtained should be devoted to the satisfaction of the contracts by which they have been procured. Having placed the whole responsibility on another, having extricated himself from all liability, to allow him to retain the property, or to assert and maintain a title to it, or any portion of it, until the debts are satisfied, would be manifestly unjust."

In *Yates v. Lyon*, 61 N. Y. 344, a case involving the validity of an assignment for the benefit of creditors, made by copartners, one of whom was an infant, the court, per Reynolds, J., says: "It cannot be doubted but that the law would devote the assets of this firm to the discharge of the partnership obligations, whenever any court should be appealed to for that purpose, and I do not see that the supposed equity of an infant partner should in such case prevail against that of the creditors of the firm. . . . It is not too much to say that if an infant goes into a mercantile adventure which proves unsuccessful, he ought, at least, to be held so far that the assets acquired by the firm should be applied to the payment of the debts of the concern."

As bearing on the question here in issue we cite: *Gay v. Johnson*, 32 N. H. 167; *Moley v. Brine*, 120 Mass. 324; *Page v. Morse*, 128 Mass. 99; *Bush v. Linthicum*, 59 Md. 344.

It is further contended, in behalf of the plaintiff, that the insolvency proceedings are void as against him for the reason that no guardian ad litem was appointed to represent his interest in such proceedings. As the petitioning creditors neither sought nor obtained any judgment or adjudication against the plaintiff personally, or against his individual estate, we are of opinion that no guardian ad litem was required. The adjudication and warrant ⁴⁸⁹ issued against the partnership property and the property of the adult partner. In the cases cited by the plain-

tiff's counsel insolvency proceedings were instituted and prosecuted against the infant and his individual estate. He was a party to the proceedings. A court can appoint a guardian ad litem only when the infant is a party defendant. The plaintiff was not a party in these insolvency proceedings.

We are of opinion that the title to the entire partnership property vested in the defendant by the assignment to him by the judge of the insolvent court, and that this action is not maintainable.

Judgment for defendant.

PARTNERSHIP—INFANT MEMBER—ASSETS OF THE PARTNERSHIP ON INSOLVENCY.—An infant may be a partner, and his contract of partnership is voidable only: *Penn v. Whitehead*, 17 Gratt. 503; 94 Am. Dec. 478. The doctrine laid down by the principal case is sustained by two authorities cited in the note to *Craig v. Van Bebber*, 18 Am. St. Rep. 603; but the soundness of the doctrine is questioned, and the question itself is regarded as unsettled. In reference to the recovery of money paid by a minor, in consideration of his being admitted as a partner in the business, upon his voluntary withdrawal from the partnership, see *Adams v. Beall*, 67 Md. 53; 1 Am. St. Rep. 379.

INFANTS—GUARDIAN AD LITEM.—A judgment or decree rendered against a minor without any guardian is not void, but merely voidable on error brought: *Peak v. Shasted*, 21 Ill. 137; 74 Am. Dec. 88. Proceedings in insolvency against an infant not represented by a guardian ad litem are void: *Farrls v. Richardson*, 6 Allen, 118; 83 Am. Dec. 618. A judgment against an infant in an action of partition, where no guardian ad litem has been appointed, is not void, and can only be taken advantage of by such infant or his privies in blood, by writ of error: *Austin v. Charlestown Seminary*, 8 Met. 196; 41 Am. Dec. 497.

HASKELL v. TUKESBURY.

[92 MAINE, 551.]

STATUTE OF FRAUDS.—The consideration for an agreement to answer for the debt of another need not be expressed in writing, but may be proved by parol.

CONSIDERATION FOR A PROMISE TO ANSWER FOR THE DEBT OF ANOTHER.—A promise to forbear and give further time for the payment of a debt, though no definite time be named, if followed by an actual forbearance for a reasonable time, is a valid and sufficient consideration for a promise guaranteeing payment.

STATUTE OF FRAUDS—PARTIES—WHAT A SUFFICIENT NAMING OF IN THE CONTRACT OR MEMORANDUM. A letter addressed to the agent of a firm saying that if his concern will give P. D. time on a bill he owes it, the writer will see that the bill is paid with interest, is sufficient to satisfy the statute of frauds, and if the firm gives time for such payment, the writer becomes answerable for the bill.

STATUTE OF FRAUDS.—Parol evidence is admissible to identify a person named in a contract, though his full name is not disclosed, as where he is designated as "Friend George."

STATUTE OF FRAUDS.—The subject matter of a contract named in a writing may be identified by reference to an external standard. Hence, if a promise is made to see paid the bill which A owes B, parol evidence may be admitted to identify such bill by showing its nature and amount.

Calvin E. Woodside, for the plaintiffs.

D. A. Meaher, for the defendant.

533 FOGLER, J. Assumpsit upon a writing signed by the defendant of the following tenor:

“Portland Theatre, Nov. 7, '96.

“Friend Geo.: ‘Pop’ Dyer was up to see me about a bill that he owes your concern. He is having a ‘fit.’ If they will give him time I will **554** see that the bills is paid with interest. Now that McKinley is elected he has got a sure thing, and I know it.

“Yours, C. C. TUKESBURY.”

The defendant pleads the general issue and by brief statement the statute of frauds. The case comes to this court from the superior court of the county of Cumberland on report.

Dyer owed the plaintiff for merchandise described in the writ. After unsuccessful efforts to collect the debt of Dyer, the plaintiffs placed the bill in the hands of George M. Goold, their salesman and agent, for collection. Mr. Goold had a conversation with the defendant, in which the defendant said he thought Dyer was all right and would pay the bill if they would give him time. In a subsequent conversation Mr. Goold asked the defendant if he would not fix it so the concern would not sue Dyer. Thereupon the defendant wrote and signed the writing in suit and sent it to Goold, who handed it to the plaintiffs' bookkeeper. The plaintiffs brought no suit against Dyer and made no further effort to collect of him, and May 27, 1897, Dyer having left town, after demanding payment of the defendant, commenced this suit.

The plaintiffs seek to charge the defendant for the debt of another, and the question is, whether the writing declared on is sufficient to satisfy the statute of frauds. The Revised Statutes, chapter 111, section 1, page 2, provides that “no action shall be maintained to charge any person upon any special promise to answer for the debt, default, or misdoings of another unless the promise, contract, or agreement, on which such action is brought, or some memorandum or note thereof, is in writing and signed by the party to be charged therewith, or by some person thereunto lawfully authorized; but the consideration

thereof need not be expressed therein, and may be proved otherwise."

The defendant contends that the action is not maintainable, because, as he says, no consideration is expressed in the writing declared upon and no sufficient consideration is proved. The statute does not require that the consideration be expressed in the writing, but expressly provides that it "may be proved otherwise."

The consideration may be proved by parol: *Williams v. Robinson*, 555 73 Me. 186; 40 Am. Rep. 352. The statute of frauds, even before the amendment expressly declaring it unnecessary, did not require the consideration to be recited in the note or memorandum signed by the party to be charged, but it might be proved by parol: *Cummings v. Dennett*, 26 Me. 397; *Gillighan v. Boardman*, 29 Me. 79; *Williams v. Robinson*, 73 Me. 186; 40 Am. Rep. 352.

A promise to forbear and give further time for the payment of a debt, though no definite time be named, if followed by actual forbearance for a reasonable time, is a valid and sufficient consideration for a promise guaranteeing the payment: *Moore v. McKenney*, 83 Me. 80; 23 Am. St. Rep. 753.

In the case at bar, the defendant, in writing, promised to see the debt of Dyer paid, with interest, if the plaintiffs would give him time. Hiram L. Jones, one of the plaintiffs, testified, and his testimony is uncontradicted, that on the receipt of the writing declared upon he notified the defendant that the proposition of the defendant was accepted, and it appears that the plaintiffs did actually forbear to enforce payment of the debt from November 7, 1896, to May 27, 1897, when the present suit was commenced. We are of opinion that the plaintiffs agreed to forbear and did forbear suit for a reasonable time, and that a sufficient consideration for the defendant's promise is proved.

The defendant further contends that the writing declared on is not sufficient to satisfy the requirements of the statute, inasmuch as the plaintiffs are not named or referred to therein; that the names of the parties are not sufficiently expressed; that the subject matter of the agreement is not sufficiently described; and that parol testimony is not admissible to supply such omissions.

George M. Goold was the agent of the plaintiffs in the transaction under consideration, and the fact was known to the defendant. The writing states that Dyer had been to see the defendant about "a bill that he owes your concern"; and states

"if they will give him time I will see that the bill is paid," showing that the defendant well understood that he made the proposition contained in the writing, not to Goold individually, nor to an undisclosed principal, but to the plaintiffs, disclosed principals. "Contracts of ⁵⁵⁶ guaranty differ from other ordinary simple contracts only in the nature of the evidence required to establish their validity. The statute requires every special promise to answer for the debt, default, or miscarriage of another to be in writing subscribed by the party to be charged thereby, and no parol evidence will be allowed as a substitute for these requirements of the statute. But in other respects the same rules of construction and evidence apply to contracts of this character which apply to other ordinary contracts": *Union Bank v. Coster*, 3 N. Y. 203; 53 Am. Dec. 280. "The statute of frauds does not change the law as to the rights and liabilities of principals and agents, either as between themselves, or as to third persons. The provisions of the statute are complied with if the names of competent contracting parties appear in the writing, and, if the party be an agent, it is not necessary that the name of the principal shall be disclosed in the writing. Indeed, if a contract, within the provisions of the statute, be made by an agent, whether the agency be disclosed or not, the principal may sue or be sued as in other cases": *Kingsley v. Siebrecht*, 92 Me. 23; ante, p. 486. In the case last cited, in which the authorities are exhaustively cited and examined, this court has decided that it is competent to prove by parol that a party named in a writing relied upon to satisfy the requirements of the statute acted as agent of another, and that the principal has the same rights and is under the same liabilities as though he had acted in his own proper person.

The defendant, however, contends that, conceding that the agency may be proved by parol, the name of the agent is not expressed in the writing. The writing signed by the defendant is addressed "Friend George." Is it competent to prove by parol that the person so addressed was George M. Goold, the plaintiff's agent? We think it is. It is not a case in which no person is named or referred to as a party. The words "Friend George" must be held to intend some person. Parol evidence is always necessary to identify the parties to a contract. Whether a party makes a contract in his own name, or in the name of another, or in a feigned name, are inquiries not different in their nature from the question, who is the person who has just ordered goods from a shop, and this ⁵⁵⁷ rule applies in case of

a contract of guaranty or other contract within the statute of frauds, as in other ordinary contracts: *Trueman v. Loder*, 11 Ad. & E. 589. In *Salmon Falls Mfg. Co. v. Goddard*, 14 How. 446, the memorandum was held sufficient though signed by the initials of the parties, it being proved by parol who the parties actually were. To the same effect is *Sanborn v. Flagler*, 9 Allen, 474. In *Fessenden v. Mussey*, 11 Cush. 127, it was decided that the omission of the middle letter of the party's name was not fatal, if it should be shown by parol that he was the person intended. The writing in question in the present suit was written by the defendant at the solicitation of George M. Goold; it was sent to him by the defendant, and was received by him; the case shows that Goold was sufficiently intimate with the defendant, that he generally addressed him as "George." There can be no doubt that when the defendant wrote "Friend George," George M. Goold, the plaintiff's agent, was intended.

The same reasoning applies to the proof of the identity of the person referred to as "Pop" Dyer. The testimony shows that F. H. Dyer, the plaintiff's debtor, was commonly known as "Pop" Dyer. It is not claimed that F. H. Dyer is not the person referred to, the contention being that parol evidence is not competent to establish such identity. This contention is not sustained for the reason and upon the authorities hereinbefore stated.

We are of opinion that the subject matter of the contract is sufficiently expressed in the writing to satisfy the requirements of the statute. It is therein described as "a bill that he owes your concern." "The subject matter may in any case be identified by reference to an external standard, and need not be in terms explained. Thus to describe it as the vendor's right in a particular estate, or as the property which the vendor had at a previous time purchased from another party, is sufficient. And it is very common to identify the debt of a third person for which the defendant has made himself responsible as the debt then owing, or to become owing, by said third person to the plaintiff, without further description": *Browne on the Statute of Frauds*, sec. 385. The rule thus laid down is supported by numerous authorities: *Williams v. Robinson*, 73 558 Me. 186, 40 Am. Rep. 352, in which the court says: "Parol evidence identifying the subject matter of the contract does not destroy the sufficiency of the memorandum, but when the subject matter is thus ascertained the memorandum may be construed to apply to it."

In 1 Greenleaf on Evidence, sec. 286, the learned author says: "As it is a leading rule in regard to written instruments that they are to be interpreted according to their subject matter, it is obvious that parol or verbal testimony must be resorted to in order to ascertain the nature and qualities of the subject to which the instrument refers. Evidence which is calculated to explain the subject of an instrument is essentially different in its character from evidence of verbal communications respecting it": See, further, 1 Greenleaf on Evidence, sec. 288; Barry v. Coombe, 1 Pet. 640; Hurley v. Brown, 98 Mass. 545; 96 Am. Dec. 671; Stoops v. Smith, 100 Mass. 63; 97 Am. Dec. 76; 1 Am. Rep. 85; Mead v. Parker, 115 Mass. 413; 15 Am. Rep. 110; Slater v. Smith, 117 Mass. 96; Giles v. Swift, 170 Mass. 461.

The subject matter of the writing signed by the defendant is referred to as a debt which Dyer owed the plaintiffs. We think it is competent for the plaintiffs to prove by parol the nature and amount of the debt. The testimony shows that the indebtedness was for merchandise sold and delivered, and amounted to forty-one dollars and fifty cents. The defendant expressly agreed to pay interest.

Judgment for plaintiffs for forty-one dollars and fifty cents and interest from November 7, 1896.

STATUTE OF FRAUDS—CONSIDERATION FOR A PROMISE TO ANSWER FOR THE DEBT OF ANOTHER.—An agreement to pay the debt of another, in consideration that the creditor would forbear and give further time for payment, is founded on a good consideration, although no definite time of forbearance is named: Calkins v. Chandler, 38 Mich. 320; 24 Am. Rep. 593. See note to Packer v. Benton, 95 Am. Dec. 262. The courts are divided upon the question whether the consideration for an agreement to answer for the debt of another need be expressed in writing. As holding that the consideration must be expressed, see Sears v. Brink, 3 Johns. 210; 3 Am. Dec. 475, and note thereto; Barker v. Bucklin, 2 Denio, 45; 43 Am. Dec. 726; as holding that the consideration need not be expressed, see Leonard v. Vredenburg, 8 Johns. 29; 5 Am. Dec. 317, and monographic note thereto; Packard v. Richardson, 17 Mass. 122; 9 Am. Dec. 123; King v. Upton, 4 Greenl. 387; 16 Am. Dec. 266.

STATUTE OF FRAUDS—PAROL EVIDENCE TO IDENTIFY PARTIES AND SUBJECT MATTER.—Parol evidence may be used to identify a person or thing mentioned in a written instrument: Henderson v. Hackney, 23 Ga. 383; 68 Am. Dec. 529. Parol evidence is not admissible to vary the terms of a contract in writing, but it may be admitted for the purpose of applying the terms of the writing to the subject matter, and of removing any ambiguity arising from such application: Stoops v. Smith, 100 Mass. 63; 97 Am. Dec. 76, 1 Am. Rep. 85. See, also, Lee v. Butler, 167 Mass. 426; 57 Am. St. Rep. 466.

JONES v. MANUFACTURING AND INVESTMENT COMPANY.

[92 MAINE, 565.]

DEATH—BURDEN OF PROOF IN ACTIONS FOR CAUSING.—An administrator suing under the death liability act of Maine for the benefit of the parents of a deceased person has the same burden of proof, and may be met by the same defenses, as in an action by the deceased himself for his injuries had he survived.

MASTER AND SERVANT—RISKS ASSUMED.—An employé of mature years and of ordinary mental capacity and intelligence is presumed to know, appreciate, and assume the ordinary risks of injury from the machinery and appliances with and about which he is working.

MASTER AND SERVANT.—It is not necessary for a master to caution a servant of ordinary intelligence and mental capacity respecting the risks of injury from machinery with or about which he works, if such risks are apparent to ordinary observation. If the servant neglects to observe, and therefore remains in ignorance of the risks, he cannot thereby create a liability against his master when injured through his disregard of obvious danger.

MASTER AND SERVANT.—The fact that machinery with or about which an employé works might be made less dangerous to him does not expose his employer to liability for injury through disregarding such danger, if it is obvious to ordinary observation.

MASTER AND SERVANT.—A servant injured through the slipping of a stick of wood from hooks or arms on which it was placed, to be carried by an endless chain, cannot recover therefor from his employer, if the danger from which he suffered was open to ordinary observation, and he, nevertheless, placed himself in a position where such slipping would probably cause an injury.

Action under death liability act of 1891 to recover for the death of an employé of the defendant, caused by a log or stick of wood falling on such employé from a hoisting apparatus or elevator. Judgment and verdict for the plaintiff, and the defendant moved for a new trial.

S. S. and F. E. Brown, for the plaintiff.

S. J. and L. L. Walton, for the defendant.

⁵⁶⁶ **EMERY, J.** The defendant company was engaged in the lawful business of manufacturing pulp paper stock from wood. The raw material, the wood, was in sticks of random size, about four feet long, and was brought on railroad freight-cars alongside of a platform near the mill. To unload the sticks from these cars and transfer them to a convenient place in the mill was the work of the defendant company. To accomplish this purpose, they used upon the opposite side of the platform from the car a lift or elevator constructed as follows: The frame work was thirty-eight feet six inches in height from the level of the platform. The two rear upright ⁵⁶⁷ posts or timbers were practically vertical. The two front timbers starting from the outer edge of the platform sloped back so that their tops were about

eight feet back from the platform. They were a little less than three feet apart. Up and down the upper side of each of these front timbers so inclined was cut a slot or groove about eight inches wide. In this groove ran an endless metal chain belt, about seven inches wide, passing over a sprocket wheel below the platform and another at the top of the machine. These belts each carried in line pairs of hooks or arms projecting out and curving upward, and which were twenty-nine inches in length, and were placed about four feet apart on the belts. The distance between the outside of one pair of hooks on one belt to the outside of the corresponding pair of hooks on the other belt was forty-six inches. The distance between the inside surfaces of the same hooks was about thirty-four inches. The machine was operated by power from the mill through a chain and sprocket at the top. It was controlled by a man standing on a small platform near the top.

The mode of unloading a car with this machine was something like this: The loaded car was run alongside of the platform, which was five or six feet wide. On the other side of the platform opposite the car was this machine. A bridge, or gang-plank, some two feet wide, was placed across this platform from the car to the sill of the machine between the belts, one end resting by iron clamps on the edge of the car and the other end temporarily fastened to the platform by a bolt or pin. A person standing over this bolt would be between the hooks on the two endless belts above described.

The person in charge of the machine being in his place on the upper platform, two men lifted or rolled the sticks of wood from the car to the platform; two other men then lifted or rolled them on the hooks or arms above described and they were carried on these hooks up over the machine to an inclined plane or trough, down which they slid by gravity to the proper place in the mill. So far as appears in the case, the motion of the belts and hooks was uniform and steady, but the sticks were held in place on the hooks ⁵⁰⁸ only by gravity. When the car was unloaded, one of the four men at work there pulled out the bolt at the outer end of the gang-plank and took up the plank to let in another car, when the plank was again put down, and the operation repeated.

On the seventeenth day of March, 1897, the plaintiff's intestate was in the employ of the defendant company, and, with three other employes, was engaged in unloading pulp wood from cars at the locality of this machine. He and one other transferred the wood from the car to the platform. The other two of the four placed the sticks on the hooks of the elevator to be

carried over into the mill. As the last stick of that carload was going up, and before it went over the top, the deceased went to pull out the bolt of the plank, in order to let in another car, and in doing so was bent over between the lower hooks and nearly under the ascending stick of wood. At that instant one end of this last stick, which probably had been previously slowly slipping, slipped endwise off the hook, and the stick fell upon the deceased, killing him instantly. The man on the upper platform noticed the slipping and gave the alarm, but the stick fell before the deceased realized the situation sufficiently to escape. The wood of this carload was about four feet long, besides the scarf, and was of various sizes, and was more or less slippery from frost and ice.

It does not appear that the deceased, or any employé, was ever directed or encouraged to pull out the plank bolt as soon as the last stick of a carload was on the hooks and before it had been carried over, or was ever warned against it. Nor does it appear that he was ever told there was danger of sticks falling off the hooks. In fact, there was such danger, and sticks had previously so fallen, though the deceased was not shown to have known of those instances. The machine had been used at that particular place about two years, and at other places about the mill for the same purpose about six years. The deceased was twenty-eight years old. It does not appear how long he had been at work at the mill or in this particular place. He had lived in the same town for some years. He had been at work off and on about this machine for at ⁵⁶⁰ least some weeks. So far as appears, he was of average intelligence and mental capacity.

Again, it does not appear what was the immediate cause of the sticks slipping and falling, whether because not properly placed on the hooks by the employés in the first instance, or because carried with an irregular motion, or because of some other circumstances. It is evident, however, that unless the sticks were placed quite evenly on the hooks at the start they would be likely to slip off.

This action is by the administrator for the benefit of the parents of the deceased under the death liability act of 1891, chapter 124, but the plaintiff has the same burden of proof, and the defendant company can interpose the same defenses, as in an action by the deceased himself for his injuries had he survived. The plaintiff claims that the defendant was negligent in two respects: 1. That it omitted to put a casing or other safeguards about the machine as it might have done, and thus removed or greatly lessened the risk of injury to its employés; and 2. That it did not warn the deceased of the risk of injury he incurred by

working with the machine or pulling out the gang-plank bolt while sticks were on the hooks. The defendant contends that, whatever the risk, it was obvious and one ordinarily attending the operation of the machine, and that under the law it rightfully presumed that the deceased saw and realized the risk and voluntarily assumed it. If this be true, it is an available defense under the law.

In the absence of any stipulation or notice to the contrary, an employé of mature years and of ordinary mental capacity and intelligence is presumed to know, appreciate, and assume the ordinary and apparent risks of injury from the machinery and appliances with or about which he is working. If he does not ask for further safeguards, or otherwise so conducts himself as to assure his employer that he is content with the machinery and appliances as they are, and will himself take the chance of injury, he cannot, after an injury, transfer the risk to the employer. This presumption is, of course, rebuttable, but is sufficient until circumstances are shown to the contrary.

The rule has been stated repeatedly with substantial uniformity ⁵⁷⁰ in various judicial decisions in this state and in harmony with the statements of the rule by the court of Massachusetts. In *Coolbroth v. Maine Cent. R. R. Co.*, 77 Me. 165, at the beginning of the opinion, the rule was stated in the following terms: "It is the well-settled law that a servant of mature age and common intelligence, when he engages to serve a master, undertakes as between himself and master to run all the ordinary and apparent risks of the service." In *Judkins v. Maine Cent. R. R. Co.*, 80 Me. 418, it was said: "Even where a master fails in his duty in respect to inspecting and repairing machinery or appliances to be used by the employé, and the servant voluntarily assumes the risks of the consequences of the master's negligence with knowledge or competent means of knowledge of the danger, he cannot recover damages of the master." In *Mundle v. Hill Mfg. Co.*, 86 Me. 400, it was said: "It is well settled that a servant, by entering the service of the master, assumes all known or apparent risks which are incident to it, however dangerous the service may be, even if it might be conducted more safely by the employer." In *Sullivan v. India Mfg. Co.*, 113 Mass. 396, it was said: "When [the employé] assents to occupy the place prepared for him, and incur the dangers to which he will be exposed thereby, having sufficient intelligence and knowledge to enable him to comprehend them, it is not a question whether such place might, with reasonable care, and by a reasonable expense, have been made safe. His assent has dispensed with the performance on the part of the master

of the duty to make it so." In *Ciriack v. Merchants' Woolen Co.*, 146 Mass. 182, 4 Am. St. Rep. 307, it was said: "In the absence of anything to show the contrary, the plaintiff must be assumed to have had the intelligence and understanding which are usual with boys of his age. There is nothing to show that he did not know the danger of coming in contact with the revolving wheels of the machine. It must be assumed that he was well aware of it." In *Goodes v. Boston etc. R. R. Co.*, 162 Mass. 288, it was said: "One entering the employment of another assumes the obvious risks arising from the nature of the employment, from the manner in which the business is carried ⁵⁷¹ on and from the conditions of the ways, works, and machinery, if he is of sufficient capacity to understand and appreciate them." In *Rooney v. Sewall etc. Cordage Co.*, 161 Mass. 153, it was said: "When the plaintiff entered the defendant's service, he impliedly agreed to assume all the obvious risks of the business, including the risk of injury from the kind of machinery then openly used. It is not material whether he examined the machinery before making the contract or not. He could look at it if he chose, or he could say, 'I do not care to examine it; I will agree to work in this mill, and I am willing to take my risk in regard to that.' In either case, he would be held to contract in reference to the arrangement and kind of machinery then regularly in use by his employer, so far as these things are open and obvious, so that they could be readily ascertained by such examination and inquiry as one would be expected to make if he wished to know the nature and perils of the service in which he was about to engage."

Some instances of the application of the rule may be cited. The employé was not cautioned against the danger in *Coolbroth v. Maine Cent. R. R. Co.*, 77 Me. 165, nor in *Judkins v. Maine Cent. R. R. Co.*, 80 Me. 418, yet in each case he was presumed to know it. In *Rooney v. Sewall etc. Cordage Co.*, 161 Mass. 153, the absence of boxing about the machine and the absence of warning to the employé were held not to transfer the risk to the employer. In *Downey v. Sawyer*, 157 Mass. 418, a boy of sixteen was held to have assumed without notice to him the risk attending his working near open gears in plain sight, and which confessedly might have been made less dangerous by guards. In *Gilbert v. Guild*, 144 Mass. 601, the rule was similarly applied to a boy of nineteen. In *Stuart v. West End Street Ry. Co.*, 163 Mass. 391, a young man of twenty was set at work feeding hay into a hay cutter, though that was not his regular work. No warning or instruction was given him as to the danger. Held,

that the danger was so obvious that he must be presumed to have understood it. The court said: "Where the elements of the danger are obvious to a person of average intelligence using due care, it would be unreasonable to require an employer to warn his employé to avoid dangers which ⁵⁷² ordinary prudence ought to make him avoid without warning. The mere fact that he cannot tell the exact degree of the danger, if the nature and character of it can easily be seen, is not enough to require warning and instruction to a man of full age and average intelligence. Something may properly be left to the instinct of self-preservation, and to the exercise of the ordinary faculties which every man should use when his safety is known to be involved."

In *Ruchinsky v. French*, 168 Mass. 68, a woman of thirty, though unfamiliar with machinery, was held to know without instruction or warning the danger of getting her hand in unguarded cog-wheels. In *Wilson v. Massachusetts Cotton Mills*, 169 Mass. 67, a young man, who had worked upon a hoisting machine, the gears of which were covered, was set to work without warning upon a similar machine, the gears of which were not covered but exposed. After some hours he was injured by his hand catching in the cog gear. Held, that he must be presumed to have known so obvious a danger. In *Williams v. Churchill*, 137 Mass. 243, 50 Am. Rep. 304, a boy of nineteen, unused to ropes, was not told of the danger of getting entangled in the loose end of a bow line he was making fast. Held, that he must be presumed to know of that danger.

In considering whether the circumstances of this case bring it within the rule above stated and illustrated, we may lay aside the numerous judicial decisions in cases where the employé was injured through some structural weakness, some decay, some break or want of repair in the machinery or appliances, or through some hidden danger in their operation. In this case, there was no weakness, no decay, no break, no want of repair, no hidden danger in the operation. The machine, though crude, was stout and serviceable. In all its parts it was strong enough for its work, and in every respect was as strong and safe as it appeared to be. The mechanism was all exposed, and its operation was visible to the most casual looker-on. The danger from which the injury resulted, that of the sticks of wood slipping from the hooks, especially if not evenly laid on them in the first instance, would be appreciated at a glance with a moment's reflection. The condition of the ⁵⁷³ wood with its snow, frost, or ice, its length compared with the distance apart of the hooks or arms

supporting it, the mode of putting it on the hooks, all rendered it apparent that there was danger of the sticks falling at times, especially if the employés were not careful to place the sticks evenly on the hooks at the start. The risk was certainly one ordinarily attending the operation of the machine by the average employé.

Again, the risk was so patent that knowledge and even full appreciation of it could have been avoided only through gross incapacity or inattention on the part of the employé. The deceased was twenty-eight years old, and, so far as the case shows, must be presumed to have possessed average intelligence and mental capacity. He had lived in Madison several years. He had worked off and on at this same machine for two weeks or more. He may be assumed to have had the common knowledge of the slipperiness of round sticks of wood exposed to the frosts and storms of March. He must have known, had he thought about it at all, that such sticks four feet long placed by ordinary workmen on such arms and lifted thirty-eight feet were liable to slip off while ascending. We think he must be presumed to have known and appreciated a risk so incident and obvious. We find nothing in the evidence to rebut that presumption, except the fact that he did encounter the risk and it went against him. That fact, however, is manifestly insufficient. To hold that he did not see and appreciate the risk of injury he incurred by getting under such a stick, in such circumstances, is to hold that he was too unthinking and inattentive to be in the exercise of due care. In either alternative there can be no recovery.

Motion sustained. Verdict set aside.

DEATH—DEFENSES IN ACTIONS FOR CAUSING.—On the general subject of defenses in an action for causing the death of another, see *Carroll v. Missouri Ry. Co.*, 88 Mo. 239; 57 Am. Rep. 382; *Seale v. Gulf etc. Ry. Co.*, 65 Tex. 274; 57 Am. Rep. 602; *Beauchamp v. Saginaw Min. Co.*, 50 Mich. 163; 45 Am. Rep. 30; *Cleveland etc. R. R. Co. v. Crawford*, 24 Ohio St. 631; 15 Am. Rep. 633. See *Donahue v. Drexler*, 82 Ky. 157, 56 Am. Rep. 886, where it was held that a widow's action for the death of her husband was not barred by proof that her husband, before his death, had released his right of action for his personal injuries.

MASTER AND SERVANT—RISKS ASSUMED.—A master may rely upon the duty of his servant to observe the defects and dangers which reasonable attention to the work in hand will generally disclose to a person of ordinary intelligence and experience in such work: *Borden v. Daisy Roller Mill Co.*, 98 Wis. 407; 67 Am. St. Rep. 816. Risks assumed by person of mature years: *Peterson v. New Pittsburg Coal etc. Co.*, 149 Ind. 260; 63 Am. St. Rep. 289; *Oirlack v. Merchants' Woolen Co.*, 151 Mass. 152; 21 Am. St. Rep. 438.

CASES
IN THE
SUPREME COURT
OF
MICHIGAN.

NICOL v. FITCH.

[115 MICHIGAN, 15.]

CONTRACTS—TERMINATION—DESTRUCTION OF SUBJECT OF.—A contract between the owners of three steamboats used as one line to pay an agent a specified salary for securing freight for such boats for the season, one-third to be paid by each owner, is not terminated as to the owner of one of the boats by its destruction before the end of the term specified in such contract. Such agent, upon the performance of his part of the contract, may recover the stipulated proportion of his salary from the owner of the vessel destroyed.

T. E. Tarnney, D. B. Hayes, and R. I. Lawson, for the appellants.

J. Palmer, Jr., and E. F. Bacon, for the appellee.

10 HOOKER, J. In the spring of 1894, defendants, being the owners of a vessel named the Ohio, Captain Galvin, representing the steamer Saginaw Valley, and Captain Scott, representing the Ford, made arrangements to run these boats, on different days, in connection with the Vermont Central Railway, as one line of boats, under the name of the Duluth & Ogdensburg Transportation Line, though they were owned and run by their respective owners. A contract was then made for the mutual benefit of the owners of the vessels, with Captain Eber B. Ward, to act as agent in securing freight for these boats during the season, for which it was agreed that each should pay him one-third of his salary (which was one thousand dollars), and of certain incidental expenses arranged for. Each owner was to have the proceeds from

the freight carried by his boat. It is admitted that Captain Ward performed the services contemplated during the season, and the owners of the other two boats paid their two-thirds of his salary. The defendants paid one hundred and seven dollars, and refused to pay more, upon the ground that their vessel, the Ohio, was lost during the season, and that the one hundred and seven dollars paid was the proportionate share of his contract that Ward had earned at the time the vessel was lost. Plaintiff is the assignee of Ward, and he was allowed to recover upon a declaration containing the common counts, on the theory of a contract fully performed by Ward. Upon the other hand, it is contended that Ward did not perform his contract; that such was made impossible by the destruction of the Ohio; and that, therefore, his right of action, if he had any, was for a breach of the original contract by the defendants. The meritorious question involved is whether the loss of the Ohio terminated the contract. From a refusal to direct a verdict in their favor, the defendants have appealed.

¹⁷ It is obvious that the case is not one where the performance of the contract was a physical impossibility, as where one agreed to sell a horse, and the horse died, or to make cider from certain apples, which were immediately destroyed by fire. It is rather the case of one refusing to receive goods bargained for, because it had become impossible, through accident, for him to make a contemplated use of the goods. It is clear that such cases are not within the rule that one is released from a contract, when contingencies must be provided for in the contract if one would avoid the consequences: See *Beebe v. Johnson*, 19 Wend. 500; 32 Am. Dec. 518; *Dermott v. Jones*, 2 Wall. 1; *The Harriman*, 9 Wall. 161; *Blight v. Page*, 3 Bos. & P. 295, note; *Jones v. United States*, 96 U. S. 24. This doctrine is well supported by authorities cited in the opinions of the federal cases above referred to: See, also, *Ford v. Cotesworth*, L. R. 4 Q. B. 127.

A distinction is sought to be drawn between the cases of the class mentioned and those where the contract may be said to contemplate the continued existence of a particular person or thing which is the subject of the contract. This rule has been applied to the case of the rental of a music hall destroyed by fire, an apprentice who became ill, and could not render personal service, and a woman whose illness prevented her from performing as a pianist; but it was held not applicable to a case where one contracted to manufacture a certain iron work, and

the mill was destroyed by fire. It was said: "There was no physical or natural impossibility inherent in the nature of the thing to be performed, upon which a condition that the mill should continue can be predicated. . . . True, the contract specifies the mill as the place, but it necessarily has no importance except as designating the place of delivery": *Booth v. Spuyter etc. Mill Co.*, 60 N. Y. 491.

In *Taylor v. Caldwell*, 3 Best & S. 826, A agreed with B to give him the use of a music hall on specified ¹⁸ days, for the purpose of holding concerts. The hall was burned, and both parties were held discharged. Blackburn, J., said: "The principle seems to us to be that, in contracts in which performance depends on the continued existence of a given person or thing, a condition is implied that the impossibility of performance, arising from the perishing of the person or thing, shall excuse the performance."

And it is said in *Dexter v. Norton*, 47 N. Y. 62, 7 Am. Rep. 415: "The reason given for the rule is because, from the nature of the contract, it is apparent that the parties contracted on the basis of the continued existence of the particular person or thing."

That there are cases where such an inference is reasonable is obvious, as in cases of contract of marriage, and perhaps the case of the music hall; but it ought not to be said to be apparent, unless the character of the contract is such as to clearly disclose such intention, and there is danger that courts, in their desire to relieve contracting parties in hard cases, may extend it to contracts where the implication is not apparent. The supreme court of Missouri held it not applicable where an insurance company claimed that a contract by which an agent was employed for five years was terminated by its insolvency: *Lewis v. Atlas etc. Ins. Co.*, 61 Mo. 538; and this court held a school district liable for the wages of a teacher, though it was found necessary to close the school by reason of the prevalence of smallpox: See *Dewey v. Alpena School Dist.*, 43 Mich. 480; 38 Am. Rep. 208, and note. See, also, 2 Smith's Lead. Cases in Equity, 8th ed., 36.

In the case before us, the subject matter of the contract was the procurement of freight to be transported. Ward undertook to give his time to this, and did so. On the part of the defendants a promise to pay was made. Ward performed his promise, and the defendants decline, not because they cannot pay, which is certainly a physical possibility, but because it has become in-

convenient for ¹⁹ them to transport the goods owing to the loss of their vessel. The parties had agreed that Ward was to secure all the freight for transportation by this line that he could obtain, for which he was to receive one thousand dollars, one-third of which sum was to be paid by the defendants. They were under no obligation to Ward to transport any of it in the Ohio, or at all, for that matter. The share the Ohio would transport would depend upon circumstances not within Ward's control. Had the defendants immediately substituted another boat for the Ohio, Ward would not have been discharged from the obligation of the contract, which would have been susceptible of performance. The case is not dissimilar from one whereby the captain of the Ohio should have agreed with the owner of goods, without qualification, to transport them, both parties expecting them to be transported in the Ohio. The loss of the vessel would not relieve the owners from the contract, as the freight could as well be transported in another vessel. If the contract bound defendants to transport the goods in the Ohio, the rule would be different. But it did not. In fact, it did not bind them to transport them at all. Ward, as their agent, was to secure the freight, but there is nothing in the record that shows that Ward had a right to insist that it be transported by defendants. His contract was performed when he secured the freight, and defendants had no obligation but to pay.

Ward having fully performed his contract, a declaration upon the common counts was proper.

Upon the undisputed testimony, the plaintiff was entitled to recover, and the court might properly have directed a verdict. It therefore becomes unnecessary to consider other questions.

The judgment is affirmed.

The other justices concurred.

CONTRACTS—TERMINATION—DESTRUCTION OF SUBJECT MATTER.—If one contracts to do a thing which is possible in itself, the promisor is liable for a breach thereof, notwithstanding it is beyond his power to perform it. An exception to this rule exists when the contract is made on the assumed continued existence of a particular person or thing, and such person or thing ceases to exist: *Anderson v. May*, 50 Minn. 280; 36 Am. St. Rep. 642. See note to *Dewey v. Alpena School Dist.*, 38 Am. Rep. 208. Generally, the destruction of the subject matter of a contract does not terminate the contract and relieve the party from future performance: *Anderson v. May*, 50 Minn. 280; 36 Am. St. Rep. 642; *Adams v. Nichols*, 19 Pick. 275; 31 Am. Dec. 137, and note; *Hallett v. Wylie*, 8 Johns. 44; 3 Am. Dec. 457; *Ross v. Overton*, 3 Call, 309; 2 Am.

Dec. 552; *Tompkins v. Dudley*, 25 N. Y. 272; 82 Am. Dec. 349; *Fildew v. Besley*, 42 Mich. 100; 36 Am. Rep. 433; *School Dist. No. 1 v. Dauchy*, 25 Conn. 530; 68 Am. Dec. 371. Cases in which a destruction of the subject matter has terminated the contract and excused performance: *Cook v. McCabe*, 53 Wis. 250; 40 Am. Rep. 765; *Wels v. Devlin*, 67 Tex. 507; 60 Am. Rep. 38; *Haynes v. Second Baptist Church*, 88 Mo. 285; 57 Am. Rep. 413.

HARLEY v. PROCUNIER.

[115 MICHIGAN, 58.]

EXEMPTIONS—RIGHT OF SELECTION.—The right to determine which of several cows owned by a husband shall be exempt from execution rests with him, and is not subject to the control of the wife. She has a remedy only when the husband fails to claim the exemption.

EXEMPTIONS—CHATTEL MORTGAGE—SIGNATURE OF WIFE.—If a husband, owning five cows and having a right to two of them as exempt from execution, executes a mortgage on two of the cows without the consent or signature of his wife, the cows mortgaged must be deemed a selection of those not exempt, and the mortgage is valid, although the statute provides that a mortgage on exempt property is void, unless signed by the wife.

O. H. Smith, for the appellant.

M. J. Connine, for the appellee.

⁵³ LONG, C. J. Plaintiff is a married woman having a family of children. September 10, 1894, her husband gave a chattel mortgage in the sum of thirty dollars upon two ⁵⁴ cows, without the plaintiff's signature, and, as she claims, without her consent. At that time the husband owned five cows. Proceedings were being taken to foreclose this mortgage, when the plaintiff brought replevin, and took the cows into possession. The replevin cause was tried in justice's court, and removed to the circuit, where, upon a trial before a jury, the defendant had verdict and judgment. The claim of the plaintiff on the trial was that these two cows were exempt, and that, therefore, the mortgage was void, under the provisions of section 7686 of 2 Howell's Statutes. That section provides that: "The following property shall be exempt from levy and sale under any execution, or upon any other final process of a court: . . . To each householder, . . . two cows," et cetera.

Subdivision 9 of that section provides: "And any chattel mortgage, bill of sale, or other lien created on any part of property above described . . . shall be void unless such mortgage,

bill of sale, or lien be signed by the wife of the party making such mortgage or lien," et cetera.

It appeared upon the trial that this mortgage was given for a bona fide indebtedness of the husband; and the defendant introduced evidence tending to show that these cows had been mortgaged prior to that to one Wood. The defendant had an agreement with the husband of plaintiff that, if Mr. Wood would release his mortgage, he would give a mortgage to the defendant upon them. The defendant made the arrangement with Mr. Wood for the release, and went to plaintiff's house. Her husband was not there; but the plaintiff was told by defendant that he had arranged for the discharge of the Wood mortgage, and that her husband promised to give him a mortgage on the same cows. The plaintiff then told him that anything her husband did about the matter was all right. The husband come home shortly after that, and defendant took a description of the two cows in plaintiff's presence. She knew which two her husband was to ⁵⁵ mortgage. At that time she made no claim that these two cows were exempt. The five cows were there at that time, and all were owned by the husband. The next morning the mortgage was executed. Plaintiff made no objection to the giving of the mortgage, and made no claim then that these two cows were exempt. The plaintiff was called as a witness, and denied that she ever had any such talk with defendant, or that she was present when the description of the cows was taken by him to put into the chattel mortgage. The court submitted the question to the jury to find whether or not, under these circumstances, these two cows were exempt. The verdict was in favor of defendant for the amount of his lien under the mortgage.

Some questions are raised upon the ruling of the court in the admission and rejection of evidence upon the trial. We find no error in that.

It is claimed by plaintiff that under these circumstances the court should have directed the verdict in her favor. We think not. The court charged the jury as to the exemption as follows: "Mr. Harley was a householder, and had a family, and was entitled to have two cows the law could not reach. It seems from the evidence he had five cows. Now, three of those cows could not be exempt, only two; and he is the one to determine which ones are to be exempt. The right of exemption rests with the man that owns the cows, the householder. If this was a levy of execution, then under the law it would be the duty of Mr.

Harley to step forward and claim which ones of five cows he should claim as exempt, and it would be the duty of the officers to hand out the cows that he claimed, and they might leave with the rest. This is not a levy under an execution, but a chattel mortgage, and he [Mr. Harley] is the man that should determine which he proposes are exempt. . . . He should do it when he gives the chattel mortgage."

It is contended by counsel for plaintiff that the court was in error in this part of the charge; that the wife had the right to determine which two of the five cows should be exempt; and that a chattel mortgage without the wife's ⁵⁶ signature is absolutely void, unless it appears that there are two remaining cows, not encumbered, which are satisfactory to the wife—that is, that the wife may make the selection of exempt property, and that, the plaintiff here not having determined which two of the five should be exempt, the mortgage is void. This statute can have no such construction. The property belonged to the husband. He could not mortgage all the cows he owned without his wife's signature to the mortgage, because, under this statute, two would be exempt; but the claim of exemption must necessarily rest with the husband. As stated by the court below, "If this was a levy of execution, it would be the duty of Mr. Harley to claim the exemption." The husband would also have the right to determine which two of the five cows he would leave out of the chattel mortgage. The law gives the wife a remedy only when the husband fails to claim the exemption. The giving of the mortgage on the two cows was a selection of those which were not exempt. But the court went further than this in his charge. The testimony showed that these two cows had been mortgaged before; and, also, the defendant's testimony showed that the wife knew just which cows her husband was giving the mortgage upon; that she made no objection, but, on the other hand, told the defendant that the giving of the mortgage by her husband was all right. The court thereupon left the question of the exemption to the jury as one of fact. Certainly, the rights of the plaintiff were fully protected under this charge; and, if either party had a right to complain of the charge, it was not the plaintiff.

The judgment must be affirmed

The other justices concurred.

EXEMPTIONS—RIGHT OF SELECTION—TIME OF MAKING.
To claim property as exempt is a personal privilege of the debtor,

but he may waive such privilege: *Wyman v. Gay*, 90 Me. 136; 60 Am. St. Rep. 238. Where a defendant has two horses, one of which is exempt from execution, he has a right to elect as to which one shall be taken in execution: *Noland v. Wickham*, 9 Ala. 169; 44 Am. Dec. 435. But where a statute exempts from attachment and execution "one or two horses, not exceeding in value one hundred dollars," a horse worth more than that sum is not exempted, although it may be the only horse the debtor owns: *Everett v. Herrin*, 46 Me. 357; 74 Am. Dec. 455. If a debtor has property of a certain kind in excess of the exemption, it is his duty to interpose his claim for exemption prior to the sale: *Harrington v. Smith*, 14 Colo. 376; 20 Am. St. Rep. 272; *Boylston v. Rankin*, 114 Ala. 408; 62 Am. St. Rep. 111. But see *McGee v. Anderson*, 1 B. Mon. 187; 36 Am. Dec. 570.

JOHNSON v. LONDON GUARANTEE AND ACCIDENT CO.

[115 MICHIGAN, 86.]

APPELLATE PRACTICE—ERROR IN NOT DIRECTING VERDICT.—If an action on an accident insurance policy is tried upon the theory that the question as to whether the insured voluntarily exposed himself to unnecessary danger belonged exclusively to the jury to decide, the insurer cannot complain on appeal that the trial court erred in not directing a verdict in his favor.

INSURANCE—ACCIDENT.—VOLUNTARY EXPOSURE TO UNNECESSARY DANGER, within the meaning of an accident insurance policy, is a conscious or intentional exposure involving gross or wanton negligence on the part of the insured.

INSURANCE—ACCIDENT—CLASSIFICATION OF RISKS. If a person engaged as a clerk in a city, and insured against accident as such, has his home upon a farm, where he spends three nights and one day per week, the farm being entirely carried on by others, hired by him, he is not a farmer, within the meaning of an accident insurance policy classifying the occupation of farmer as more hazardous than that of clerk.

INSURANCE—ACCIDENT—CHANGE OF OCCUPATION.—If a person while engaged as a clerk in a city takes out accident insurance as such, and has his home on a farm, the fact that his employers sell their business and he ceases to draw a salary from them does not thereby necessarily make him a farmer, so as to limit his recovery under a policy making farming a more hazardous risk than clerking, if he has the farm work carried on by his employés.

Assumpsit on a policy of accident insurance. Plaintiff took out an accident policy against bodily injuries sustained through external, violent, and accidental means. His application represented that he was engaged in the occupation of secretary and treasurer for a grocery partnership doing business in a city, and, as part of the policy issued to him, he agreed: "That, if injured while engaged in work or duty classed as more hazardous than my occupation above stated, I shall be entitled to recover only

such amount as the premium paid by me would purchase at the rates fixed for such increased hazard." At the time of his application and until the accident, he resided on his farm outside the city, and part of the business of the farm was raising cattle, and he kept a bull. On the day of the accident, the bull had broken into his calf pasture, and the insured went in to drive the bull out, when the latter, though having never shown any viciousness before, tossed him and inflicted the injury for which he seeks to recover. The insured hired two men to manage the farm and the stock thereon, and they had entire charge of the premises. Some time before the accident, the grocery firm employing the insured sold out their business, and though he was drawing no salary at the time, he was assisting them in collecting accounts, and his term of employment as secretary had not expired. Accident insurance was classified by the insurer as select, preferred, ordinary, medium hazardous, and extrahazardous. The occupation of secretary or clerk under which the assured was insured was deemed "select," while farming was deemed "hazardous." Judgment for plaintiff, and defendant appealed.

C. S. McDonald and S. S. Babcock, for the appellant.

Sloman & Groesbeck, and E. T. Berger, for the appellee.

89 GRANT, J. 1. Counsel urge that the court erred in not directing a verdict for the defendant, on the ground that the plaintiff had voluntarily exposed himself to unnecessary danger. The complete answer to this is, that counsel preferred no such request at the trial. The case was tried upon the theory that upon this point the question belonged to the jury to decide. This question is therefore not before us.

2. Error is alleged upon the following portion of the instructions: "In order to make his act upon this occasion a voluntary exposure to unnecessary danger, he must have acted with gross or wanton negligence, or otherwise it was not a voluntary exposure to unnecessary danger."

90 In this connection the court also charged as follows: "I charge you also that a voluntary exposure means a conscious or intentional exposure. If the insured in this case believed, or had good reason to believe, that he was endangering his safety by attempting to drive this bull from this inclosure, then I charge you that he cannot recover. If, on the other hand, he did not believe or had any reason to believe that there was any

danger to himself in that attempt, then I charge you that it was not a voluntary exposure to unnecessary danger." This charge is sustained by the authorities: *Manufacturers' etc. Indemnity Co. v. Dorgan*, 58 Fed. Rep. 952; 7 C. C. A. 588. See, also, 2 *Bacon on Benefit Societies*, sec. 492, where will be found a full citation of authorities.

3. Was plaintiff engaged in an occupation more hazardous than that in which he was classified in the policy? The defendant requested the court to instruct the jury that plaintiff was in fact engaged in the more hazardous employment; also, that if they found that he was engaged in another occupation in addition to that of secretary and treasurer, and did not disclose that fact to the defendant, he could recover only the lesser sum under the more hazardous risk. These requests were refused, and the jury instructed that if the plaintiff had ceased to belong to the occupation in which he was insured, and had, in fact, become a farmer, he could only recover for the more hazardous occupation.

The question is one of fact, to be determined by the court only when there is no dispute as to the evidence, and but one rational conclusion can be drawn therefrom. A man may be engaged in two or more occupations, in which case he can only recover for injury received in the employment for which he is insured: *Standard Life etc. Ins. Co. v. Taylor*, 12 Tex. Civ App. 386. The provisions of the policy in that case were similar to those in this. Taylor was insured as a blacksmith, employed by a railroad company. In fact, he also acted as a switchman and car-coupler, occupations more hazardous than blacksmithing. Held, that recovery for injuries received while acting ⁹¹ as a switchman or coupler must be limited to the increased hazard. We think there was no evidence tending to show that plaintiff was a farmer, within the terms of the policy, until his employers, Hull Brothers, had ceased to do business. The fact that he lived upon his farm, and carried it on through others, does not make him a "farmer," within the meaning of that term as used in these accident policies. He was at home only from Saturday night to Monday morning, and on Wednesday night, of each week. There is no testimony to show that during that time he was engaged in the actual work of a farmer, so as to incur the more hazardous risks incident to that business.

It does not follow that plaintiff's policy lapsed when his regular employment with Hull Brothers ceased, or that he had necessarily become a farmer or engaged in the business of farm-

ing by spending his time at his home when the necessity for his being in Detroit had ceased: *Stone v. United States Casualty Co.*, 34 N. J. L. 371. In that case a school teacher, out of employment, had let contracts for the erection of two dwellings for his own use, and, while overlooking one, fell and was killed. Held, that he had not changed his employment, but was engaged in an individual act, which did not avoid the policy: See, also, 2 Bacon on Benefit Societies, sec. 491; *Hess v. Preferred Masonic etc. Assn.*, 112 Mich. 196. There was testimony tending to show that plaintiff had not changed his occupation. The letters, upon which considerable reliance is placed, were not written by the plaintiff himself, or dictated by him, but were written by his sister-in-law while he was suffering from his injuries. They are explained by him and by her in such a manner that they were properly left to the jury, in connection with the other testimony, to determine their exact meaning. There was sufficient conflict in the evidence to justify the submission of the question to the jury.

The judgment is affirmed.

The other justices concurred.

APPELLATE PRACTICE—RAISING OBJECTIONS—ERRORS INDUCED BY PARTY'S OWN ACT.—A question not raised at the trial will not be considered for the first time on appeal: *Relch v. Cochran*, 151 N. Y. 122; 56 Am. St. Rep. 607; *Greene v. Greene*, 49 Neb. 546; 59 Am. St. Rep. 560. Parties cannot complain of error which they invite or adopt: *Johnson etc. Co. v. Central Bank*, 116 Mo. 558; 38 Am. St. Rep. 615. A party to an action is bound by the rulings of the court which he obtains upon his own motion, and is estopped from claiming such ruling as error: *Newell v. Meyendorff*, 9 Mont. 254; 18 Am. St. Rep. 738; *Tarbell v. Royal etc. Co.*, 110 N. Y. 170; 6 Am. St. Rep. 350.

INSURANCE—ACCIDENT—VOLUNTARY EXPOSURE.—Voluntary exposure to unnecessary danger means intentional exposure to such danger: *De Loy v. Travelers' Ins. Co.*, 171 Pa. St. 1; 50 Am. St. Rep. 787. See, also, *Traveler's Ins. Co. v. Jones*, 80 Ga. 541; 12 Am. St. Rep. 270, and note thereto.

INSURANCE—ACCIDENT—CHANGE OF OCCUPATION.—The word "occupation," when found in the by-laws or policies of insurance companies, must be held to have reference to the vocation, trade, or calling which the assured is engaged in for hire or for profit, and not as precluding him from the performance of acts and duties which are incidentally connected with the life of men in any or all occupations, or from engaging in mere acts of exercise, diversion, and recreation: *Union Mut. Acc. Assn. v. Frohard*, 134 Ill. 228; 23 Am. St. Rep. 664.

MORELAND v. STRONG.

[115 MICHIGAN, 211.]

COTENANCY—RIGHT OF COTENANT UNDER FORECLOSURE SALE.—A purchaser of the undivided interest of a cotenant at foreclosure sale is at once entitled to enter and enjoy the premises, and his cotenant cannot thereafter lawfully monopolize the use of the land, either directly or indirectly.

COTENANCY.—ONE COTENANT CANNOT MAKE A VALID LEASE of the entire premises without the consent of the other.

COTENANCY—GROWING CROPS—ACCOUNTING.—A cotenant in possession is not entitled to the exclusive use of the premises, after entry and demand of possession by his cotenant, until the crop growing at the time shall mature. As to such crops the cotenant last to enter may be permitted to share the proceeds upon an accounting in equity upon a bill filed for partition, if justice requires it, and in such case the cost of production should first be deducted.

COTENANCY — PRIORITY BETWEEN MORTGAGES—RIGHT TO GROWING CROPS.—A chattel mortgage on crops on land owned in cotenancy, given by the tenant in possession after the commencement of foreclosure proceedings on the interest of his cotenant in the land, and after notice of lis pendens is filed, does not affect the rights of the mortgagee of the land, and a purchaser at foreclosure sale of the land mortgaged is entitled to a cotenant's undivided interest in such crops free from the lien of the mortgage thereon.

COTENANCY—GROWING CROPS—ACCOUNTING.—A person who has put in a crop on land held in cotenancy, under a contract with the tenant in possession, is chargeable with notice of the other cotenant's interest in the use of the premises.

E. I. Frankhauser, F. H. Stone, and O. J. Cornell, for the appellants.

Watts, Bean & Smith, for the appellees.

²¹² **HOOKE**, J. The defendant, Robert D. Strong and his brother, Homer N. Strong, were the owners in common of a farm of three hundred and sixty acres, which came to them by purchase, subject to a mortgage to M. B. Koon. On July 17, 1889, Homer gave a mortgage to the complainants, for fifteen hundred dollars, on his undivided half of the premises; and on July 2, 1890, he deeded his interest to his sisters. From the time that Homer went to Texas, soon after the purchase, Robert D. Strong occupied the premises alone; and in 1890 he made an oral contract with defendant Lindsay to work the place on shares for five years, under which the crops in dispute were raised. Complainants began foreclosure proceedings in chancery upon their mortgage, lis pendens being filed March 13,

1893. The defendants were not made parties. The land was sold under the decree, and complainants received a commissioner's deed on June 29, 1894, upon a sale made June 1, 1894.

On the fifteenth day of August, 1894, the complainants filed the bill in this cause, claiming to own an undivided half of said premises, and that Robert D. Strong owned the other undivided half. It alleges that defendant Lindsay "has an interest in said premises as tenant for years, for a five years' lease of said premises, which will expire April 1, 1896, by virtue of which he has one-third of all ²¹⁸ the crops and proceeds of said land, said Robert D. Strong furnishing everything enabling said Lindsay to operate and carry on said farm." It alleges, further, that during the year 1894 there was raised upon the farm, by said Lindsay, a large quantity of produce, in which the complainants have a half-interest, subject to the share and rights of the tenant, Lindsay, which the defendants denied. The bill prayed for a partition of the premises, and a division of the crops. A temporary injunction was issued, and a receiver appointed to take charge of the crops and convert them into cash; and the defendants were required to deliver them over to the receiver, and also to resign to him the care and management of the premises. The case was heard on pleadings and proofs, and on January 14, 1895, the court made a decree, of which the following is the substance:

"Doth find that complainants are seised in fee simple of an undivided one-half interest, as tenants in common with Robert D. Strong, who is unmarried, of the premises described in said bill, and that said Elijah Lindsay has an interest in said premises as tenant for years under a five years' lease on shares, which will expire April 1, 1896, which is not in writing; that the complainants acquired their said title on June 1, 1894, by virtue of a chancery sale under a decree of said court on foreclosure of mortgage made July 17, 1889, by Homer N. Strong and wife to complainants; that on the said first day of June, 1894, complainants asserted their rights to said premises, and to the crops thereon, and made their said claim known to said Robert D. Strong; also demanded a division of said land and crops by letter of July 9, 1894, which letter was answered by said defendant Strong, July 17, 1894; that said defendant declined to recognize the rights of complainants in said premises, and the crops grown thereon; that the sale under said foreclosure proceedings was duly confirmed; that the allegations in the said bill contained

are true; that a partition and division ought to be made as therein prayed.

"It is therefore ordered, adjudged, and decreed by the court that the complainants, Robert S. Moreland, James H. Moreland, and Eugene W. Crane, John Berdan, Harry T. Sinclair, and Edwin Jackson, and the defendant ²¹⁴ Robert D. Strong, are each entitled to one-half of said premises, to wit [here follows the description of premises same as in bill of complaint]; and that division and partition of said premises be made; and that John M. Moreland and Thomas J. Lowery and Charles H. Roy, neither of whom appears to be connected with any of the parties by consanguinity or affinity, and who are entirely disinterested, be, and they are hereby, appointed commissioners to make partition of said premises; that each of said commissioners take and subscribe an oath or affirmation, as required by law, and honestly and impartially execute the trust reposed in them, make partition of the said premises, according to the rights and interests of the parties, and a true report make to the court; that the said commissioners shall go upon the premises and make partition thereof, allotting the several shares of the respective parties, quantity and quality relatively considered, according to their respective rights and interests as hereby adjudged, designating their respective shares by posts, stones, and other permanent monuments, and that, if necessary, they employ a surveyor with necessary assistance to aid therein; and that they report their respective actings and doings, under their hands and seals, to the court, as soon as practicable; but the question as to whom the crops belong, and in what proportion, is expressly reserved, and not yet decreed by said court.

"VICTOR H. LANE,
"Circuit Judge."

At this juncture, one Cook asked leave to file a petition in said cause, in which he alleged that on April 28, 1894, Robert D. Strong gave to him a mortgage upon his two-thirds interest in the wheat and oats raised upon said premises in 1894, for the consideration of, and to the amount of, fifteen hundred dollars, and praying that the receiver be directed to deliver up the said wheat and oats, and that the injunction be dissolved. Objections were filed to the filing of this petition:

"Now come the complainants, by Watts, Bean & Smith, their solicitors, and object to the filing of the petition of Chauncey F. Cook in said cause, for the following reasons:

"1. Because the notice in said cause is not properly entitled; does not show that said case is in chancery.

²¹⁵ "2. Because said petition does not show said Cook to be entitled to any equities.

"3. Because the said petition does not show that said Cook has shown any diligence; does not show that he had not knowledge of the claimed facts set forth in his petition long before filing same.

"4. Because it does not show that the said claimed mortgage was placed on file with the town clerk where said property is situated, or where the mortgagor lived; and, in fact, the same was not filed until December 10, 1894.

"5. Because it does not appear from said petition that petitioner will be injured, and it does not appear that petitioner has not other security which is ample for his claimed debt.

"6. Because it appears from said petition that, before said pretended mortgage was filed, the receiver appointed by said court had possession of said property.

"7. Because petitioner, if he has any right, has a complete remedy at law.

"Dated January 26, 1895.

"WATTS, BEAN & SMITH,
"Solicitors for Complainants."

It does not appear that any further proceedings were had on said petition until April 9, 1895, when the following action was taken:

"This cause having been brought on to be heard on the petition of Chauncey F. Cook, who prays leave to file a petition in said cause, and after reading said petition and hearing the argument of counsel, and the court, being fully advised in the premises, doth order, adjudge, and decree that the said petition of the said Chauncey F. Cook may be, and hereby is, filed in said cause as of on the twenty-eighth day of January, 1895; and it is further ordered, adjudged, and decreed by the court that the relief therein prayed be, and the same is hereby, denied.

"VICTOR H. LANE,
"Circuit Judge."

On the same day a decree was made, approving and confirming the report of the commissioners, and requiring the complainants to pay one-half, and the defendants to pay the other half, of the costs; and a further hearing was had in relation to the crops, and a decree was made giving to ²¹⁶ the complainants

one-half, and to the defendants the other half, of the proceeds of the crops, after paying the costs and expenses of handling and converting said property into money, and the costs of said suit, and the receiver's reasonable charges, to be fixed and allowed by said court. The defendants and the petitioner, Cook, appeal, and the questions discussed relate to the crops, no controversy arising over the partition of the land.

The principal controversy is over the claim of the complainants that they are entitled to one-half of the crops raised by defendant Lindsay during the year 1894, some, if not all, of which were sown and planted before they took title under the commissioner's deed, but all of which were put in by Lindsay, at the expense of himself and Robert D. Strong. The defendants contend that Robert D. Strong was in the rightful possession and use of the premises; that he never excluded his brother or the complainants from their rights to enter, occupy, and use said land for him; and they maintain that, under such circumstances, one cannot be required to account to his cotenant for a portion of the crops raised.

On the twenty-ninth day of June, 1894, the complainants became owners of the undivided moiety of said lands under their purchase at foreclosure sale, and entitled to all of the rights which Homer N. Strong had before such sale. They became at once entitled to enter and enjoy said premises, with Robert D. Strong, their cotenant; and it is manifest that Strong could not lawfully monopolize the use of the land, either directly or through Lindsay. At the time the arrangement was made with Lindsay, Robert D. Strong could not make a valid lease of the entire premises any more than he could make a valid sale and conveyance of the same: 11 Am. & Eng. Ency. of Law, 1094, and note; *Mee v. Benedict*, 98 Mich. 263, 271; 39 Am. St. Rep. 543; *Freeman on Cotenancy and Partition*, secs. 183, 196, 205, 248. But we think it was not a lease. It was a mere contract, by which Lindsay undertook to perform certain services upon the land, Robert D. Strong furnishing seed, tools, and teams. ²¹⁷ It bears a close resemblance to the employment of a clerk, to be paid for his services by a share of the profits of the business; and, as between themselves, they were tenants in common of the crops.

It is contended that the English rule should be applied, viz., that a person in possession by consent of his cotenant cannot be required to account to his cotenant for a share of the profits arising from his use of the premises; but we are of the opinion

that this cannot be carried so far as to permit the cotenant in possession to have the exclusive use of the premises, after entry or demand of possession, until the crop growing at the time of the entry or demand shall mature. As to such crops, the cotenant may be permitted to share the proceeds, upon an accounting in equity upon a bill filed for partition, if justice requires it: See Freeman on Cotenancy and Partition, sec. 426; Gage v. Gage, 66 N. H. 282; 28 L. R. Ann. 842, 843, note; Gayle v. Johnston, 80 Ala. 395. And in such case the cost of production should first be deducted, which would amply protect the cropper: Early v. Friend, 16 Gratt. 21; 78 Am. Dec. 668, note. Apparently, the complainants' bill, when drawn, was intended to concede this.

If Cook was a party before the court to a sufficient extent to have the right of appeal from the order denying him the right to intervene, we should still be compelled to affirm the order of the circuit court as to him. He professed to have a mortgage on two-thirds of certain crops, taken after foreclosure proceedings were commenced and *lis pendens* filed. The record showed that Homer N. Strong, having title to an undivided half of the premises, had given complainants a mortgage thereon; and Cook must be held chargeable with notice of that fact, and of the rule that a purchaser at a foreclosure sale takes the mortgagor's interest in the crop, even against a tenant or assignee: Coman v. Thompson, 47 Mich. 22; 41 Am. Rep. 706. The chattel mortgage was given on April 28, 1894, some three months after the decree was entered in the foreclosure case, and after the commencement of publication of the ²¹⁸ notice of sale. It was apparent that, before these crops could mature, some one would acquire the interest of Homer N. Strong in the premises, with all of his rights of possession and partition, which were necessarily incident. We must hold, therefore, that this chattel mortgage in no way affects the rights of the complainants; and while it may be enforced against the interest of Robert D. Strong, it has nothing to do with this partition proceeding, and the court properly refused to allow the petitioner to intervene.

Lindsay, as well as Cook, made his contract with notice of the complainants' rights, and must be held to have known that the contract was subject to interruption. He cannot complain, therefore, if his one-third interest is subjected to a proportionate share of the expense of the receiver in harvesting and marketing the crop.

Complainants, on acquiring title, immediately demanded possession and a share of the crop, and were denied both. The court gave them one-half of the crops, apparently not taking account of the cost of raising the crop. This cut Lindsay off without anything for his labor, except as he might obtain it from the share of Robert, and the decree also made him liable for one-half of the costs in the partition case. It gave nothing to Robert D. Strong for his expenses in raising the crops, and left him, after paying Lindsay the agreed share, but one-sixth. While there is some evidence in the record upon the subject, we cannot form an accurate opinion of the amount that should be allowed to Robert D. Strong for his share of the expenses in raising said crop. We think that so much of the decree as relates to the crops should be modified by directing the allowance to Lindsay of one-third of the proceeds of the crop, less his one-third of the expenses of the receiver; that Robert D. Strong be allowed reasonable compensation for the use of teams, seed, and machinery, and the expenses reasonably incurred in raising, harvesting and marketing the crop; and that the residue be divided equally between him ²¹⁹ and the complainants, subject to the payment by each of one-third of the expenses—the trial court to take further evidence, if it shall be by the judge deemed necessary, to ascertain the amount of said Strong's allowance. The defendants, Strong and Lindsay, will recover costs of this court against the complainants, and the complainants will recover costs against Cook.

The other justices concurred.

COTENANCY—POWER TO LEASE.—A tenant in common can only lease his individual share, unless he has authority from his cotenants: *Mussey v. Holt*, 24 N. H. 248; 55 Am. Dec. 234; *Vaughan v. Cravens*, 1 Head, 108; 73 Am. Dec. 163. A tenant in common cannot grant an easement so as to confer a right which can be enforced against the other tenants: *Palmer v. Palmer*, 150 N. Y. 139; 55 Am. St. Rep. 653.

COTENANCY—MORTGAGE OF CROP BY TENANT IN POSSESSION.—Where one tenant in common occupies and cultivates the common estate, to the exclusion of his cotenants, the latter have a right to an account of the profits of the crops produced, but no property in the crops; and therefore a mortgage of such crops by the occupying tenant is good against his cotenants, and the mortgagee is not liable to account to them: *Bird v. Bird*, 15 Fla. 424; 21 Am. Rep. 296.

COTENANCY—ALLOWANCE FOR IMPROVEMENTS—ACCOUNTING.—A tenant in common occupying the whole estate, without a claim on the part of his cotenants to be admitted into possession, is under no obligation to account: *Izard v. Bodine*, 11 N. J. Eq. 403; 69 Am. Dec. 595; *Kean v. Connelly*, 25 Minn. 222; 33 Am. Rep. 458. See extended note to *Early v. Friend*, 78 Am. Dec. 665, where this question is treated. As to when a cotenant

has a right to compensation for improvements to the property, see *Ballou v. Ballou*, 94 Va. 350; 64 Am. St. Rep. 733; *Cosgriff v. Foss*, 152 N. Y. 104; 57 Am. St. Rep. 500. See extended monographic note to *Ward v. Ward*, 52 Am. St. Rep. 924-941.

PEOPLE v. TICE.

[115 MICHIGAN, 219.]

CRIMINAL LAW—ALIBI—INSTRUCTIONS CONCERNING.
An instruction to the jury in a criminal case to carefully scrutinize any evidence in relation to an alibi, because an alibi is a defense that is easily proven and hard to disprove, is not erroneous.

WITNESSES—IMPEACHMENT.—If a witness denies that in a conversation participated in by her and another, in the presence of a third person, she assented to certain statements made by such other person, such third person is competent to contradict and impeach her testimony.

APPELLATE PRACTICE—NEW TRIAL.—The failure of the trial court to file reasons for the denial of a motion for a new trial is not reversible error, if no request for such reasons is made at the time the motion is denied.

C. M. Eby, for the appellant.

C. E. Sweet, prosecuting attorney, for the people.

²²⁰ **HOOKE**R, J. The defendant was convicted of the offense of arson, upon the testimony of one alleged to be an accomplice. Upon the trial, this witness first denied knowledge of the defendant's guilt, and after a recess, during which time he had an interview with one or more of the officers, and with his mother and sister, changed his testimony, and stated that the defendant had committed the act in his presence. In his charge the learned circuit judge discussed the conduct of the witness mentioned, at length, and the rules by which the jurors were to determine the value of his testimony, in connection with the unusual and peculiar circumstances under which it was given; and several assignments of error are based upon this part of the charge. They raise the question whether the charge was prejudicial, in that it gave undue prominence to certain circumstances. Our examination has satisfied us that the charge was fair, and we deem it unnecessary to discuss the assignments in detail.

The defendant offered evidence tending to prove an alibi. Referring to it, the court said: "I will say that, while the in-

struction given with reference to an alibi is true—that this is the law—you are to carefully scrutinize any evidence in relation to an alibi. An alibi is a defense that is easily proven and hard to disprove. Therefore you will be careful and cautious in examining the evidence in regard to an alibi.”

What was meant by the reference to “the instruction given with reference to an alibi” does not appear. If, as is probable, it refers to a request to charge upon that subject, which may have been read to the jury for aught that appears in the record (the “voluntary charge” only ²²¹ being given), it may have been necessary by way of modification; and, if not, it was a proper caution to give to the jury, as it is notorious that an alibi affords the readiest avenue of escape from merited punishment, through false testimony.

The testimony of the witness Jewell was admissible. The defendant’s wife, Ida Tice, was asked if, in a conversation in which Etta Jennings participated, in the presence of Jewell, she did not assent to certain statements made by Etta. She denied the conversation, and that she was present at the place mentioned on the occasion referred to. Thereupon Jewell was permitted to testify that in such conversation Etta Jennings said that “she knew Sim was not out, because she stayed there all night,” et cetera; that Ida Tice was not three feet away, and all present were talking together, and Mrs. Tice said, “Etta stayed there that night, and Sim was not out.”

It is alleged that the cause should not have been submitted to the jury, for the reason that there was not sufficient evidence to sustain a conviction. It does not appear that the claim was made upon the trial, but, if it had been, the point is not sustained by the record, as there was testimony showing circumstances which tend to corroborate the story of Jennings. Counsel also claimed the right to review the denial of a motion for a new trial, notwithstanding the fact that the judge failed to state his reasons therefor. This point is ruled by the case of *McRae v. Garth Lumber Co.*, 102 Mich. 488. We are not prepared to hold that it is error for a court not to file reasons for the denial of a motion for new trial, where no request has been made that he do so. Such a request should have been filed or made previous to or at the time of the hearing and decision of said motion.

The judgment of the circuit court is affirmed.

The other justices concurred.

CRIMINAL LAW—ALIBI—INSTRUCTIONS.—It is error in a criminal prosecution for the trial court, by means of cautionary instructions, to discredit a particular defense, such as an alibi, or the evidence in support thereof, by stating to the jury that such defense is one "capable of being, and has been occasionally, successfully fabricated; that even when wholly false its detection may be a matter of great difficulty, and that the temptation to resort to this as a spurious defense may be very great, especially in cases of importance": *Henry v. State*, 51 Neb. 149; 66 Am. St. Rep. 450, and note; *Turner v. Commonwealth*, 86 Pa. St. 54; 27 Am. Rep. 683. See note to *Sharp v. State*, 14 Am. St. Rep. 41-44.

WITNESSES—IMPEACHMENT.—When a witness denies or fails to remember that on former occasions he made statements inconsistent with his testimony on the trial, evidence that he did make such statements is admissible to impeach him, upon the establishment of a proper and sufficient predicate: *Levy v. State*, 28 Tex. App. 203; 19 Am. St. Rep. 826. See note to *Consolidated Ice Machine Co. v. Kelfer*, 23 Am. St. Rep. 695. See extended monographic note to *Allen v. State*, 73 Am. Dec. 762-777.

APPELLATE PRACTICE—FAILURE OF COURT TO DO SOME ACT.—Error cannot be based upon the failure of the trial court to define a statutory term, when no request to that effect was made: *Wragge v. South Carolina etc. R. R. Co.*, 47 S. C. 105; 58 Am. St. Rep. 870.

SYKES v. CITY SAVINGS BANK.

[115 MICHIGAN, 321.]

HUSBAND AND WIFE—LOANS BETWEEN.—If a wife gives her husband money at his request, the law implies a promise on his part to repay her, if there are no circumstances tending to show a different understanding between the parties.

EVIDENCE—SYNONYMS.—If a wife testifies that money given by her to her husband was advanced upon the "understanding" that it was to be repaid to her, the word "understanding" may be treated as synonymous with the word "agreement."

HUSBAND AND WIFE—LOANS BETWEEN—ESTOPPEL. If a wife advances money to her husband with the expectation that he will repay it, but without a special agreement as to the time of repayment, the transaction does not constitute a gift, unless the facts are such as to show an estoppel against her.

INSTRUCTIONS.—REQUESTS for instructions having no legitimate bearing on the case on trial are properly refused.

GARNISHMENT—PAYMENT TO WRONG PARTY.—A defendant in garnishment proceedings cannot escape liability by reason of a payment of the fund in dispute, after service of the garnishment, to one who is not entitled to such money.

Bowen, Douglas & Whiting, for the appellant.

F. D. Andrus, for the appellee.

³²² **HOOVER, J.** John Bommer was indebted to the plaintiff on a judgment recovered before a justice in 1883; and this judg-

ment was sued in the circuit court, and a judgment was rendered there, October 13, 1894, for five hundred and five dollars and forty-one cents, damages and costs, on which date the defendant was garnished. Its disclosure stated that it was not indebted to Bommer, and that it had no property belonging to him in its possession or under its control; whereupon an issue was framed, and the question went to a jury, a verdict being found in favor of the defendant. The plaintiff has appealed from the judgment.

An outline of the facts disclosed by the testimony is as follows, viz.: Bommer was a brewer, and opened an account with the defendant by depositing on September 1, 1890, the sum of three thousand two hundred and thirty dollars. This account was closed on July 7, 1894, by the withdrawal of his balance of three hundred and forty-three dollars and fifty-eight cents, which was paid to him in cash. During the period mentioned, Christina Bommer, his wife, sometimes made deposits to her husband's credit; but she never drew upon the account, or had any control over the money deposited. On receiving this sum of money (three hundred and forty-three dollars and fifty-eight cents), Bommer paid it to his wife, who deposited it to her credit upon the same day that it was drawn from the bank by her husband. It is claimed upon behalf of the plaintiff that this was a voluntary transfer by Bommer, and is void as against the plaintiff, and that the fund may be reached by garnishment, as the money of Bommer. The learned circuit ⁸²³ judge submitted to the jury the question whether this transfer was voluntary. It is contended by the plaintiff that this was error, for the reason that the undisputed testimony showed it to be such.

The testimony offered on behalf of the plaintiff—for none was offered upon behalf of the defendant—shows that some years before this proceeding was commenced, but while Bommer owed the plaintiff, he (Bommer) bought a homestead for two thousand one hundred and fifty dollars, title to which was taken in the names of himself and wife. This was paid for by a check upon the bank at a time when he had a balance to his credit of four thousand six hundred dollars, as appears by the bank-books, which plaintiff introduced. Subsequently a house and lot were purchased, and title taken in the names of Mrs. Bommer and Mr. Bommer's mother. Bommer and wife borrowed five hundred dollars, giving the defendant bank a joint note for five hundred dollars, secured upon the homestead. This note was given upon September 12, 1891. Mrs. Bommer testified

that, at the time of the purchase of the house and lot, Bommer's mother wanted the deed made to her, because she had furnished Bommer with money. After this time, Mrs. Bommer collected the rents from this property, amounting to nineteen dollars a month, and Bommer allowed her from twelve dollars to twenty dollars a week to provide for the family. From these sources she saved something, which after a time she was in the habit of letting her husband have upon request, and he used it in business. At first she deposited it in the bank to his credit, for she had no bank account. She admitted that she did not keep track of the amount, but says it exceeded the amount paid to her, and she also said that he made no express promise to repay her. She testified that this was her own money, and that he owed her for it, and that such was the understanding between them, and that she "saw that he was failing in business right along, and losing money, and she told him she wanted her money back, . . . to pay off the [five hundred dollars] mortgage," and he gave her the sum mentioned, and it was used, with money that she subsequently deposited, for that purpose.

³²⁴ It is urged that this testimony does not show a promise to repay, or the recognition of contract relations; and cases are cited to support the proposition that when a woman allows her husband to use her money in his business, or gives it to him for that purpose, the law will presume that it is a gift. We do not question the fact that a wife may give her property to her husband, and the inference that it is a gift may be drawn from circumstances; but we doubt the proposition that the law will presume it a gift in all cases where there is an absence of an express promise by the husband to repay. The usual rule is that, if one gives another money at his request, the law will imply a promise to repay; and we see no injustice in applying the rule against a husband, where there are no circumstances tending to show a different understanding between the parties. This court has frequently held that the presumption of the law is against a gift by the wife to the husband and the burden of proving it is upon him: *Durfee v. McClurg*, 6 Mich. 223; *Penniman v. Perce*, 9 Mich. 509; *Wales v. Newbould*, 9 Mich. 45; *Jenne v. Marble*, 37 Mich. 319. In *White v. Zane*, 10 Mich. 333, it was held that such a gift must be established by some other evidence than that of use and possession by him, permitted by her. It is true that the case did not involve money belonging to the wife, but specific chattels; but we see no reason for discrimination against money, when we consider that the uses to which money

is adapted do not ordinarily permit the return of the identical money used.

The wife testified to the understanding between her husband and herself. While, in a sense, the word "understanding" may be said to involve a conclusion, it is an ambiguous term, and is sometimes used as synonymous with "agreement." Technically, the court should determine what was understood or agreed by the parties from what was said; but where, as in this case, the ambiguous statement is made without objection or cross-examination, ³²⁵ with a view to ascertaining what is meant by the term, we think it should go to the jury.

The charge of the court is criticised upon the ground that it allowed the question to turn upon Mrs. Bommer's expectation. He said: "If she loaned the money to him with the expectation that he should repay it, although the time when it should be repaid may never have been mentioned, then I charge you, gentlemen of the jury, that he was right in returning to her the three hundred and forty-three dollars. But, if you find that she gave the money to him without expectation of its being paid, then she would not be entitled to have it repaid."

In view of the presumption against gifts by the wife, and the onus being upon the husband to establish it, we think this was not error. It certainly cannot be that a wife's property can be disposed of by her, as a gift, without an intention to give. She may possibly be estopped from denying that it is a gift in some cases, but that question is not here.

The court left the jury no alternative but to find a verdict for the plaintiff, if they should determine that Mrs. Bommer's husband did not owe her—in other words, if they found that he was not under obligation to repay her for the money saved by her, and which she allowed him to use; but it is contended that this question should not have been submitted to the jury, for the further reason that the money that she saved was his, and not hers. In short, the plaintiff's contention was, as aptly stated in the appellee's brief, that: "John Bommer had no right to purchase the homestead in the joint names of himself and wife; that the homestead really belonged to himself alone; that the five hundred dollars borrowed on the homestead really belonged to him, and consequently the property purchased with it also belonged to him, and that, therefore, the rents belonged to him; and that he therefore owed his wife nothing, and the money (three hundred and forty-three dollars and fifty-eight cents) paid by him to her was without consideration."

ant, and that soon afterward he came to her and promised to marry her as soon as his wife had been dead sufficiently long, and accomplished her seduction, and that he had intercourse with her frequently for several months thereafter. Before plaintiff was allowed to testify very ³³⁰ much, counsel for defendant was allowed to question the plaintiff, when he elicited from her the fact that in April, 1891, she married one Rabeke, who lived with her until August, 1891, and that plaintiff gave birth to a child in September, 1891. Defendant denied that he ever had intercourse with plaintiff, and it is the claim of the defense that Rabeke was the father of the child, and that there never had been any seduction.

After the fact had been elicited of the marriage of plaintiff and the birth of the child, counsel for defendant insisted that, as plaintiff was a married woman, she was not competent as a witness in this proceeding; and it is also claimed that it was error in the court to allow her to testify that the man she afterward married had no intercourse with her until in February, for the reason that the effect of her testimony was to bastardize issue born in wedlock, and that, for reasons of morality and public policy, such testimony was incompetent. It is urged by counsel for the plaintiff that the testimony in relation to non-intercourse between plaintiff and her husband was not drawn out by plaintiff, and that defendant cannot complain. We think counsel in error, as the record shows that plaintiff, when examined by her counsel, testified: "During the month of October, I did not know August Rabeke, the man I afterward married. I got acquainted with him, so far as I remember, in February, 1891."

It was the claim of the defendant that, instead of seducing plaintiff, he had no intercourse with her, and that Rabeke was the father of the child. It is evident that if plaintiff did not know Rabeke in October, 1890, and he did not get acquainted with her until in February, 1891, he could not have had intercourse with her in October, 1890; and the effect of this testimony in relation to intercourse was not different from what it would have been if witness had testified directly to the fact of nonintercourse. It is material, then, to inquire, Was it competent for the wife to testify to the nonintercourse of the ³³¹ man who afterward became her husband, in view of the fact that her child was born in wedlock, and the effect of her testimony would be to illegitimatize her offspring? Plaintiff's claim is, that the principal question in the controversy is that

of seduction, and the birth of the child is an incident that goes to the measure of damages, simply, and that it was competent for the wife to testify as she did. In 1 Jones on Evidence, section 96, the rule is stated as follows: "It is well settled, on grounds of public policy, affecting the children born during the marriage, as well as the parties themselves, that the presumption of legitimacy as to children born in lawful wedlock cannot be rebutted by the testimony of the husband or the wife to the effect that sexual intercourse has or has not taken place between them. . . . The rule not only excludes direct testimony concerning such intercourse, but all testimony of such husband or wife which has a tendency to prove or disprove legitimacy. For example, it was held incompetent to ask the husband, for the purpose of proving nonaccess, whether at a given time he did not live a hundred miles away from his wife. . . . The rule rests, not only on the ground that it tends to prevent family dissension, but on broad grounds of public policy. . . . Nor does it depend upon the form of action, or the parties. On the contrary, it obtains, whatever the form of legal proceedings or whoever may be the parties."

This doctrine is sustained by the uniform current of authorities, so far as I have been able to examine them: See cases cited in 1 Jones on Evidence, sec. 96; *Dennison v. Page*, 29 Pa. St. 420; 72 Am. Dec. 644. See annotations to this case, where there is a very full collation of the authorities. We do not think it was competent for Mrs. Rabeke to testify to nonaccess with her husband during the period of gestation, or to a state of facts from which the inference must be drawn that she did not have intercourse with him until February: *Egbert v. Greenwalt*, 44 Mich. 245, 38 Am. Rep. 260.

We then come to the question, Could she testify to the fact of having intercourse with defendant? In 1 Jones on Evidence, section 96, following what we have just quoted, it is said: 382 "While the rule prevents the wife from testifying that she has not had intercourse with her husband, it does not prevent the wife from testifying that another person than her husband has had, or has not had, connection with her": *Commonwealth v. Shepherd*, 6 Binn. 283, 6 Am. Dec. 449; *Chamberlain v. People*, 23 N. Y. 85; 80 Am. Dec. 255; *People v. Overseers of Poor*, 15 Barb. 286; 2 Am. & Eng. Ency. of Law, 149. It ought not to be forgotten that this is an action for seduction. It is claimed by plaintiff that her ruin was accomplished as early as the early part of October, and the seduction might be

complete, though no conception followed. We think it was competent for her to give testimony in relation to what occurred between her and the defendant.

Objection is made to the testimony that defendant admitted that he was the father of the child. It is said that the effect of this testimony is to bastardize the child, and therefore the testimony is inadmissible. We have already seen that, for reasons of public policy, it has been held that the mother could not testify to nonaccess by the husband; but, as before stated, the primary inquiry here is, Did the defendant seduce the plaintiff? We think that, in an action between the plaintiff and himself, such an admission is entirely competent: *Palmby v. McCleary*, 12 Ont. 192; *Badder v. Keefer*, 91 Mich. 611; 100 Mich. 272.

It is claimed there was no promise of marriage that should have been relied upon by the plaintiff, and that she cannot recover. It is also claimed that as the plaintiff had stated in an affidavit in bastardy proceedings that defendant promised to marry her if, as a result of the intercourse, a child was begotten, the judge erred in refusing a request that, if the jury found that the statement contained in the affidavit was true, the plaintiff could not recover. We think the rule announced in *Stoudt v. Shepherd*, 73 Mich. 588, is a complete answer to these contentions. It is true that the action of seduction has been hedged about by many fictions of the law, and that many cases can be found sustaining the claim of counsel. It has long been held in ³³³ this state that a debauched woman could sue in her own name for the injury: *Watson v. Watson*, 49 Mich. 540; *Dalman v. Koning*, 54 Mich. 320. It was said in the case of *Stoudt v. Shepherd*, 73 Mich. 588, by Mr. Justice Campbell: "This court recognized, what we conceive to be the recognized doctrine of experience, that seduction may be accomplished by means of influence and persuasion intended to reach, and actually reaching, the result, which do not necessarily involve either a promise of marriage or pecuniary advantage; and that such effectual persuasion, which is the active cause of it, may be as distinct a grievance as the more venal representations, which appeal to covetousness more than to excited feeling." This case is followed in *Hallock v. Kinney*, 91 Mich. 57; 30 Am. St. Rep. 462.

We do not discover any error in the record, except what we have before pointed out. Because of that error, the case is reversed, and a new trial ordered.

The other justices concurred.

SEDUCTION—NONACCESS OF HUSBAND—LEGITIMACY OF CHILD.—Neither the testimony of the husband, nor of the wife, nor of her alleged paramour, will be received to show that a child born during the marriage was illegitimate, if the husband was not impotent and had the opportunity for sexual intercourse with the wife: *Scanlon v. Walshe*, 81 Md. 118; 48 Am. St. Rep. 488. A husband or wife is an incompetent witness to prove nonaccess in order to establish the illegitimacy of a child born in wedlock, but begotten before: *Dennison v. Page*, 29 Pa. St. 420; 72 Am. Dec. 644, and monographic note thereto; *Egbert v. Greenwall*, 44 Mich. 245; 38 Am. Rep. 260; *Wright v. Hicks*, 15 Ga. 160; 60 Am. Dec. 687. But see *Woodward v. Blue*, 107 N. C. 407; 22 Am. St. Rep. 897.

SEDUCTION—EVIDENCE.—On the question of evidence in cases of seduction, see the note to *Weaver v. Bachert*, 44 Am. Dec. 172.

SEDUCTION—PROMISE OF MARRIAGE.—Seduction, accomplished under promise of marriage to be performed only on condition that pregnancy results from the intercourse, is not seduction within a statute punishing seduction "under promise of marriage": *State v. Adams*, 25 Or. 172; 42 Am. St. Rep. 790. Contra, see note to *State v. Carron*, 87 Am. Dec. 408. In the absence of a statute, the violation of a promise of marriage is not one of the necessary constituents of seduction: *Marshall v. Taylor*, 98 Cal. 55; 35 Am. St. Rep. 144.

Illegitimacy—Evidence of Husband or Wife to Prove.*

The authorities universally sustain the rule that the presumption which exists as to the legitimacy of a child or children born in lawful wedlock cannot be rebutted by the testimony of the husband or wife, to the effect that sexual intercourse has, or has not, taken place between them within the period during which such child must have been begotten. This rule not only excludes direct testimony concerning such intercourse, but all testimony of such husband or wife which has, or may have, a tendency to disprove legitimacy: *Boykin v. Boykin*, 70 N. C. 262; 16 Am. Rep. 776; *Corson v. Corson*, 44 N. H. 587; *Melvin v. Melvin*, 58 N. H. 569; 42 Am. Rep. 605; *Egbert v. Greenwall*, 44 Mich. 245; 38 Am. Rep. 260; *Tioga County v. South Creek Tp.*, 75 Pa. St. 433; *Shuman v. Shuman*, 83 Wis. 250. A husband or wife is an incompetent witness to prove nonaccess in order to establish the illegitimacy of a child born in wedlock, but begotten before: *Dennison v. Page*, 29 Pa. St. 420; 72 Am. Dec. 644. Neither the testimony of a husband or wife, or of her alleged paramour, can be received to show that a child born during the marriage was illegitimate, if the husband was not impotent and had opportunity for sexual intercourse with the wife: *Scanlon v. Walshe*, 81 Md. 118; 48 Am. St. Rep. 488.

On the question as to whether a certain man was the father of a child begotten while the mother was his wife and while they were living in the same house, with opportunities for sexual intercourse, no statements or admissions of either of them are admissible to show nonintercourse, nor are either of them competent to testify to facts which may tend to bastardize such child: *Shuman v. Shu-*

* REFERENCE TO MONOGRAPHIC NOTES.

Illegitimacy, evidence of what admissible: 72 Am. Dec. 649-654.

Presumption of legitimacy of children born in wedlock: 56 Am. Dec. 211, 212.

man, 83 Wis. 250. The mother of a child born in wedlock, though begotten before, is incompetent to prove that the child was not begotten by the man who became her husband before its birth: *Dennison v. Page*, 29 Pa. St. 420; 72 Am. Dec. 644. A wife cannot testify on the question of the legitimacy of her child or children, to facts tending to show nonaccess of her husband: *Mink v. State*, 60 Wis. 583; 50 Am. Rep. 386; *Binns v. Dazey*, 147 Ind. 536. In proceedings instituted to have a person adjudged the father of a bastard child, the mother, a married woman, is not competent to testify to the nonaccess of her husband for a year previous to the birth of such child: *People v. Court of Sessions*, 45 Hun, 54; *State v. Pettaway*, 3 Hawks, 623. This rule and the reasons therefor are well stated in *Mink v. State*, 60 Wis. 583, 50 Am. Rep. 386, where Mr. Justice Orton, in delivering the opinion of the court, said: "The law is well settled that the wife, on the question of the legitimacy of her children, is incompetent to give evidence of the nonaccess of her husband during the time in which they must have been begotten. This rule is founded on the very highest grounds of public policy, decency, and morality. The presumption of the law is, in such a case, that the husband had access to the wife, and this presumption must be overcome by the clearest evidence that it was impossible for him, by reason of impotency or imbecility, or entire absence from the place where the wife was during such time, to have had access to the wife, or to be the father of the child. Testimony of the wife, even tending to show such fact, or of any fact from which such nonaccess could be inferred, or of any collateral fact connected with this main fact, is to be most scrupulously kept out of the case, and such nonaccess and illegitimacy must be clearly proved by other testimony."

In the case of *Tioga County v. South Creek Tp.*, 75 Pa. St. 433, it appeared that a woman was married, that her husband immediately thereafter abandoned her, and that a child was born shortly after the marriage, and it was held that she was not a competent witness to prove that her husband was not the father of the child. In delivering the opinion of the court, Mr. Justice Gordon said: "That issue born in wedlock, though begotten before, is presumptively legitimate is an axiom of law so well established that to cite authorities in support of it would be a mere waste of time. So the rule that the parents will not be permitted to prove nonaccess for the purpose of bastardizing such issue, is just as well settled. Many reasons have been given for this rule. Prominent among them is the idea that the admission of such testimony would be unseemly and scandalous, and this not so much from the fact that it reveals immoral conduct upon the part of the parents, as because of the effect it may have upon the child, who is in no fault, but who must, nevertheless, be the chief sufferer thereby. That the parents should be permitted to bastardize the child is a proposition which shocks our sense of right and decency, and hence the rule of law which forbids it": *Tioga County v. South Creek Tp.*, 75 Pa. St. 437.

A mother who, in divorce proceedings, and also in proceedings for

the adoption of her children, testifies that they were the children of her husband, is estopped, in a subsequent proceeding, from testifying that they were the issue of a meretricious relation between herself and a person not her husband, and whom, after being divorced from her husband, she marries: *Scanlon v. Walshe*, 81 Md. 118; 48 Am. St. Rep. 488. Though a court should permit a mother to testify that children begotten and born to her in wedlock are not the children of her then husband, where it appears that she was then living with her husband, who had opportunities for sexual intercourse with her, and who is not shown to have been incompetent, such evidence is not sufficient to overcome the presumption of legitimacy: *Scanlon v. Walshe*, 81 Md. 118; 48 Am. St. Rep. 488.

In an action for divorce, the husband is not a competent witness to prove nonaccess, for the purpose of proving the adultery of his wife and the birth of a child: *Corson v. Corson*, 44 N. H. 587. It is well settled that neither husband nor wife is competent to prove nonaccess during wedlock for the purpose of bastardizing their issue, or to testify to anything which may tend, directly or indirectly, to render a child born during wedlock illegitimate, no matter what may be the form of legal proceedings, or whoever may be the parties thereto: *Chamberlain v. People*, 23 N. Y. 85; 80 Am. Dec. 255. Nonaccess, to prove the illegitimacy of a child born during wedlock, cannot be proved by either husband or wife, whether the action be civil or criminal, or whether the proceeding is one of settlement or bastardy, or to recover property claimed as heir at law: *Dennison v. Page*, 29 Pa. St. 420; 72 Am. Dec. 644. The rule which renders the husband or wife incompetent to testify to any fact which may tend to render issue of their marriage illegitimate is not affected by statutory provisions enlarging the competency of witnesses: *Chamberlain v. People*, 23 N. Y. 85; 80 Am. Dec. 255. A child born in wedlock is not competent to testify to the fact that he was the result of an adulterous intercourse upon the part of his mother: *Eloi v. Mader*, 1 Rob. 581; 38 Am. Dec. 192. The admission by a third person that a child born in wedlock was begotten by him, and not by the subsequent husband of the mother, is not evidence sufficient to rebut the legal presumption of its legitimacy, and that it is the child of the husband: *Montgomery v. Montgomery*, 3 Barb. Ch. 132.

Declarations or acts of the husband or wife at or subsequently to the birth of a child are inadmissible to prove it illegitimate, in the absence of proof of nonaccess at the time of conception: *Dennison v. Page*, 29 Pa. St. 420; 72 Am. Dec. 644. Upon the question as to whether the husband was the father of a child begotten while the mother was his wife, and while they were living in the same house, with opportunities for sexual intercourse, no statements or admissions by such mother or her then husband are admissible to show nonintercourse, and thus bastardize such child: *Shuman v. Shuman*, 83 Wis. 250. And on the prosecution of a man for incestuous marriage with the daughter of his half-sister by the same father, declarations by his deceased mother and father that he is an illegitimate child, not the son of his supposed father, and that there is no

blood relationship between himself and his wife, are inadmissible, in the absence of evidence of nonaccess between the supposed parents, or that they were living apart, or that the supposed father was impotent at the time that the accused was conceived: *Simon v. State*, 31 Tex. Crim. Rep. 186; 37 Am. St. Rep. 802. The declarations of parents are not admissible to bastardize their issue, if their marriage is proved or admitted: *Craufurd v. Blackburn*, 17 Md. 49; 77 Am. Dec. 323. Although the declarations of the husband or wife are inadmissible during their lifetime to bastardize the child or children of the marriage, such declarations are admissible after the death of the parents, especially as connected with their conduct, and in explanation thereof: *Wright v. Hicks*, 15 Ga. 160; 60 Am. Dec. 687. The declarations of a husband that a child born to his wife during the marriage is not his are not sufficient to prove its illegitimacy, notwithstanding it was born only three months after the marriage and a separation between himself and his wife took place soon thereafter by mutual consent: *Bowles v. Bingham*, 2 Munf. 442; 5 Am. Dec. 497. The presumption of the legitimacy of a child born in wedlock is so strong that it cannot be overcome by admissions by the wife of her adultery while cohabiting with her husband, much less by the mere admissions of the adulterer: *Grant v. Mitchell*, 88 Me. 23; *Hemmenway v. Towner*, 1 Allen, 209. Even where the declarations of the father are admitted in evidence, they are insufficient to bastardize the issue of the marriage, and rebut the presumption of legitimacy resulting therefrom: *Vernon v. Vernon*, 6 La. Ann. 242. While the wife's declarations are admissible, in connection with other satisfactory proof, to establish the fact of adultery, in an action for divorce, they are inadmissible if they tend to bastardize the issue of the marriage: *Cross v. Cross*, 8 Paige, 139; 23 Am. Dec. 778.

The mother of an alleged bastard, who is a married woman, and whose husband is living at the time of the alleged illicit intercourse, and the birth of the child, although she is, from the necessity of the case, a competent witness to prove the illicit intercourse, and who is in fact the father of her child, is not competent as a witness to establish the nonaccess of the husband, nor his absence from the state. This rule has been said to be founded in decency, morality, and policy, and the fact that the parties should not be permitted to say, after marriage, that they had no sexual connection. The incompetency of the wife has also been placed on the ground of the interest of the husband, in charging another with the support of the child: *People v. Overseers of Ontario*, 15 Barb. 286; *Commonwealth v. Shepherd*, 6 Binn. 283; 6 Am. Dec. 449; *Parker v. Way*, 15 N. H. 45; *State v. Pettaway*, 8 Hawks, 623.

SMITH v. DETROIT LOAN AND BUILDING ASSOCIATION.

[115 MICHIGAN, 340.]

LANDLORD AND TENANT—NOTICE TO QUIT—RE-ENTRY.—If a tenant, holding over after the termination of his term, fails to pay the rent due within the time fixed by a statutory notice to quit, served upon him, his right to occupy the premises terminates, and the landlord may then peaceably re-enter and take possession, to the exclusion of the tenant. Such common-law right of re-entry is not abridged by the Michigan statutes: Howell's Annotated Statutes, sec. 8299, et seq.

LANDLORD AND TENANT—NOTICE TO QUIT—RE-ENTRY.—At the expiration of a notice to quit, after the termination of the term, the tenant becomes a trespasser, and the landlord may enter the premises during the tenant's absence, take possession, and remove the tenant's goods, without legal process, and the tenant has no right to re-enter.

LANDLORD AND TENANT—FORCIBLE ENTRY AND DETAINER.—An entry by a landlord, which has no other force than that implied in every trespass, is not within the meaning of a forcible entry and detainer statute.

LANDLORD AND TENANT—TERMINATION OF LEASE—RIGHT OF LANDLORD TO RE-ENTER.—A landlord who has peaceably regained possession, during the temporary absence of the tenant, who is in default in payment of rent, and on whom notice has been served to terminate the lease, and whose goods have been removed from the premises, may defend such possession against the tenant, using no more force than is necessary, and is not liable for injury inflicted upon the tenant in repelling his efforts to regain possession, unless more force is used than is necessary.

L. J. Fick and R. Young, for the appellant.

J. Fuller, for the appellee.

341 MOORE, J. Plaintiff recovered a judgment against the defendant for a trespass committed upon her person and to her personal property, from which judgment defendant appeals.

Plaintiff's declaration alleged, in substance, that she purchased upon land contract from defendant, on the twentieth day of March, 1890, lot 28 and the west half of lot 29, of Hunt and Leggett's subdivision. The declaration then stated the terms of the contract as originally made, and alleged: "That plaintiff went into possession of the premises by virtue of it, and that November 1, 1895, the contract was modified [stating the terms of the modification], and that on March 30, 1896, while she was in the possession of the premises by virtue of the contract, the defendant entered upon said premises, and without process of law, and contrary to the just rights of the plaintiff in said premises, and while the plaintiff was sick, wickedly and wrongfully caused the said plaintiff to be knocked down

and bruised, and to be thrown bodily from and out of the said building on said premises, and to be dragged out from said premises; . . . and that the said defendant caused the goods and chattels of the plaintiff in said buildings on said premises to be thrown into the street, and deprived plaintiff wrongfully of her goods and chattels," et cetera.

Another count in the declaration charged that the plaintiff came into possession of said premises March 20, 1890, by virtue of said contract and agreement, and that, while she was rightfully in possession of said premises, an assault was made upon her by defendant, and her goods were thrown into the street.

³⁴² The plaintiff introduced testimony tending to show all of the facts stated in her declaration. The modification of the contract which plaintiff claims was made in October or November, 1895, was an oral modification, and not in writing. It is the claim of the defendant that in the fall of 1895 the plaintiff was in default in her payments under the contract, and that proceedings were commenced before a circuit court commissioner to obtain possession of said premises, which resulted in a judgment for restitution in favor of the defendant corporation; that after this judgment was obtained, an arrangement was made with the plaintiff by which she was to pay rent at the rate of ten dollars per month, and that her possession from that time was to be as tenant, and not as vendee. The record discloses that on February 21, 1896, the defendant caused a notice to quit or pay rent to be served by leaving it at the house with Mr. Engel, who occupied the lower part of the house as a tenant under Mrs. Smith. Within a week plaintiff had knowledge of the serving of this notice, and filed a bill in equity. In her bill of complaint she claimed to be in possession of the premises as vendee by virtue of the terms of the contract, setting it up, and stating that she was ready to perform all of its conditions, and praying for an accounting, and for specific performance, and for a writ of injunction. A temporary injunction was granted, according to the prayer of the bill. Defendant answered to said bill, and upon its motion, on March 30, 1896, the injunction was dissolved.

At this time plaintiff was keeping house in the upper part of the house upon the premises. No one was living in the lower part of the house. She had occasion to go to the business part of the city during the day, and before doing so locked the house, and carried the key with her. During her absence, and shortly

after the injunction was dissolved, the attorney for the defendant unlocked one of the doors of the house, caused the plaintiff's goods to be removed to the barn upon the premises, and put a family in possession. Upon the same day, and shortly after, the ³⁴³ plaintiff returned to the premises, unlocked the side door of the house, and entered. She claims she was then set upon by the persons in possession, and very cruelly beaten; that during her absence her furniture had been thrown out of the house, and that she had never seen it from that time until the time of the trial; that as the result of the beating, she was sick, and confined to the house for some time; that as soon as she was able to do so, she saw the defendant corporation, and was referred by it to its attorney; that she informed the attorney she wanted a deed of the premises, and was ready to comply with the terms of the contract; that he informed her she had been fired out of the premises, and that he had instructed the person who had put her out to keep her out; that if she went back again, she would be kicked out, and he would have her arrested.

On the part of the defendant it was claimed that Mrs. Smith was not treated as she testified; that no more force was used than was necessary to repel her attacks; that she finally left the premises voluntarily; that no injury was done to the personal property, and that she was notified where it was, and that she could have it at any time.

The circuit judge charged the jury, in effect, that they could not go back of the proceedings before the circuit court commissioner, which proceedings must be regarded as conclusive, and that the relation of vendor and vendee was ended by them; that the relation of vendor and vendee could not be restored by an oral agreement between the vendor and the vendee. He further charged them that the notice of February 21, 1896, that plaintiff should either vacate the premises or pay the rent due, did not terminate the relation of landlord and tenant; that under such circumstances, if the tenant does not vacate, it is the duty of the landlord to commence proceedings in court, and get a judgment, before a tenancy can be ended; and that in this case, while the entry was, in the eyes of the law, a peaceable entry, it was nevertheless an unlawful entry, and he charged the jury they must find a verdict ³⁴⁴ for some amount in favor of the plaintiff. He then charged them upon the question of damages to her person; and, in reference to the damages to the goods, he charged the jury as follows: "Respecting the

wrong done her goods, if you find that all the defendant did was to set her goods outside, and notified her that she could take them, it was her duty to take them, and thereby lessen the damage to that extent. . . . If, on the other hand, she was deprived of the goods entirely, and told she could not have them, why then she would be entitled to the value of the goods."

The defendant insists there are three reversible errors in this case. One is that the proofs do not sustain the cause of action alleged in the declaration, because the cause of action alleged is that the plaintiff was in possession as vendee under the contract, while the proofs show that she was in as a tenant, and that her tenancy had been terminated by the notice, and the court erred in not directing a verdict for the defendant as requested. Another ground assigned to be error is that, as the entry was a peaceable entry of premises to the possession of which the defendant was lawfully entitled, therefore the plaintiff cannot recover. The third claim is that the court erred in his instruction to the jury as to the damages which might be allowed in relation to the personal property.

The declaration was not demurred to, but the plea of the general issue, with notice of the defenses heretofore mentioned, was interposed. The gist of the declaration is, not a trespass upon real property, but a trespass upon the person and to personal property, while the plaintiff was rightfully in the possession of certain real property. We quite agree with the learned trial judge that it was immaterial whether the possession of the real estate by the plaintiff was as vendee, as claimed by her, or as a tenant, as claimed by defendant, if she was in fact lawfully in the possession of the premises; and we see nothing in the pleadings that would prevent a recovery if the facts warranted it.

³⁴⁵ If it be assumed, as it must be, for the purposes of this case, under the proofs, that after the agreement of November, 1895, the plaintiff's occupancy was that of a tenant, the next question to be considered is, Did the notice of February, 1896, terminate the tenancy, so that defendant was justified in taking possession of the premises as it did, and using force to put the plaintiff out when she attempted to repossess herself of the house? Defendant insists it did, and cites 3 Howell's Statutes, sec. 5774; 2 Taylor on Landlord and Tenant, secs. 531, 532, and note 1; Hoffman v. Harrington, 22 Mich. 55; Hyatt v. Wood, 4 Johns. 150; 4 Am. Dec. 258; Ives v. Ives, 13 Johns. 235; Mussey v. Scott, 32 Vt. 82. An examination of the au-

thorities cited will show that the decisions were rendered in cases brought either for trespass to the real estate, or to obtain the possession of the real estate, or where the tenancy was ended beyond any contingency that it might be restored by the act of the tenant. I think with the trial judge that section 5774 of 3 Howell's Statutes is to be construed in connection with section 8295 of 2 Howell's Statutes, which provides how possession of premises may be recovered, and section 8299 of 2 Howell's Statutes, which provides that upon the trial to recover possession of the premises, if it is claimed that complainant is entitled to the possession of the premises in consequence of the nonpayment of any sum of money due either as rent or as a part of the purchase money, this amount shall be ascertained, and be stated in the judgment, and with section 8308 of 2 Howell's Statutes, which provides that no writ of restitution, for five days after judgment, shall issue if the defendant shall pay during the five days after the rendition of judgment, the amount so found due, and double the amount of costs.

If effect is to be given to the provisions of all these sections, I do not see how the construction contended for by the defendant can be given. The tenant has a right to rely upon these provisions of the statute, and that right cannot be cut off by the plaintiff's arbitrarily taking the law into his own hands, and determining for himself that ⁸⁴⁶ the tenancy is ended. Where there is a dispute between the vendor and vendee, or the landlord and tenant, or the mortgagor and the purchaser at a mortgage sale, as to the right of possession, it cannot be said that the person who is seeking to obtain possession is given entry by law until that dispute is settled by the courts in the manner prescribed by law. An entry under the circumstances claimed by the plaintiff to exist in this case was, as the learned trial judge stated, an unlawful entry (2 Howell's Statutes, sec. 8284), and cannot be excused or justified, where the action is brought for injury to the person and the personal property of the one evicted. No great hardship can come to any one by following the provisions of the statute in asserting possessory rights. It is undoubtedly the purpose of these statutory provisions to change the common law in relation to the right of entry where that right is controverted, and to provide a peaceable and summary way to dispose of a disputed right of possession. A hearing may be had within a very short time, and must be had within thirty days, and no appeal can be taken without giving

a bond in twice the amount of the annual rental of the premises in dispute. The statute should be given such a construction as to make it effective, and do away with such disputes and encounters as occurred in this case.

As to the other assignment of error, in relation to the charge of the court upon the question of damages in relation to the personal property, we think there is testimony in the case that justified the giving of the charge.

I think the judgment should be affirmed.

³⁴⁶ MONTGOMERY, J. I cannot agree with the conclusion of Mr. Justice Moore. On the contrary, I think that, when the plaintiff failed to pay the rent due within the time fixed by the notice served upon her, her right to occupy the premises terminated. In my opinion, it was not the purpose of section 8299 and section 8308 to abridge the common-law right of re-entry in such cases. These sections should be construed as providing a remedy by ³⁴⁷ proceedings in court, and the limitations are to be construed as limitations placed upon such remedy. To give to these sections of the statute the construction adopted by the trial judge, and approved by Mr. Justice Moore in his opinion, is to extend the term of the tenant beyond the time fixed by agreement. In 2 Taylor on Landlord and Tenant, section 532, it is said, after a consideration of many authorities: "The right of the landlord forcibly to enter, and expel the tenant who holds over after the conclusion of his term or the expiration of a notice to quit, subject only to indictment under the statutes for excessive force against the person, is now generally established."

In Ives v. Ives, 13 Johns. 235, it is said: "It is well settled that the person having title—that is, having a right to enter—is not liable in an action of trespass for entering with force, although liable to indictment for a forcible entry." To the same effect is Souther v. Codman, 14 R. I. 119, 51 Am. Rep. 364.

In the case of Freeman v. Wilson, 16 R. I. 524, it is said: "At the expiration of a notice to quit, the tenant becomes a trespasser, and the landlord may enter the premises during the tenant's absence, take possession, and remove the tenant's goods, without legal process, and the tenant has no right to re-enter." And see Low v. Elwell, 121 Mass. 309, 23 Am. Rep. 272; Hyatt v. Wood, 4 Johns. 150, 4 Am. Dec. 258.

In Fuhr v. Dean, 26 Mo. 116, 69 Am. Dec. 484, it is said: "Where one having title to land and a right of entry enters thereon, although the entry be by force, the common law af-

fords no civil remedy to the party dispossessed. He must resort to the statutory remedy by action of forcible entry and detainer."

2 Howell's Statutes, section 8284, provides: "No person shall make any entry into lands, tenements, or other possessions but in cases where entry is given by ³⁴⁸ law, and in such cases he shall not enter with force, but only in a peaceable manner."

The succeeding sections provide how possession may be restored if one does enter by force.

In construing statutes containing similar provisions, the courts have not been agreed as to what is meant by force and a peaceable manner. In *Smith v. Reeder*, 21 Or. 541, it was held, in a case where a lease of property had by its own limitation expired, and the tenant refused to surrender possession, but continued to hold over, and the landlord, during the temporary absence of the tenant, leaving no one in possession, entered in a peaceable and orderly manner, and, having so entered, forced open in a peaceable manner an outer door of a dwelling-house on the premises which had been fastened by the tenant, and in a careful manner removed the tenant's goods, and stored them in an outbuilding, and moved his own household goods and family into the house, sending word to the tenant that he could have a reasonable time in which to come upon the premises to remove his goods and stock, that this was not a forcible entry, within the meaning of the statute. In the same case it is held that a forcible entry, within the meaning of the statute, is an entry accompanied with some circumstance of force or violence to the person, or one accomplished in a riotous or tumultuous manner, endangering the public peace. An entry which has no other force than that implied in every trespass is not within the statute.

In the case of *Fort Dearborn Lodge v. Klein*, 115 Ill. 191, 56 Am. Rep. 133, it is held: "The word 'force,' as here used, means 'actual force,' as contradistinguished from 'implied force.' Any entry requires force, in the literal sense of the term, but that, of course, could not have been meant, for it would involve an absurdity. Nor does it mean that force which the law implies where a peaceable entry is made by one having no right to enter, for the act absolutely prohibits a person of that kind from making an entry at all. The conclusion, therefore, is irresistible that the force which the statute inhibits is actual force": ³⁴⁹ See *Willard v. Warren*, 17 Wend. 257.

In the case of *Hoffman v. Harrington*, 22 Mich. 55, it is said, with respect to real property, that the owner, having a right

of entry, may, since the statutes, enter peaceably upon one who is in possession without right, by the very terms of those statutes, and that a forcible entry is not made unless the tenant is forcibly expelled, and is not complete until the expulsion.

In the case of *Shaw v. Hoffman*, 25 Mich. 162, it is said that, in construing our statute, much respect should be given to the decisions of the courts construing like statutes. Chief Justice Christiancy said: "The statute was not intended to apply to a mere trespass, however wrongful. The entry or detainer must be riotous, or personal violence must be used, or in some way threatened, or the conduct of the parties guilty of the entry or detainer must be such as in some way to inspire terror or alarm in the persons evicted or kept out. In other words, the force contemplated by the statute is not merely the force used against or upon the property, but force used or threatened against persons as a means or for the purpose of expelling or keeping out the prior possessor."

In *Franck v. Wiegert*, 56 Mich. 474, it is said: "If the defendant, at the time he entered into possession of the property, had the right to that possession, and he entered peaceably, such possession would be lawful, and neither the plaintiff nor her husband would have the right forcibly to put him out."

In the case of *Marsh v. Bristol*, 65 Mich. 378, 385, it is said: "Under the law as it existed before the statute, the default of plaintiff under the lease would have justified Bristol in entering and using sufficient force to put him out. The statute changing this right does not make the continuance in possession any less unlawful, but, in the interest of public tranquillity, provides against breaking the public peace. In doing so, it adopts the definitions of the law as existing on the subject of forcible entries, which were already indictable in other ³⁵⁰ cases, and by this prohibition were made indictable in these cases. It provides that a person put out by forcible entry may be restored to possession: 2 Howell's Statutes, secs. 8284, 8285. But where there has not been a forcible entry, it does not forbid retaining possession by force, unless the possession is unlawful, and against the rights of the person kept out."

And, in commenting upon the case of *Hoffman v. Harrington*, 22 Mich. 55, it is said: "It was further said that leaving goods on the premises could not prevent making a peaceable entry, as force against property was no breach of the peace, and the force, to make it unlawful, must be against the tenant himself. In that case the property was actually put off, but that was held not to bring it within the statute. It is entirely

well settled that unless the tenant is driven off, either by actual force applied to him, or as the only apparent way of avoiding its use against him at the time, he cannot be regarded as forcibly expelled, and there is no forcible entry."

It is also said: "The object of the statute against forcible entries is not to aid men in violating their obligations, and holding what they have no right to hold, but merely to prevent riotous and forcible measures in breach of the peace. Bristol and his principal were the parties wronged by plaintiff's continuance in possession against right. By going into possession without breaking the peace, Bristol committed no wrong in claiming possession, and in remaining there peaceably; and, this being so, by plaintiff's own showing plaintiff himself was the aggressor to regain a wrongful occupancy. This the law will not permit."

In the case of Gillespie v. Beecher, 85 Mich. 355, which was a case where the plaintiff was in possession of a hotel as a tenant (which hotel was owned by the defendant) after the lease had expired, it was held the jury should have been instructed that, if they were satisfied from the testimony that the lease had terminated, Mr. Beecher was entitled in the law to the possession of his premises, and that he had a right to enter peaceably into the possession thereof, and that plaintiff and her husband ³⁵¹ had no right to remove him by force; that in doing so they made an assault upon him that was unlawful, and he had a right to resist such assault by force sufficient to repel it; and that, if he used no more force than was necessary to repel the assault, he would not be liable to the plaintiff in such action.

We think it follows from the cases cited that the jury should have been instructed that, if the plaintiff had leased the lands from defendant, as testified to by its attorney, and the lease had been terminated for nonpayment of rent, and the defendant, through its attorney, had obtained possession of the house peaceably, it was not liable in this action, unless more force was used by its agents than was necessary to repel the effort of plaintiff to regain possession of the house.

As to the other assignment of error, in relation to the charge of the court upon the question of damages in relation to the personal property, we think there is testimony in the case that justified the giving of the charge.

Plaintiff's counsel, in his brief, argues that the court erred in charging the jury that the proceeding before the circuit court

commissioner ended the relation of vendor and vendee between the parties. As the plaintiff has not appealed, or assigned error in relation to this matter, we are not inclined to discuss the question.

For the reasons stated, judgment is reversed, and a new trial ordered.

Long, C. J., and Grant, J., concurred with Montgomery, J. Hooker, J., did not sit.

LANDLORD AND TENANT—TERMINATION OF LEASE—RIGHT OF LANDLORD TO RE-ENTER.—In Rhode Island, a landlord may forcibly eject a tenant from his premises after the expiration of his lease, though the tenant is in possession under a fair claim of right to remain a tenant. If the tenancy has in fact terminated, he is a mere trespasser, and the landlord has the right to use so much force as is reasonably necessary to expel him: *Allen v. Kelly*, 17 R. I. 731; 33 Am. St. Rep. 905. The statutes of forcible entry and detainer have, in most of the states, materially changed this common-law right to enter with force and evict a tenant: See note to *Mosseller v. Deaver*, 19 Am. St. Rep. 544. But see *Overdeer v. Lewis*, 1 Watts & S. 90; 37 Am. Dec. 440, and note; *State v. Ross*, 4 Jones, 315; 69 Am. Dec. 751, and note thereto; *Stearns v. Sampson*, 59 Me. 568; 8 Am. Rep. 442. In Connecticut, it has been held that, under the statutes of forcible entry and detainer, a landlord, entitled to repossession, could not re-enter during the tenant's temporary absence, without legal warrant, and hold forcible possession: *Mason v. Hawes*, 52 Conn. 12; 52 Am. Rep. 552.

LANDLORD AND TENANT—FORCIBLE ENTRY.—As to what amounts to forcible entry, see *Lewis v. State*, 99 Ga. 692; 59 Am. St. Rep. 255, and note thereto.

HUBBARD v. GARNER.

[115 MICHIGAN, 406.]

'ARREST—RIGHT OF SEARCH—RETENTION OF MONEY.

An arresting officer has no authority to take money from the person of the party arrested, and retain it, unless it constitutes evidence against him which can be used on the trial of criminal proceedings instituted by his arrest.

GARNISHMENT—MONEY TAKEN FROM PRISONER.

Money wrongfully taken from the person of a party arrested, and retained, is not subject to garnishment.

APPELLATE PRACTICE—ASSIGNMENT OF ERROR—BILL OF EXCEPTIONS.—An objection that the assignments of error do not accompany the bill of exceptions is not available on appeal, if the appellee has stipulated for a settlement of such bill.

APPELLATE PRACTICE.—A GENERAL ASSIGNMENT OF ERROR that the facts found do not support the judgment, may be based upon the record without any bill of exceptions, and all of the assignments of error may, in a proper case, be amended to that end, on appeal.

Black & Brown and Geer, Williams & Halpin, for the appellant.

E. L. Bray, for the appellee.

⁴⁰⁷ MONTGOMERY, J. This action originated in justice's court. It is sought to subject to process of garnishment money belonging to the principal defendant, John Chapman, which was at the time of the service of the process in the hands of the garnishee defendant, Garner. The facts, as found by the circuit judge, are that the defendant Chapman was arrested by the city marshal for a misdemeanor, and taken to the county jail for detention; that Garner was the jailer in charge; that Chapman was searched by the marshal in the presence of Garner, and two hundred and nine dollars and forty-one cents in money taken, and turned over to Garner for safekeeping.

The court found that there was no bad faith on the part of Garner or the plaintiff, and found, as matter of law, that the money might be reached by this process. We are unable to agree with this conclusion. It is not pretended that the money taken from Chapman by the officers constituted any evidence against him which could have been used on the trial of the criminal proceedings instituted by his arrest. Indeed, it is quite apparent that it could not have been so used. We think the officer had no authority to take and retain possession of the money. While he had the right to search the prisoner, to see that he had upon his person no instruments which might aid to effect his escape, and also to retain in his custody any evidence which might be used on his trial, the right of seizure does not extend beyond this: 2 Am. & Eng. Ency. of Law, 2d ed., 860, and cases cited. This court has recently had occasion to pass upon the right of search and seizure, and we have held that such right ought not to be extended beyond the necessities of the case: *Newberry v. Carpenter*, 107 Mich. 567; 61 Am. St. Rep. 346.

The seizure being wrongful, was the money in the hands of the officer subject to garnishment? On the authority of *Bailey v. Wright*, 39 Mich. 96, it is clear that the money could not, after such unauthorized seizure, have been attached by the officer; and we think, on principle, that it should be held exempt from garnishee process. To sustain such proceedings would open the door to such ⁴⁰⁸ invasions of the personal security of the individual as cannot receive the sanction of this court. It is true that there was no collusion shown in this case,

but in all cases it might be difficult to show actual collusion; and we think the safe rule is that which excludes the possibility, and this rule is supported, as we conceive, by the best reasoned cases: *Robinson v. Howard*, 7 Cush. 257; *Dahms v. Sears*, 13 Or. 47; *Richardson v. Anderson*, 4 Tex. App. Civ. Cas. 493; *Connolly v. Thurber-Whyland Co.*, 92 Ga. 651; *Commercial Exchange Bank v. McLeod*, 65 Iowa, 665; 54 Am. Rep. 36; *Rood on Garnishment*, sec. 56; *Hill v. Hatch*, 99 Tenn. 39; 63 Am. St. Rep. 822.

Plaintiff contends that the case is not presented in shape to admit of consideration of this question. It is true that the proper practice was not observed, as the assignments of error did not accompany the bill of exceptions. But the plaintiff stipulated to the settlement of the bill, and, as the defect is amendable, we do not deem it necessary to remand the record for this purpose. The appellant has also mistaken the practice in another respect. The assignments of error are special, and there were no exceptions to the findings in the court below. Under these circumstances, we cannot consider the case on special assignments of error directed to specific rulings on questions of law: *Haines v. Saviers*, 93 Mich. 440. We can, however, under an assignment of error alleging that the findings do not support the judgment, consider that question: *Trudo v. Anderson*, 10 Mich. 357; 81 Am. Dec. 795; *Peck v. City Nat. Bank*, 51 Mich. 354; 47 Am. Rep. 577. Such assignment may be based upon the record, without any bill of exceptions. Counsel for appellant ask leave to amend the assignments of error, and as we think no surprise will occur, or injustice be done to plaintiff, we will permit it. The appellee will be entitled to the usual motion fee, and the judgment will be reversed, and judgment entered in this court for defendant, with costs of both courts, less the motion fee taxed to appellee.

The other justices concurred.

ARREST—RIGHT OF SEARCH.—In the absence of statute, an officer has no right to take any property from the person of the prisoner, except such as may afford evidence of the crime charged, or means of identifying the criminal, or may be helpful in making an escape, and for these purposes he may search the prisoner, but he holds all property thus taken, whether goods or money, subject to the order of the court: *Holker v. Hennessey*, 141 Mo. 527; 64 Am. St. Rep. 524, and note thereto.

GARNISHMENT—MONEY TAKEN FROM PRISONER.—When money taken from a prisoner by an officer is, and is not, subject to garnishment and attachment: *Ex parte Hurn*, 92 Ala. 102; 25 Am. St. Rep. 23, and note; *Holker v. Hennessey*, 141 Mo. 527; 64 Am. St. Rep. 524.

APPELLATE PRACTICE—BILL OF EXCEPTIONS—ASSIGNMENT OF ERROR.—When the only error alleged is that the finding of facts does not support the judgment, no exceptions are necessary, as the finding itself becomes a part of the record, and presents the question as fully as it could be presented by exceptions: *Trudo v. Anderson*, 10 Mich. 357; 81 Am. Dec. 795. A bill of exceptions is not a proper medium through which to certify to the appellate court matters which must necessarily be a part of the original record in the case: *New Orleans etc. R. R. Co. v. Allbritton*, 38 Miss. 242; 75 Am. Dec. 98. A bill of exceptions settled for one purpose may be used for another: *Foley v. Foley*, 120 Cal. 33; 65 Am. St. Rep. 147. A bill of exceptions must show the errors complained of: *Rahm v. State*, 80 Tex. App. 310; 28 Am. St. Rep. 911.

MILLER v. SMITH.

[115 MICHIGAN, 427.]

JUDGMENTS OF JUSTICES—COLLATERAL ATTACK.—A judgment of a justice's court, regular upon its face, cannot be impeached, in a collateral proceeding, by showing that neither of the parties to the case in such court was a resident of the county where the justice resided.

JUDGMENTS—JUSTICES' COURTS—COLLATERAL ATTACK.—A judgment of a justice of the peace which, on its face, shows jurisdiction, imports absolute verity, when attacked collaterally.

JUDGMENTS—JUSTICES' COURTS—COLLATERAL ATTACK.—A judgment of a justice of the peace, regular upon its face, cannot, in a collateral proceeding, be impeached by parol.

Crane, Norris & Stevens, for the appellant.

C. O. Smedley and J. W. Powers, for appellee.

427 MOORE, J. The plaintiff resides on the county line between Kent and Ottawa counties, in Ottawa county. September 21, 1896, an Ohio corporation brought suit against him before a justice of the peace living in Grand Rapids, Kent county. The summons was served in Kent county, and regularly returned. No attention was paid to the summons by the defendant in the case before the justice. Judgment was rendered against him. An execution was issued, and delivered to the defendant in this case, who was a deputy sheriff. The officer levied upon a quantity of potatoes. The plaintiff in this case replevined them, and by direction of the judge a verdict was returned in favor of the plaintiff.

The defendant bases his right to hold the property upon the execution which was in his hands. There was nothing in the summons, the declaration, or the docket entries made by the

justice which made it appear that Mr. Miller ⁴²⁸ was not a resident of Kent county at the time the summons was served upon him. That fact was made to appear for the first time by his parol testimony in the replevin case. The question involved is, Can a judgment of a justice's court, regular upon its face, be impeached in a collateral proceeding by showing that neither of the parties to the case in the justice's court was a resident of the county where the justice resided? It is the claim of the plaintiff that such a judgment can be impeached, and he cites *Hall v. Shank*, 57 Mich. 36. There is language used in this opinion from which the inference claimed by the plaintiff can be drawn. It is stated, however, in the opinion that the facts were not controverted, and from them it appeared that, when the suit was commenced before the magistrate, none of the parties were residents of the county of Kent, and personal service was had upon but one of the defendants; that, on the return day of the summons, none of the defendants appeared, and the justice, upon his own motion, adjourned the cause from March 31st to April 5th. The court held that by this adjournment the justice lost jurisdiction. This disposed of the case without it being necessary to use the language used by Justice Sherwood when he said: "It is not competent under 2 Howell's Statutes, section 6819, for a plaintiff to sue a defendant in justice's court, where they are both residents of this state, in a county where neither of them resides." This was undoubtedly a correct statement of the law, but the question remains, When must the objection be made to the jurisdiction of the court? Should it be made in the case where the court seeks to take jurisdiction of the person when it has not jurisdiction under the law, or may the question be raised at any time, in a collateral proceeding as well as in the original proceeding?

It is claimed on the part of the appellee that justices' courts are of limited and inferior jurisdiction, and are confined strictly to the authority given them by the statute, and should be held to the exact limits of jurisdiction prescribed by the statute: *Wight v. Warner*, 1 Doug. ⁴²⁹ (Mich.) 386; *Clark v. Holmes*, 1 Doug. (Mich.) 398; *Spear v. Carter*, 1 Mich. 19; 48 Am. Dec. 688; *Shadbolt v. Bronson*, 1 Mich. 89; *Wall v. Trumbull*, 16 Mich. 249; *King v. Bates*, 80 Mich. 367; 20 Am. St. Rep. 518. The cases in 1 Douglass and 1 Michigan were decided before section 1, article 6, of the constitution of 1850 was adopted, which reads: "The judicial power is vested in one supreme court, in circuit courts, in probate courts, and in justices of the peace."

Section 18 is as follows: "In civil cases, justices of the peace shall have exclusive jurisdiction to the amount of one hundred dollars, and concurrent jurisdiction to the amount of three hundred dollars, which may be increased to five hundred dollars, with such exceptions and restrictions as may be provided by law. They shall also have such criminal jurisdiction, and perform such duties, as shall be prescribed by the legislature."

Section 6814 of 2 Howell's Statutes, provides that a justice of the peace "shall have original jurisdiction of all civil actions wherein the debt or damages do not exceed the sum of one hundred dollars."

Section 6817 of 2 Howell's Statutes, provides: "Each of said courts is hereby vested with all such powers, for the purpose of exercising jurisdiction conferred by this chapter, as are usual in courts of record, except the power of setting aside a verdict and arresting judgment thereon."

These provisions were not contained in the constitution prior to that date, so that those cases do not now control. The case of *Wall v. Trumbull*, 16 Mich. 249, did not relate to a proceeding in court, but related to the action of one who was a supervisor. The case of *King v. Bates*, 60 Mich. 367, 20 Am. St. Rep. 518, does contain the statement that justices' courts are courts of limited jurisdiction, but it holds that it is not competent to show by parol such a state of facts as would confer upon the court jurisdiction, when the docket and files do not show that the court had jurisdiction.

The decisions of the courts in relation to the question ⁴⁸⁰ involved in this case are not uniform. Decisions of very respectable courts can be found which sustain the claim of the appellee. In *Hamilton v. Millhouse*, 46 Iowa, 75, it was said: "The only question presented is, whether the judgment of the Keokuk county justice of the peace is void for want of jurisdiction. The code provides that jurisdiction of justices of the peace does not embrace suits for the recovery of money against actual residents of any other county. The agreed statement upon which the cause was submitted shows that the plaintiff in this action, at the time of the rendition of the judgment against him, was an actual resident of Washington county, whilst the judgment against him was rendered in Keokuk county. Appellant insists that, as the notice was duly served on Hamilton in Keokuk county, the justice, upon the face of the notice, acquired jurisdiction, and that Hamilton should have appeared, and pleaded the want of jurisdiction. But this

construction would deprive a party of any practical benefit of the provision denying jurisdiction to justices of the peace in actions against residents of other counties. In many cases it would be cheaper to suffer judgment to go by default than to travel to a remote part of the state to interpose the defense of a want of jurisdiction. It would be exceedingly inconvenient if a party traveling through the state may be sued in any township at which a railroad train stops long enough for service of notice to be made, and can only interpose the fact of want of jurisdiction by employing counsel to represent him, or appearing personally."

Counsel for appellee also cite the case of *Ferguson v. Crawford*, 70 N. Y. 253, 26 Am. Rep. 589, which holds that judgments of courts of record may be impeached by parol. This last case, as will hereafter appear, is contrary to the decisions of this court.

In *Barnes v. Harris*, 4 N. Y. 375, it was held that in a suit commenced before a justice of the peace by a long summons, which was duly served by a constable of the county, the defendant is prima facie amenable to the jurisdiction; that if the defendant is not a resident of the county, he should appear in the case, and take objection. ⁴⁸¹ This case was doubtless overruled by *Ferguson v. Crawford*, 70 N. Y. 253; 26 Am. Rep. 589. In *Brooks v. Powell* (Tex. Civ. App., Feb. 27, 1895), 29 S. W. Rep. 809, it was held that, in a collateral suit, parol testimony could not be introduced to attack the jurisdiction of a justice of the peace. "The judgment must be held to import absolute verity, and not subject to collateral attack."

In *Fulkerson v. Davenport*, 70 Mo. 541, it was held, in a case where the transcript of a judgment in justice's court recited that a summons was duly executed, et cetera, and a judgment by default was taken: "A judgment by default in a justice's court, it is conceded, cannot be upheld unless the record shows that the defendant was served with process in the proper township; but the record of these two judgments does show on its face personal service in the township where the suit was brought, and, as was held by this court in *Franse v. Owens*, 25 Mo. 329, it will be presumed, in the absence of evidence to the contrary, that the defendant resides in such township. The jurisdiction of the person and the subject matters appears on the record, and the only way for the defendant to avoid this was to appear before the justice as he was notified to do, and establish the facts which he now proposes to prove in this col-

lateral proceeding. A judgment regular on its face cannot be impeached collaterally: 2 Freeman on Judgments, sec. 524; Fagg v. Clements, 16 Cal. 389." In Gregory v. Bovier, 77 Cal. 121, the same doctrine is held. See, also, Hume v. Conduitt, 76 Ind. 598.

In Reed v. Gage, 33 Mich. 179, it was held that a judgment in justice's court could not be attacked collaterally upon the ground of failure to make proof of the authority of the attorney of the plaintiff to appear. In Somers v. Losey, 48 Mich. 294, it is held that, where a judgment in justice's court is regularly rendered, and not appealed from, it cannot be attacked collaterally on the ground that the suit should have been brought in the name of a different official plaintiff. In Smith v. Pearce, 52 Mich. 370, where a mechanic sued for his wages, and made the owner of a building on which he ³⁴² worked a joint defendant with the contractor who hired him, it was held that, though the defendant was not liable personally in justice's court, and the justice erred in rendering judgment against him, and the error would render the judgment liable to reversal on appeal or certiorari, the judgment should be assailed in the regular way, and not attacked collaterally: See Fruitport v. Muskegon Circuit Judge, 90 Mich. 20.

In the recent case of Allured v. Voller, 112 Mich. 357, there is a discussion of the doctrine of collateral attack, in which Mr. Justice Montgomery uses this language: "On the second trial of the case, defendant sought to show that this acceptance of service was not in fact signed by the defendant in the original action brought by plaintiff against Pierson; and whether it was permissible to make this appear by parol testimony, in contradiction of the record, presents the sole question for consideration. The question is not novel, or, if it be determined on authority, uncertain, nor do we deem it a doubtful one on principle. If it were permitted, in a collateral action, to impeach the validity of a judgment-roll by facts aliunde the record, a party relying upon such a judgment would never know how to shape his case for trial, or what multitude of issues he might be required to meet. Hence the rule that a judgment which, on its face, shows jurisdiction, imports absolute verity, when attacked collaterally. See 1 Freeman on Judgments, section 124, and Van Fleet on Collateral Attack, section 468, in which place it is said: 'On principle, a judicial proceeding is never void because the proof of service is false in fact. Such proof is a necessary part of the record, and to permit its

verity to be questioned collaterally overturns the very foundations of all judicial proceedings.' See, also, the cases cited in the same section: And see *Landon v. Comet*, 62 Mich. 91; *Somers v. Losey*, 48 Mich. 294; *Corbitt v. Timmerman*, 95 Mich. 581; 35 Am. St. Rep. 586. . . . It is true that in New York, and possibly in one or two other states, this rule has not always been adhered to; but the weight of authority is decidedly in favor of the contention of plaintiff in this case."

It is true that this was a judgment of a court of record, but I cannot see why the doctrine there announced should not apply to judgments rendered in justices' courts, where ⁴³³ the records show that the court had jurisdiction of the question. It would not seem to be any great hardship to require one who has been regularly served with process, who desires to question the jurisdiction of the court, to appear before the court, and by proper plea or motion make an issue, and have it determined then and there, instead of waiting until some indefinite time in the future, when it might be impossible, for want of proof, to decide the question according to the fact. It is not difficult to conceive of a case where it is almost, if not quite, impossible for a plaintiff to know where a defendant resides, though the fact of course, is known to the defendant. Why should not the defendant, in such a case, when proper service has been made upon him, try the question in the original proceeding, instead of delaying until the witnesses who know the facts are perhaps forgotten, or dead, and the original claim outlawed? I think, not only is the weight of authority in favor of the doctrine that a judgment of this character cannot, in a collateral proceeding, be impeached by parol, but that it is in accordance with good sense and common honesty.

Judgment is reversed, and new trial ordered.

The other justices concurred.

JUDGMENTS—JUSTICES' COURTS—COLLATERAL ATTACK. Ordinarily, nothing is presumed in favor of the jurisdiction of a justice of the peace; it must be affirmatively shown: *Spear v. Carter*, 1 Mich. 19; 48 Am. Dec. 688. But in a collateral attack upon the judgment of a justice of the peace, the burden must be assumed by the attacking party of showing that the justice did not have jurisdiction of the defendant: *Hambel v. Davis*, 89 Tex. 256; 59 Am. St. Rep. 46. If the facts touching the acquisition of jurisdiction are fully disclosed, judgments of justices of the peace, so far as collateral attack is concerned, are regarded no less favorably than those of courts having more extensive powers: *Leonard v. Sparks*, 117 Mo. 103; 38 Am. St. Rep. 646. Recitals in a justice's judgment, regular in every respect, "that the parties appeared in person and by attorney," cannot be collaterally attacked, and in such a proceeding such recitals import absolute verity: *Heck v. Martin*, 75 Tex. 469; 16 Am. St. Rep. 915.

BEATH v. CHAPOTON.

[115 MICHIGAN, 506.]

DURESS—EMBEZZLEMENT—NOTE GIVEN IN SETTLEMENT.—An embezzler of money, who gives his note in settlement and acknowledgment of the debt, cannot defend against the note on the ground that his signature thereto was obtained by duress of threats to arrest and imprison him.

DURESS.—THREATS OF CRIMINAL PROSECUTION, unaccompanied by threats of immediate imprisonment, do not constitute duress.

NEGOTIABLE INSTRUMENTS—NOTE GIVEN IN SETTLEMENT OF CRIME.—A note given in settlement of a charge of embezzlement is valid only to the extent of the amount embezzled.

NEGOTIABLE INSTRUMENTS—FRAUD IN INDORSEMENT.—If an indorsement on a note given in settlement of a charge of embezzlement is induced, through the maker's representation that the note is given for the purchase of an interest by him in the payee's business, the indorser is not liable to such payee, if the latter knew of the false representations inducing the indorsement.

Assumpsit on a note made by the defendant Chapoton and indorsed by one Watson. Chapoton defended on the ground that his signature to the note was obtained by duress. Watson defended on the ground that his indorsement on the note was obtained by false representations known to the plaintiff, Beath, the payee of the note, and made by Chapoton, to the effect that the note was for the purchase of an interest by the latter in plaintiff's business. Judgment for the defendants, and plaintiff appealed.

W. Barlow, for the appellant.

J. Considine, Jr., and A. Lucking, for the appellees.

507 GRANT, C. J. 1. Complaint is made that the court erred in instructing the jury: "If you find that the note was obtained from Chapoton upon threats of criminal prosecution, plaintiff cannot recover." Counsel for defendants cite only one authority to support this instruction, viz.: *Hackley v. Headley*, 45 Mich. 574. The action in that case was upon a promissory note. The defense was duress, in that the plaintiffs took an unconscionable advantage of defendant's financial straits, thereby compelling him to accept two thousand dollars less than was his due. The defense was held bad. This case was approved and followed in *Goebel v. Linn*, 47 Mich. 489; 41 Am. Rep. 723.

Chapoton had been for a long time in the employ of plaintiff, who claimed he had embezzled large sums of money. Plain-

tiff testified that Chapoton admitted the embezzlement; that it was agreed to amount to two thousand seven hundred dollars; that Chapoton agreed to give four notes of six hundred and seventy-five dollars each, to ⁵⁰⁸ be secured by indorsements, in settlement of the claim. He denied any threats to prosecute, and any knowledge of representations made by Chapoton to Watson. The record states that: "Defendant Chapoton gave evidence tending to show that, a short time before these notes were given, Beath claimed that he (Chapoton) had embezzled money from the said Beath, and that he threatened to prosecute him, and put him in jail, and disgrace him; . . . and that he would not have executed such notes except for the fear of criminal prosecution and on account of the threats so made by said Beath." This statement is the sole foundation for claiming duress.

If Chapoton had embezzled money, and notes or other evidences of debt, with security, were given by Chapoton in settlement and acknowledgment of the debt, he could not defend upon the ground that plaintiff threatened criminal prosecution if his honest debt was not acknowledged and secured: *Wolf v. Troxell*, 94 Mich. 573. The law does not permit a criminal, who has stolen property, to defend against the debt, or its written acknowledgment, on the ground of threatened prosecution or imprisonment. Such a rule would often be attended with disastrous results. A party might settle his speculation by giving his notes, payable after the statute of limitations could be pleaded in bar of the original debt. If, instead of an indorsed note, Chapoton had given a note and mortgage for two thousand seven hundred dollars (and he admits that he agreed to this amount, and to give four promissory notes therefor), would he be permitted to avoid his just liability by saying, "True, I owed it, but plaintiff threatened to prosecute me if I didn't pay it, and therefore I secured my honest debt"? The consideration for the note in such cases is not the avoidance of a criminal prosecution, but the just debt.

A. was convicted of larceny, and sentenced to pay a fine of one thousand dollars, and was confined in prison. He executed a mortgage to the county for one thousand dollars, on condition of which he was pardoned. He filed a bill in equity to set ⁵⁰⁹ aside the foreclosure sale on the ground of duress. Decree was entered for the amount actually due: *Rood v. Winslow*, Walk. Ch. 340; 2 Doug. 68. Where W. gave a mortgage for five thousand dollars to settle a charge of adultery, the same

defense was interposed. The securities were held valid to the amount actually due, viz., two thousand dollars: *Briggs v. Withey*, 24 Mich. 136. B. paid license taxes under threats of prosecution from the village attorney. The taxes were void. Held, that they were not paid under duress: *Betts v. Reading*, 93 Mich. 77. See, also, *Cribbs v. Sowle*, 87 Mich. 347; 24 Am. St. Rep. 166, and authorities there cited.

"Duress by threats exists, not wherever a party has entered into a contract under the influence of a threat, but only where such a threat excites a fear of some grievous wrong, as of death, or great irremediable injury, or unlawful imprisonment": 6 Am. & Eng. Ency. of Law, 64.

Threats of criminal prosecution, unaccompanied by threats of immediate imprisonment, do not constitute duress: *Harmon v. Harmon*, 61 Me. 227; 14 Am. Rep. 556; *Buchanan v. Sahlein*, 9 Mo. App. 552; *Bodine v. Morgan*, 37 N. J. Eq. 426; *Dunham v. Griswold*, 100 N. Y. 224. "Threat of legal process is not duress, for the party may plead, make proof, and show that he is not liable": *Preston v. Boston*, 12 Pick. 14. In *Bodine v. Morgan*, 37 N. J. Eq. 426, the defendants, father and son, were charged with fraudulently taking and appropriating business orders. The father settled, and gave a mortgage of five thousand dollars. His defense was substantially the same as that here set up. The court used the following language: "But, further, the threat to arrest him for his unlawful appropriation of their orders and goods to his own use unless he should indemnify them, constituted, if it was made, no duress; and, if the mortgage had been given under the pressure of such a threat, it would not have affected its validity."

It was incumbent upon defendant Chapoton to establish two facts—the illegality of the demand and the duress: ⁵¹⁰ *Buchanan v. Sahlein*, 9 Mo. App. 552. Defendant Chapoton was under no physical restraint. According to his own statement, plaintiff had previously made the claim of embezzlement, and threatened prosecution if it was not settled. Chapoton telephoned to his friend Watson, requesting him to call at plaintiff's store. Watson complied, and while the three were there together the notes were executed. There is no evidence of any threats or restraint at that time, no prosecution had been commenced, nor was there any statement that any had been commenced, and he was free to go and come as he chose. It therefore appears that Chapoton, after the alleged charge and threats were made, took ample time to consider it, and then voluntar-

ily settled by giving these notes. This is not the course pursued by a man conscious of his innocence, and in the possession of his faculties. There is nothing to show that he was young or old, inexperienced, feeble in body or mind, or unable to indignantly deny and resist a false charge of embezzlement and felony. Under this record the only question to be submitted to the jury with regard to him was whether there was a failure of consideration, in whole or in part, for the notes. Under the above decisions, he was liable upon them to the extent of moneys appropriated by him, if any were so appropriated; and it was the province of the jury to determine the amount. If he had appropriated none of the plaintiff's money, of course the notes were without consideration, and void.

2. Complaint is made of the following instruction: "It is not necessary that Beath should have known exactly the fraudulent representations made by Chapoton in order to get Watson to indorse the note. If he (Beath) had sufficient knowledge to put him upon inquiry, so that he could have found out that Watson had been so induced by fraudulent representations, then the plaintiff cannot recover."

If there were no evidence in the case to which this instruction was applicable, it would be error under the rule ⁵¹¹ in *Cristy v. Campau*, 107 Mich. 172. The record, however, states that there was "evidence tending to show that plaintiff heard the conversation [between Chapoton and Watson] and the false and fraudulent representations, and at one point acquiesced in them; and that plaintiff suggested to Chapoton that he (Chapoton) should tell his proposed indorsers that the notes were to be given for acquiring an interest in the business." In view of this evidence, the instruction was correct. If plaintiff had knowledge that Chapoton intended to make false representations to secure indorsers, he could only relieve himself from the consequences of such representations by informing the indorser of the true state of affairs. Of course, the converse of the proposition should be given to the jury, because the plaintiff denied any knowledge of the false representations.

Judgment reversed, and new trial ordered.

The other justices concurred.

DURESS — EMBEZZLEMENT — THREATS OF CRIMINAL PROSECUTION.—It is not the threat of criminal prosecution in any case that constitutes duress, but the condition of mind produced thereby. The threat must be of such a nature, and made under such circumstances, as to constitute a reasonably adequate cause

to control the will of the threatened person, and must have that effect, and the act sought to be avoided must be performed by the person while in such condition: *Wolff v. Bluhm*, 95 Wis. 257; 60 Am. St. Rep. 115, and note. It is not duress for one who believes that he has been wronged to threaten the wrongdoer with a civil suit. And if the wrong includes a violation of the criminal law, it is not duress to threaten him with a criminal prosecution: *Hilborn v. Bucknam*, 78 Me. 482; 57 Am. Rep. 816; *Thorn v. Pinkham*, 84 Me. 101; 30 Am. St. Rep. 835. In California, it is held that a contract is procured by menace when it is obtained by threats of imprisonment upon a charge of embezzlement: *Morrill v. Nightingale*, 93 Cal. 452; 27 Am. St. Rep. 207.

NEGOTIABLE INSTRUMENTS—NOTE GIVEN IN SETTLEMENT OF CRIME.—A promissory note given for moneys which the maker has embezzled is founded upon a good consideration, and cannot be avoided on the ground that it was procured by threatening to prosecute him for embezzlement: *Thorn v. Pinkham*, 84 Me. 101; 30 Am. St. Rep. 835.

NEGOTIABLE INSTRUMENTS—FRAUD IN INDORSEMENT. An indorsement made for the accommodation of the maker, upon his express assurance that the instrument would be negotiated only in another state, cannot be enforced against the indorser, if, contrary to the agreement, it is negotiated in this state to one who has not parted with anything, nor made any new agreement in reliance upon it, and who received it merely as additional security for an antecedent debt: *United States Nat. Bank v. Ewing*, 131 N. Y. 506; 27 Am. St. Rep. 615. For a general discussion of the rights and liabilities of accommodation indorsers, see monographic note to *Altoona Second Nat. Bank v. Dunn*, 81 Am. St. Rep. 745-757.

ROGERS v. DAY.

[115 MICHIGAN, 664.]

HOMESTEADS—RIGHTS OF WIFE—CRUELTY OF HUSBAND.—A wife loses none of her rights in the homestead by being driven therefrom through the cruelty of her husband.

DEEDS—VOID COVENANTS—EFFECT OF DIVORCE.—A covenant of warranty in a deed or mortgage which is void, cannot be given life as an effectual conveyance by a subsequent decree of divorce.

HOMESTEADS—ABANDONMENT BY WIFE.—A letter from a wife to her husband, who has driven her from home by his cruelty, to the effect that she will not go back to live with him, and that he can use the place to help himself with, but that she will have what she took away, does not constitute a declaration of abandonment of her homestead interest.

HOMESTEADS.—ABANDONMENT of a homestead by a husband or wife does not validate a conveyance of the homestead by one of them without the other's signature.

HOMESTEADS—PURCHASE OF, UNDER EXECUTION—RIGHTS ACQUIRED.—A purchaser of a homestead at execution sale, under a decree for alimony in favor of the owner's wife, succeeds to her rights, and may attack a prior mortgage as invalid, because she did not join therein.

ADVERSE POSSESSION—PLEADING—EVIDENCE.—Title by adverse possession may be shown under a bill to set aside a mortgage averring a purchase of the property at execution sale, and the taking of immediate possession more than the statutory period before the commencement of the action, and averring that complainant and his grantors have ever since been in the actual, continuous, and uninterrupted possession of the premises.

Bill to set aside a mortgage executed by one Louw to the defendant, Day, dated September 20, 1880, on the ground that the land mortgaged was a homestead and that the mortgage was not signed by the wife. Louw owned the land, and with his wife and children lived upon it as a homestead from 1870 to May, 1880. By his cruelty his wife and children were driven from home. He was convicted of assault upon his wife and sentenced to prison. His wife then obtained a divorce on February 23, 1881. After he was sent to prison, his wife controlled the farm during 1880 and sold two cows therefrom. After the husband was liberated he took one of such cows, and was then arrested and charged with larceny. While under arrest he executed the mortgage in question, and also a deed of the land to one Carrington. His wife did not join in either of these instruments. On January 17, 1881, the wife filed a petition for alimony, which was granted, and, upon the failure of her husband to pay it, the land was sold under execution to one Dresser, from whom the complainant derived title. Judgment for complainant, and the defendant appealed.

A. G. Day, in propria persona, for the appellant.

J. G. McLaughlin, for the appellee.

666 GRANT, C. J. 1. Was the mortgage valid when executed? To this there can be but one answer. It was not. The wife lost none of her marital rights, including her right in the homestead, by being driven therefrom through the cruelty of her husband. At the time the mortgage was executed, her homestead right was as secure as though she had been in actual possession: *Sherrid v. Southwick*, 43 Mich. 515; *Barker v. Dayton*, 28 Wis. 367; *Heron v. Knapp*, 72 Wis. 553.

2. The mortgage contained a covenant of warranty of title. Did this inure to the benefit of defendant upon the granting of the divorce? The plain language of the statute, which makes such a mortgage absolutely void, is 667 a complete answer to the question. The covenant in an absolutely void instrument has no greater force than the instrument itself. A covenant in a deed which is void cannot be given life as an ef-

fectual conveyance by a decree of divorce: *Phillips v. Stauch*, 20 Mich. 369, 381; *Watertown Fire Ins. Co. v. Grover etc. Sewing Machine Co.*, 41 Mich. 131; 32 Am. Rep. 146; *Hall v. Loomis*, 63 Mich. 709; *Alt v. Banholzer*, 39 Minn. 511; 12 Am. St. Rep. 681; *Barton v. Drake*, 21 Minn. 299.

The defendant cites, to support his contention, *Heaton v. Sawyer*, 60 Vt. 495; *In re Romero's Estate*, 75 Cal. 379; *Prater v. Prater*, 87 Tenn. 78; 10 Am. St. Rep. 623; *Wiggin v. Buzzell*, 58 N. H. 329. In *Heaton v. Sawyer*, 60 Vt. 495, the decree settled all the rights of the parties. The care of the children was given to the wife, and a certain sum was decreed to be paid by the husband to her in lieu of all her rights in the estate. The same remark applies to *Wiggin v. Buzzell*, 58 N. H. 329. In *Prater v. Prater*, 87 Tenn. 78, 10 Am. St. Rep. 623, the wife had deserted her husband, eloped with another man, had taken up a permanent residence with him in another state, and had continued to live in adultery with him until her husband's death. In *In re Romero's Estate*, 75 Cal. 379, it was held that a homestead cannot be set apart from the estate of a decedent to minors who are not the children of decedent either in fact or by adoption. These cases do not support the contention.

3. An attempt was made to show an abandonment of the homestead by Mrs. Louw. This is based upon two letters dated, respectively, in August and September, 1880, which are claimed to have been written by her. The former purports to be signed "Sarah M. Louw." The other has no signature. These letters were written after she had been compelled to leave her husband and his home, and while proceedings for divorce were pending. Neither letter says a word about abandoning her right to the homestead. The first states that she will not go back to live with him, and that he can use the place to help himself with, and she will have what she took away. The ⁶⁰⁸ second letter says nothing whatever about her intentions. Giving these letters the broadest significance, they do not amount to an abandonment. She, soon after, filed her petition for alimony, and prosecuted her suit to a decree. But an abandonment by husband or wife does not validate a conveyance of a homestead without the other's signature: *Belden v. Younger*, 76 Iowa, 567; *Bruner v. Bateman*, 66 Iowa, 488.

4. Defendant insists that only the husband, widow, or children can take advantage of this homestead right, and maintain a suit to protect it; and that, since neither in this case dis-

affirmed the conveyance, the complainant has no standing. Complainant stands in the shoes of Mrs. Louw. She chose to have the property sold upon execution on a decree rendered in her favor. This act estopped her to set up her homestead right as against the purchaser at the sale and his grantees. Complainant is in possession under her, and as her grantee under the execution sale. He succeeded to her rights.

5. Defendant attacks the regularity of the execution sale, and sets up alleged jurisdictional defects. If complainant rested his rights upon this sale, it would be necessary to determine its validity. He, however, has shown title by adverse possession. Defendant insists that such title is not claimed by the bill, and that, therefore, complainant cannot recover on this ground, and cites *Moran v. Palmer*, 13 Mich. 367. The decision in that case was based upon the fact that complainant, after proofs were in, sought relief upon equities springing from estoppels in pais, which were not even referred to, either in the bill or the answer. The case, however, was remanded, with permission to complainant to amend his bill. In the present case complainant sets up the date of a sale, and the immediate taking of possession thereunder (which was more than fifteen years before the commencement of the suit), the continuance of such possession, and states that he and his grantors have been in "actual, continuous, and uninterrupted possession" of the premises. An adverse ⁶⁰⁹ possession is therefore set up, and can be taken advantage of under the prayer for general relief.

The decree is affirmed, with costs.

The other justices concurred.

HOMESTEAD—RIGHTS OF WIFE—CRUELTY OF HUSBAND. Under a constitutional provision that "if the owner of a homestead die, leaving a widow, but no children, and said widow has no separate homestead in her own right, the same shall be exempt," such widow does not, by her abandonment of and living apart from her husband, in another state, forfeit her right to his homestead upon his death, however reprehensible her conduct morally may have been: *Duffy v. Harris*, 65 Ark. 251; 67 Am. St. Rep. 925. Where a wife has once had her home with her husband, in his dwelling, he cannot deprive her of that vested right by driving her out: *Stanton v. Hitchcock*, 64 Mich. 316; 8 Am. St. Rep. 821.

HOMESTEAD—ABANDONMENT—DEEDS—EFFECT OF DIVORCE.—The abandonment of a homestead does not retroact so as to give validity to a mortgage thereof void at the time of its execution: *American etc. Assn. v. Burghardt*, 19 Mont. 323; 61 Am. St. Rep. 507. A mortgage (not for purchase money) of his homestead by a married man, without his wife's signature, is absolutely void, and is not rendered valid by a subsequent abandonment of the

homestead, nor by the fact that the husband and wife are subsequently divorced: *Alt v. Banholzer*, 39 Minn. 511; 12 Am. St. Rep. 681, and note thereto. After a husband and wife have resided on her property as their homestead until he has acquired a homestead right therein, an absolute divorce obtained by her against him terminates his homestead right: *Kern v. Field*, 68 Minn. 317; 64 Am. St. Rep. 479, and note. See, also, *Kirkwood v. Domnau*, 80 Tex. 645; 26 Am. St. Rep. 770.

CASES
IN THE
SUPREME COURT
OF
MISSOURI.

STATE v. BOWLES.

[146 MISSOURI, 6.]

MURDER IN THE SECOND DEGREE—MALICE IMPLIED FROM THE USE OF A DEADLY WEAPON.—If one intentionally stabs another in a vital part with a deadly weapon, the law presumes that he intends the natural consequences of his act. From the use of a deadly weapon malice may be inferred, and, if death results, the slayer will be guilty of murder in the second degree, in the absence of qualifying or mitigating circumstances, or the proof of circumstances showing premeditation.

CRIMINAL LAW.—A DEADLY WEAPON IS any weapon or instrument by which death would ordinarily be produced. That a weapon was deadly may be inferred, though there is no evidence of its dimensions, from the fact that it produced death.

MURDER—INDICTMENT FOR.—It is not necessary to charge, in an indictment for murder, that the act charged was committed with a deadly weapon.

CRIMINAL LAW.—MALICE WAS IMPLIED by the common law from the unlawful killing of a human being, and the burden of proving extenuating circumstances, unless they were disclosed by the evidence against the defendant, lay on him.

CRIMINAL LAW—MALICE—PRESUMPTION.—It is not essential, in the case of the killing of one person by another, to justify the jury in inferring malice and premeditation, to show that the slayer had predetermined his crime any considerable time before it was committed, if, without any adequate provocation, he began to abuse the deceased, assaulted and provoked him to fight, and then stabbed him, inflicting a mortal wound. If he had time to think and to conceive the intention to kill, this is sufficient to justify the inference of malice and premeditation, though he had the intention to kill but for a minute before executing it.

DYING DECLARATIONS are admissible when they relate only to the identification of the prisoner, his perpetration of the homicide, and the circumstances immediately attending it, and are made by the decedent when he was fully convinced that there was no hope of his recovery.

JURY TRIAL IN A CRIMINAL CASE—REFUSAL OF UNNECESSARY INSTRUCTION.—The refusal of a court on a trial for murder to instruct the jurors that they could not consider anything said at the time of the difficulty, by another person there present, as bearing on the conduct of the defendant, cannot constitute reversible error, when the indictment does not charge a joint offense or conspiracy, and there is no effort to connect such third person with the crime for which the defendant was being tried.

CRIMINAL TRIAL—HOMICIDE—EVIDENCE OF PHYSICAL DISPARITY OF THE DEFENDANT.—If, upon a trial for murder, the accused claims to have acted in self-defense, evidence tending to show great disparity in the physical condition of the two combatants should be admitted in favor of the defendant.

APPELLATE PROCEDURE—PRESUMPTION OF HARM FROM ERROR.—It is only when the court can see that an error of the trial court in a criminal prosecution in rejecting evidence works no injury that it can be treated as harmless on appeal.

E. C. Hall and Witten & Hughes, for the appellant.

Edward C. Crow, attorney general, Sam B. Jeffries, assistant attorney general, and W. W. Graves, for the state.

10 GANTT, P. J. The defendant was indicted for murder in the second degree of Hugh Hall, in Clinton county, on the 6th of March, 1897, and was convicted as charged. No error is assigned or perceived in the record proper.

The evidence, briefly stated, establishes that the homicide occurred near a small village called Lilly. There are two stores in the place. The deceased was a clerk in one and defendant in the other. There is no evidence of ill-feeling between the two prior to the night of the homicide.

On that night the deceased, Hall, and several others in the spirit of a joke made a scarecrow, by cutting openings for a human face in a paper box and placing a lamp inside, for the purpose of frightening John Shaver, the proprietor of the store in which defendant clerked, and one Atcheson, a young man visiting in the neighborhood. Shaver lived on his farm about one-half of a mile north of Lilly. Having constructed their scarecrow, the deceased and his party, about 9 o'clock that night, went up the road leading from Lilly to Shaver's house about a quarter of a mile, and placed the scarecrow in a hedge fence on the east side of the road. Opposite to this place was a haystack in a field across the road. Two of the party went into an adjoining cornfield, and the deceased and others went behind the haystack to await the coming of Shaver and Atcheson.

About 9 o'clock that evening Shaver closed his store, and he and the defendant, Bowles, started to his home, together, up the said public road, Shaver riding a pony and defendant walk-

ing. The night was ¹¹ dark and cloudy. When they reached the point in the road where the scarecrow had been placed in the hedge fence, Shaver discovered it and shot at it with his pistol. Thereupon the young men in hiding all laughed and indicated their hiding place.

Shaver said to defendant, "There they are behind the haystack; you shoot them on that side, and I will shoot the sons of bitches when they come around on this side." The deceased was then on top of the stack and rose up and said, "Shoot me if you wish." After a wordy altercation deceased came down, and, being asked, said he had put up the scarecrow. Defendant thereupon said, "Hugh, you ought not to have put that there; it might make trouble." A quarrel ensued, and resulted in a mutual encounter between deceased and defendant with their fists. According to the defendant's evidence, deceased struck him first with his fist, but it was dark and the witnesses could not state definitely which struck first, but both were engaged in it.

The fight continued between these two until defendant was forced or knocked back to the ditch on the side of the road, when defendant was seen to strike deceased with a swinging lick, and as he did, Hall, the deceased, cried out, "He has a knife; he has stabbed me, and stabbed me bad," and leaned or fell against a post. He began to sink down, and was caught by some of his companions, and laid on the ground. One of the party immediately went after a physician. Defendant's evidence tended to show that deceased was striking him when the fatal stab was given, and that defendant had seen deceased make a motion toward his pocket as if to get a weapon, but that it was so dark defendant could not see whether he had anything in his hand.

¹² On the other hand, the state's evidence tended to show that before the fatal blow was given, the combatants had ceased fighting for a few moments, and deceased was standing still, and his hands had dropped to his side, when defendant suddenly sprang forward and stabbed him.

The wounded man was taken back to the store, and, when the physician came, it was ascertained that deceased had been cut in the right groin. The wound had been inflicted by a sharp instrument. It cut through two parts ligament, severed the iliac artery, and cut through the peritoneum. The physicians testified that the wound was in a vital part, and this wound necessarily fatal. The body of deceased was examined that night

and no weapon found upon him, and the state's witness testified he made no attempt to use any in the fight.

On the part of defendant, he and his brother testified to finding an open knife next morning near the place of homicide, which they identified as either belonging to defendant or being very similar to one he usually carried. This evidence in turn was rebutted by the state.

1. The first, and we think the most serious, contention of the learned counsel for defendant, is that under the facts there is no murder in the case, and it was error to instruct upon the elements of murder in the second degree, as was done by the circuit court.

The propriety of this charge depends upon the law. In this state it has been uniformly and consistently adjudged that when one intentionally stabs another in a vital part with a deadly weapon, the law presumes that he intended the natural consequences of his act, and from the use of the deadly weapon the existence of malice may be inferred, and he will be guilty of murder in the second degree in the absence of qualifying ¹³ or mitigating circumstances, or of proof of circumstances showing deliberation.

The learned counsel concedes that abstractly stated this is the law, but insists that it has no application to the facts disclosed on the trial of this case, for the reason that it was an unintentional stab, and the weapon was not shown to be a deadly weapon.

The first contention is out of the question. The whole evidence shows that defendant purposely and intentionally stabbed deceased. His own testimony unequivocally establishes that fact. The character of the knife with which defendant did the stabbing was shown by the nature of the wound inflicted with it. There was ample evidence in the description of the wound, and its effect, to demonstrate that the knife used was a deadly weapon.

A deadly weapon is any weapon or instrument by which death would likely be produced, when used in the manner in which it may appear it was used in the affray. It needs no argument to prove that a knife capable of inflicting a wound of the dimensions and depth shown in this record, and in a vital part of a grown man, was such a weapon as the law denominates deadly or dangerous. It does not follow because no witness testified to seeing the knife, or detailed its exact dimensions, there was no proof as to its dangerous or deadly character. The deadly

effect it produced was confirmation strong of its lethal qualities. There is no evidence to indicate that the blow in the vital part of deceased was in any sense the result of accident, or was unintentional: *Harris v. State*, 34 Ark. 469; *People v. Rodrigo*, 69 Cal. 601.

By the discussion as to the character of the weapon used we are of course not to be understood as intimating that it is necessary to charge in an indictment that a murder was committed with a deadly ¹⁴ weapon. On the contrary, it is clear that it is not at all necessary to so charge: *State v. McDaniel*, 94 Mo. 301; 2 *Bishop's Criminal Procedure*, 3d ed., sec. 514; *State v. Hyland*, 144 Mo. 302.

We have been dealing only with the presumption arising from the use of a deadly weapon, and the sufficiency of the evidence in this case, to establish that the knife, with which the homicide was affected, was a deadly weapon. Finally, upon this point, is the case so wanting in circumstances tending to show malice that the trial court and this court can say, as a matter of law upon the whole evidence, that there was no evidence of murder, and that issue was erroneously submitted to the jury?

While it was eminently proper to instruct the jury as to manslaughter in the fourth degree, it does not follow that the court erred in submitting to the jury, under the evidence, whether the stabbing was not with malice.

The common law implied malice in every unlawful killing, and the burden of proof of extenuating circumstances, unless they arose out of the evidence against the defendant, lay on him: *State v. Dunn*, 18 Mo. 419. That there was evidence that this homicide was the result of a quarrel may be admitted, and yet, from other testimony, the conduct of the defendant might be characterized as indicating a heart fatally bent on mischief.

There was absolutely nothing in the mere hanging of the scarecrow in the hedge to give any reasonable man any provocation for assaulting the perpetrator of such an antiquated and innocent joke, and yet the uncontradicted testimony is that Shaver and defendant both indulged in the most offensive oaths and epithets to the deceased because of his participation therein, Shaver even threatening to shoot him. It is ¹⁵ altogether probable that but for the very insulting epithets applied to deceased and his companions by Shaver and defendant, no difficulty whatever would have occurred. There was evidence that the defendant was admonished three times by deceased to keep his hands off of him, thus indicating that the defendant was

the aggressor, and from which the jury might have inferred that defendant went into the rencounter with deceased with the knife in his hands, and stabbed him after deceased had ceased to fight. The evidence is quite conclusive that deceased at no time used or attempted to use any weapon, and that defendant in the dark did purposely use a deadly weapon upon deceased.

Upon the whole, we think there was sufficient evidence upon which to submit to the jury the question of malice and premeditation. It is not at all necessary for defendant to have preconceived the crime before starting up the road that night. If with no more provocation and justification than the finding of a scarecrow in the hedge he began to abuse the deceased, and assaulted him until he provoked him to a fist fight, and had time to think and intended to kill deceased, it was sufficient if he had this intention for a minute, as well as an hour or a day before he stabbed him, to constitute premeditation in the eye of the law.

As already said, if the jury found the other alternative, to wit, that deceased was the aggressor, and by his blows aroused a sudden passion in defendant, and in the sudden quarrel defendant, without malice or premeditation, struck deceased with his knife and killed him, then it was only manslaughter in the fourth degree.

2. Defendant assigns as error the admission of the dying declarations of the deceased. The objection was that these statements were not made under a sense of ¹⁶ immediate dissolution. We think the preliminary inquiry clearly developed that the deceased was fully convinced that there was no hope of his recovery, and so expressed himself. In fact, he died an hour later. The circuit court was exceedingly careful to elicit all the circumstances before admitting the testimony, and we think was fully justified in admitting the dying declarations. Their competency otherwise is not questioned. They related only to the identification of the prisoner as the perpetrator of the homicide, and the circumstances immediately attending it, thus bringing them within the conservative rule announced in 1 Greenleaf on Evidence, section 156, so often approved and followed in this court: *State v. Draper*, 65 Mo. 335, 27 Am. Rep. 287, and subsequent cases.

3. Counsel for defendant requested the court to instruct the jury that they could not consider anything said by John W. Shaver at the time of the difficulty as bearing upon the conduct of defendant.

There was no charge of conspiracy or joint offense in the indictment, and no effort to connect Shaver with the crime for which defendant was being tried, and the instruction was unnecessary. The court in its discretion might have given it without committing error, but it was not reversible error to refuse it.

4. There was no error in the eleventh instruction given by the court on the law of self-defense. It was such as has often met the approval of this court.

5. The defendant called Dr. Stowers and proved by him that he knew the defendant, and had treated him professionally for the past two years.

Defendant then offered to prove by this witness that the defendant, at the time of the difficulty charged in this indictment, was suffering from acute disease affecting his nerves, and especially his hip joints, and that the defendant was unable to perform ordinary ¹⁷ manual labor, unable to ride horseback, was bound continually to take medicine by hypodermic injections for the purpose of allaying the intense pain caused by this affliction, and was unable to run or to move out of a walk on account of this affliction. The court sustained an objection to this evidence, and the defendant duly excepted.

One of the principal defenses in this case was self-defense. It was urged by defendant that the deceased was a much heavier and stronger man than defendant; that deceased had forced him back into the ditch, and he stabbed him to prevent great bodily harm. Upon that theory the court instructed the jury.

Under such a state of facts it seems to us that evidence tending to show great disparity in the physical condition of the two combatants was of prime importance to defendant. If defendant was suffering from an acute affliction of the hip joint which forbade his retreat or rendered him utterly powerless to resist the onslaught of deceased, certainly it would have gone far with the jury to excuse his use of a knife on his assailant, if such they believed the deceased to have been. Such evidence is uniformly held admissible in cases of this character.

In Selfridge's case, Wharton on Homicide, appendix No. 1, Chief Justice Parker expressly charged: "You must make up your mind from all the circumstances proved in the case such as the rapidity and violence of the attack, the nature of the weapon with which it was made, the place where the catastrophe happened, the muscular debility or vigor of the defendant, and his power to resist or fly."

In that case evidence was received of the defendant's debility, and this was considered one of the chief points for the jury to consider, whether danger to the ¹⁸ defendant was apparent: *Fain v. Commonwealth*, 78 Ky. 183; 39 Am. Rep. 213; *Hinch v. State*, 25 Ga. 699; *State v. Benham*, 23 Iowa, 154; 92 Am. Dec. 417; 1 Bishop's New Criminal Law, sec. 873; Wharton's Criminal Evidence, secs. 83, 84.

Error is presumptively harmful. It is only when we can say that it clearly worked no injury that it can be said to be harmless. In a mutual rencounter such as this record discloses, it cannot be maintained that a fact so patent as the diseased condition of defendant could be excluded from the consideration of the jury without injury to his defense.

The case was otherwise carefully and well tried, but for the exclusion of this evidence it must be and is reversed and remanded.

Sherwood and Burgess, JJ., concur.

MURDER IN THE SECOND DEGREE—MALICE IMPLIED FROM THE USE OF A DEADLY WEAPON.—An intentional killing with a deadly weapon, when proved or admitted, raises a presumption of malice, and is prima facie evidence of murder in the second degree, without proof of deliberation or premeditation: *State v. Norwood*, 115 N. C. 789; 44 Am. St. Rep. 498; *State v. Levelle*, 34 S. C. 120; 27 Am. St. Rep. 799, and note. See note to *State v. Deschamps*, 21 Am. St. Rep. 399.

CRIMINAL LAW—DEADLY WEAPON.—The question whether an instrument with which a personal injury is inflicted is a deadly weapon depends upon the manner of its use, rather than upon the intrinsic character of the instrument itself: *State v. Norwood*, 115 N. C. 789; 44 Am. St. Rep. 498.

MURDER—INDICTMENT.—What is a sufficient allegation in an indictment, of the manner and means of death: *Palmer v. People*, 138 Ill. 356; 32 Am. St. Rep. 146, and note.

CRIMINAL LAW—PREMEDITATION.—Premeditation is properly defined to mean "thought of beforehand any time, however short": *State v. Landgraf*, 95 Mo. 97; 6 Am. St. Rep. 26.

DYING DECLARATIONS of the deceased are admissible in evidence on a trial for murder to prove any relevant fact embraced in the *res gestae* of the killing: *Wilkerson v. State*, 91 Ga. 729; 44 Am. St. Rep. 63. Dying declarations used for the purpose of identification: *State v. Kessler*, 15 Utah, 142; 62 Am. St. Rep. 911, and note.

JURY TRIAL—REFUSAL TO INSTRUCT.—In a murder case, a request to charge the jury which has no application either to the evidence or to the prisoner's statement is properly refused: *Jackson v. State*, 91 Ga. 271; 44 Am. St. Rep. 22. See *Evansville etc. R. R. Co. v. Guyton*, 115 Ind. 450; 7 Am. St. Rep. 458.

CRIMINAL TRIAL—EVIDENCE OF BAD CHARACTER OF DECEASED.—In homicide cases, evidence of the bad character of the deceased is admissible only when the plea of self-defense is interposed: *Gardner v. State*, 90 Ga. 810; 85 Am. St. Rep. 202, and cases cited in the note.

APPELLATE PROCEDURE.—ERROR IS PRESUMPTIVELY PREJUDICIAL, and one claiming it to be otherwise must show its innocuous character: *Dayharsh v. Hannibal etc. R. R. Co.*, 103 Mo. 570; 23 Am. St. Rep. 900; *Niagara Fire Ins. Co. v. Bishop*, 154 Ill. 9; 45 Am. St. Rep. 105.

LANGFORD v. FEW.

[146 MISSOURI, 142.]

EXECUTION—RETURN OF NULLA BONA, WHAT IS NOT.—An indorsement on an execution that it has been executed by reading to the defendant and scheduling his property, and that it is returned not satisfied, accompanied with a copy of the schedule showing and describing three hundred dollars' worth of property, but which schedule is not signed nor sworn to by anyone, does not constitute a sufficient return of nulla bona to support subsequent proceedings. The statement that the writ is returned not satisfied is not equivalent to a statement that the defendant had no goods or chattels whereof to levy the same.

AN EXECUTION ISSUING OUT OF A COURT when a transcript is filed, without a pre-existing return of nulla bona, is void, if the statute provides that no execution shall be issued on such transcript until an execution issued out of the court wherein the judgment was rendered has been returned that the defendant had no goods or chattels whereof to levy the same.

EXECUTION.—THE RETURN OF NULLA BONA SIGNIFIES that the officer made strict and diligent search, and was unable to find any property of the defendant liable to seizure under the writ, whereof to levy the same, but the return "not satisfied" conveys only the idea that it has not been paid.

EXECUTION—PRESUMPTION IN SUPPORT OF THE ISSUING OF.—Where a clerk is prohibited from issuing execution until some condition precedent has occurred, there is no presumption of the happening of such condition from the fact that he has issued the writ.

J. L. Fort and C. L. Keaton, for the appellant.

J. C. Sheppard and W. W. Perkins, for the respondent.

¹⁴⁴ **MARSHALL, J.** Action in ejectment to recover the south half of the northwest quarter of section 8, township 24, range 1 east, in Ripley county. The answer is a general denial and plea of homestead rights. The ¹⁴⁵ reply is a general denial. Plaintiff's evidence is: 1. A deed from the sheriff of Ripley county, dated October 18, 1893, recorded March 2, 1894, reciting that on November 7, 1892, William P. Morrison recovered a judgment against defendant before a justice of the peace in said county; that a transcript of the judgment was filed in the circuit clerk's office on the 13th of December, 1892, and upon which an execution was issued on March 18, 1893,

directed to the sheriff of Ripley county, and under which he levied on the land in controversy, and sold it to plaintiff for twenty-five dollars; 2. A transcript of the judgment of the justice of the peace in favor of Morrison and against Few. Attached to and forming a part of the transcript is a recital that an execution was issued on the 13th of December 1892, and a further statement signed by the justice of the peace, as follows: "March 13, 1893, execution returned, not satisfied, with a schedule of defendant's property, to the amount of two hundred and twenty-three and eighty-seven one-hundredths dollars." It was agreed that the monthly rents and profits are four dollars per month.

The defendant's evidence is: 1. A deed from Mrs. M. J. Morrison and seven others, without date, but acknowledged October 2, 1886, and recorded June 24, 1889, conveying an undivided ten-elevenths interest in the north half of the northwest quarter and all of the south half of the northwest quarter that lies north of Big Barren creek, in section 28, township 25, north, range 1, east, to defendant, in consideration of three hundred and ninety-five dollars, in trade, and one hundred and fifty dollars and forty-five cents; 2. The testimony of defendant that he took possession of the land in January, 1888, but did not have the deed recorded until he came to Ripley county; that he stayed on the place two years; made one crop, then moved off, returned in the fall and the ¹⁴⁶ next spring sold it to J. W. Shipp on the 9th of April, 1890; that W. P. Morrison exhibited the sheriff's deed to him but he did not examine it; that he sold the place for some stock, traded the stock and with the proceeds and money he borrowed from the county he paid for the land. In rebuttal, plaintiff introduced the deed from Few to Shipp, the deed is not set out in the record, but it is there stated to be a warranty deed, recorded, but where or when is not shown. Plaintiff then offered the complete transcript of the justice of the peace in the case of Morrison v. Few, including the execution and return of the constable. The return is the material part and is as follows: "Executed the within writ in the county of Ripley, state of Missouri, on the twenty-third day of December, 1892, by reading to W. L. Few, and scheduled the property of defendant. Execution returned not satisfied. P. E. Whitwell, Const.," with the following added: "Copy of oath of appraisers. F. W. Bell, W. D. Raywinkle and J. T. Hutson, Sr., appraisers, being duly summoned to appraise the property of W. L. Few, before entering upon their

duties, make oath and say they will faithfully and impartially appraise the property exhibited to them by the said Few" (signatures, and seals, and oaths attached), to which is also underwritten the following: "Copy of the schedule January 21, 1893, State of Missouri, county of Ripley. To the justice court of Kelley township, of J. W. Hutstedler, J. P.: W. L. Few sets forth upon oath the following described property to the amount of three hundred dollars' worth as scheduled, to wit." (Here follows an itemized list of personal property with the values set opposite each item, and aggregating two hundred and thirty-nine dollars and forty cents, but there is no signature or jurat of anyone attached to it.) Defendant objected, and the court excluded the transcript. Plaintiff then offered again the transcript on file in the circuit clerk's office and also ¹⁴⁷ the note upon which the judgment of the justice of the peace was based.

The plaintiff asked and the court refused to give the following instructions:

"1. The court declares the law to be, that if the court finds from the evidence and admissions of the parties that the defendant is the common source of title and that the plaintiff has acquired the title of defendant by a sheriff's deed of and for the said lands, then the court should find for the plaintiff and assess his damages and value of the monthly rents and profits as shown by the evidence, unless the court should find from the evidence that the land in controversy was the homestead of the defendant at the time of the sale thereof under the execution and judgment shown in evidence.

"2. The court further declares the law to be that the sheriff's deed offered in evidence and the transcript of and from the justice upon which the same is based, offered in evidence, cannot be impeached or invalidated in this collateral proceeding of ejectment for any mere irregularity or seeming informality therein contained."

The court of its own motion gave the following instructions:

"1. The court, sitting as a jury, declares the law to be, that if it appears from the evidence that defendant was, at the time of the institution of the suit before J. W. Hufstedler, the justice of the peace, a citizen and resident of Ripley county, and has been a resident of the county ever since, and was at the time of the filing of the transcript of said justice's docket in the office of the clerk of the circuit court of Ripley county, and at the time of suing out of the said clerk's office the execution under which the sale was made at which the plaintiff became

the purchaser of the land of ¹⁴⁸ defendant, and there had not been an execution issued by the justice directed to some constable, and a return by such constable of such execution that the defendant had no goods or chattels whereof to levy the same, then in that case the finding and verdict should be for the defendant.

"2. The court further declares the law to be that unless the court find from the evidence that the former homestead claimed by the defendant was acquired by the filing of the deed of conveyance thereto in the clerk's or recorder's office for record and entering into the possession thereof as such homestead by the defendant before he contracted the debt mentioned in the transcript, execution, and deed of plaintiff, although the court may find the land in controversy claimed as a homestead was acquired with the proceeds of the sale of the first mentioned land claimed as his homestead, and unless the court finds both such facts from the evidence, the court will find for the plaintiff, unless the court should further find from the evidence that plaintiff did not acquire the title under the sheriff's deed."

There was judgment for defendant and plaintiff appealed.

1. It thus appears very vaguely that defendant owned an undivided ten-elevenths of the north half of the northwest quarter and all of the south half of the northwest quarter that lies north of Big Barren creek, in section 28, township 25, north, range 1 east, and that about 1890 he sold something, the record does not clearly show what, but presumably that property, to J. W. Shipp. No explanation is vouchsafed by this record as to what defendant did with the proceeds, but from the instructions it seems to be assumed that ¹⁴⁹ he purchased the land in suit with them. It is not shown where or how defendant acquired title to the land here involved. Both parties, however, concede that they claim title through defendant. The defendant in his answer claims it as a homestead, but the facts disclosed by the record are so meager that it is impossible for this court to ascertain with any degree of satisfaction whether or not he ever owned this land or was ever in possession of it. The statement of the case above is a full and fair statement of every material matter contained in the transcript. It nowhere appears whether or not the defendant is a housekeeper or head of a family so as to be entitled to claim homestead rights under chapter 80 of the Revised Statutes of 1889 or exemptions under section 4903, or whether he was in such favored condition in December, 1892, when the execution from the justice of the peace was issued against him, or in April, 1893, when

the sheriff executed the writ of fieri facias. It seems, however, to be assumed by counsel for both parties that defendant was the head of a family, and we will treat the case in that way.

The proposition of law involved is whether a return by a constable on an execution issued by a justice of the peace, which says: "Executed the within writ in the county of Ripley, state of Missouri, on the twenty-third day of December, 1892, by reading to W. L. Few, and scheduled the property of defendant. Execution returned not satisfied. P. E. Whitwell, Const.," with the oath of the three appraisers, and a copy of a schedule which recites that W. L. Few sets forth upon oath the following described property to the amount of three hundred dollars worth as scheduled (describing it), but which is not signed or sworn to by anyone, is a sufficient return to authorize the issuance of an execution by the clerk of the circuit court and a sale of real estate under the provisions of section 6287 of the ¹⁵⁰ Revised Statutes of Missouri of 1889, which provides, "but no execution shall be sued out of the court where the transcript is filed, if the defendant is a resident of the county, until an execution shall have been issued by the justice, directed to the constable of the township, . . . and, if not, to any constable in the county, and returned that the defendant had no goods or chattels whereof to levy the same."

This provision has been on our statute books since as early as 1835. It first underwent judicial interpretation in *Coonce v. Munday*, 3 Mo. 374, and it was insisted that the recital in the execution issued by the circuit clerk that the constable had made a nulla bona return was sufficient, and at any rate that the fact might be shown aliunde. But McGirk, C. J., denied that the circuit clerk had the power to make such a recital, and, construing the provision of the statute quoted, said: "The law expressly forbids an execution to issue until one has issued from the justice," and added that "the lawmakers had an undoubted right to prescribe the terms on which the execution might or should issue, and when they have done so, no one can dispense with those terms." It was argued, however, that it was a mere irregularity which could not be attacked collaterally. But the court said: "In the case before us, the law says the execution can have no existence." The question arose there, just as it does here, in an ejectment suit, where the purchaser at the execution sale—a stranger to the original case—was the plaintiff and the defendant was the same in both cases.

The question again came before this court by a bill in equity

brought by the purchasers at the execution sale. McGirk, J., speaking of filing transcripts of justices' judgments in the office of the circuit clerk, and issuing executions thereon, said, "The act of the ¹⁵¹ general assembly authorizes this to be done, but it requires that before any execution can issue on the judgment thus filed in the clerk's office an execution shall have issued from the justice, and returned no goods to be found. In this case the only evidence of the facts were found on the justice's docket or transcript, which says an execution had issued, and that the constable returned not satisfied by levying on the property of Burk and making some twenty-nine dollars—the return does not show that the defendant, Burke, had more goods, et cetera. The law is express that no execution can go from the clerk's office till a return of nulla bona is made to an execution issued by the justice": *Burke v. Flournoy*, 4 Mo. 116.

In *Wineland v. Coonce*, 5 Mo. 297, 32 Am. Dec. 320, it was pointed out that a lien could be obtained by filing the transcript, but that no execution could issue from the circuit court until there had been a return of nulla bona by the constable. In *Illingworth v. Miltenberger*, 11 Mo. 80. it was decided that a nulla bona return was not necessary on a mechanic's lien judgment rendered by a justice and a transcript filed in the circuit court, because no execution could issue from the justice.

In *Linderman v. Edson*, 25 Mo. 105, the constable's return was nulla bona as to one of two defendants, but it was not stated which, and no return as to the other. The question arose in an ejectment suit, brought by the purchaser at the execution sale. Held, that plaintiff acquired no title by the sheriff's sale.

In *Burke v. Miller*, 46 Mo. 258, the court again pointed out that the legislature had two objects in view: 1. To create a lien; and 2. To enforce the lien; but that the enforcement was stayed until there was a return of nulla bona by the constable, and that the purpose of the stay was to prevent unnecessary seizure and sale of the defendant's real estate.

¹⁵² Appellant, however, insists that the return of the constable above quoted is a compliance with the statute. The statute expressly prohibits the issuance of an execution by the circuit clerk until an execution has been issued by the justice of the peace, "and returned that the defendant had no goods or chattels whereof to levy the same." The return of the constable in this case is that he executed the writ, "by reading it to W. L. Few, and scheduled the property of defendant. Execution returned not satisfied." The oath of the appraisers amounts to

only a preliminary. It does not appear that they made any appraisal. The schedule of defendant is not signed or sworn to and does not on its face purport to be all the property he owned, nor is it pretended that the values are those fixed by the appraisers. It rather conveys the idea that defendant was selecting this particular property under section 4907 of the Revised Statutes of Missouri of 1889, and is not at all inconsistent with the possibility that he had other property which, perhaps, the officer had seized along with that selected. The return of the officer does not exclude the idea that defendant had other property. The return required of the constable by the statute is, "that the defendant had no goods or chattels whereof to levy the same." This officer simply says he read the writ to defendant, scheduled his property and returned the execution not satisfied. The return of *nulla bona* has a defined meaning in law. It signifies that the officer made strict and diligent search and was unable to find any property of the defendant liable to seizure under the writ, whereof to levy the same. A return of not satisfied conveys only the idea that it has not been paid. In *Dillon v. Rash*, 27 Mo. 243, a return of *nulla bona* was held necessary. In *Franse v. Owens*, 25 Mo. 329, a return of "no property found of ¹⁵³ defendant in said townships whereof to levy" was held to comply with the statute. In *Burke v. Flournoy*, 4 Mo. 117, a return of "not satisfied by levying on the property of Burke and making some twenty-nine dollars," was held insufficient because it did not show that Burke had no more property, the court saying a "*nulla bona*" return is requisite: See, also, *McDowell v. Clark*, 68 N. C. 118; *Harman v. Childress*, 3 Yerg. 327; *Metcalf v. Gillet*, 5 Conn. 400; *Williams v. Amory*, 14 Mass. 20; *Russ v. Gilman*, 16 Me. 209; *Walsh v. Anderson*, 135 Mass. 65; *Perry v. Dover*, 12 Pick. 211. *Freeman on Executions*, section 356, says: "The most usual obstacle met by officers is their inability, after due search, to discover property subject to the writ. When this has been the case, and it becomes necessary to return the writ wholly or partly unexecuted, the officer must exonerate himself by stating clearly and unequivocally that the writ is returned unsatisfied": Citing as authority a great number of cases. *Herman on Executions*, page 387, says: "An officer has no right to make the return (*nulla bona*) without having made an effort to find any of the property of the defendant. A general report that the defendant has no goods will not excuse such a return. It may be made after one thorough search." "Not satisfied" does not cover the legal requisites of a strict and

thorough search and a failure to find any property belonging to defendant whereof to levy the writ. It is not synonymous with nulla bona, and does not answer the requirements of the statute. The case of *Jordan v. Surghnor*, 107 Mo. 520, must be read in the light of the facts in that case, which were that the defendant was not a resident of the county in which the judgment was rendered, and in such cases no execution is required by statute to be issued by the justice and returned nulla bona by the constable for the ¹⁵⁴ manifest reason that prima facie there would be no personal property on which the constable could levy.

2. Plaintiff, however, contends that it will be presumed that the clerk of the circuit court did his duty, and that he did not issue the execution until there was a proper return of nulla bona by the constable. The answer is plain. As against a positive prohibition of the statute, there can be no presumptions, and there is no room for a presumption in this case, for the plaintiff himself introduced the return made by the constable, which, as we have held herein, was not in compliance with the statute. There is a difference between indulging a presumption in favor of an officer having done a duty which the law casts upon him, and indulging a presumption that a fact exists which the statute requires to exist in order to give the officer power to act, and without which he is prohibited from acting. A person who buys real estate that is sold under this statute gets no title unless the statute is strictly followed, for, while it gives a remedy to the creditor, it also protects the debtor. It is further contended that this is a mere irregularity in the judgment and execution under which the land was sold, which cannot be attacked in this collateral proceeding. As the references herein contained to the cases decided by this court and in other jurisdictions clearly show, just such contentions were unsuccessfully made under similar conditions of the records. The reason is, that it is not merely an irregularity. It goes to the root. It is the corner stone upon which plaintiff's right to recover rests, and without which he has no standing in any court. The sheriff's deed to plaintiff does not even attempt to supply "the missing ¹⁵⁵ link," for it only recites the justice's judgment on the 7th of November, 1892, the filing of the transcript in the circuit clerk's office on the 13th of December, 1892, and the issuance by the circuit clerk of the execution by him on the 18th of March, 1893. There is no recital whatever that any execution was ever issued by the justice of the peace, much less a recital

of a nulla bona return, and in view of the fact that the judgment was rendered on November 7th, and the transcript was filed on December 13, 1892, there could not have been an execution issued and returned nulla bona by that time. It is evident from these recitals that the plaintiff in that judgment by this action was taking advantage of the first object of the statute, securing a lien; but this deed furnishes no proof or basis for presumption that the second prerequisite of the statute, an execution and nulla bona return, had been complied with. In this view of the case it is not necessary to discuss the other assigned errors.

The judgment of the circuit court is affirmed.

All concur.

EXECUTION—WHAT IS A RETURN OF NULLA BONA.—A return of a sheriff, "After search and inquiry, I know of no property of the defendant in the county upon which to levy this fieri facias," was held a sufficient return of nulla bona: *Gibson v. Robinson*, 90 Ga. 756; 35 Am. St. Rep. 250; *Gunn v. Howell*, 35 Ala. 144; 73 Am. Dec. 484.

EXECUTION—WHEN INVALID.—A judgment of a justice may be filed in the clerk's office so as to create a lien upon the lands of the judgment debtor at any time after it has been rendered, but the lien cannot be enforced until execution against the goods has been returned unsatisfied: *Wineland v. Coonce*, 5 Mo. 296; 32 Am. Dec. 320.

EXECUTION—PRESUMPTION IN SUPPORT OF OFFICERS' ACTS.—If it appears that a judgment has been entered, and an execution issued thereon under which a sale was made, and afterward confirmed by the court, it will be presumed that the proceedings leading up to such sale were regular: *Tacoma Grocery Co. v. Draham*, 8 Wash. 263; 40 Am. St. Rep. 907, and note; *Dubuc v. Voss*, 19 La. Ann. 210; 92 Am. Dec. 526. No presumption is indulged that an officer acting under a naked statutory power, with a view to divest, upon certain contingencies, the title of the citizen, has done his duty and complied with the law; the purchaser relying upon the execution of the power must show that every preliminary step prescribed by the law has been followed: *Keane v. Cannovan*, 21 Cal. 291; 82 Am. Dec. 738.

WATSON v. ALDERSON.

[146 MISSOURI, 333.]

WILLS—WHO MAY CONTEST PROBATE OF, AS PARTIES INTERESTED.—Under a statute authorizing any person interested in the probate of a will to appear within five years after the probate to contest the validity of the will, one who, after the death of the testator, levied upon and sold the interest of one of his heirs in real property, belonging to him at the time of his death, is entitled, as a party interested, to contest such probate, because, if he succeeds he establishes his title to the property so purchased by him.

WILLS—HEIRS—WHEN HAVE A RIGHT TO CONTEST.—If a testator's widow is bequeathed absolutely all the household furniture and a life estate in the home place or residence, any of his heirs has a right to contest the probate of the will, because they are prejudiced thereby. Though they have an interest in the same property under the will, it is not the same interest therein to which they are entitled as heirs at law.

H. C. Lackland and C. W. Wilson, for the appellants.

T. F. McDearmon, W. C. Scarritt, Theo. Bruere & Son, W. F. McEntire, and Frank Hagerman, for the respondents.

337 **BRACE, J.** This is an appeal from a judgment of the circuit court of St. Charles county, sustaining a demurrer to plaintiff's amended petition.

On or about the fifth day of May, 1895, Benjamin A. Alderson, late of said county, deceased, departed this life, leaving surviving him as his only heirs-at-law, his children, the plaintiffs Fannie A. Durrell, Anna M. Weems, and R. F. Alderson, and the defendants David P. Alderson, Samuel B. Alderson, Bettie G. Watkins, William A. Alderson, and Mabel H. Alderson.

Afterward, on the 15th of May, 1895, an instrument in writing was duly admitted to probate in the probate court of St. Charles county, as the last will and testament of said deceased, as follows:

"Know all men by these presents, that I, Benjamin A. Alderson, of the city and county of St. Charles, and state of Missouri, declare the following to be my last will and testament:

"First. I desire that all my debts be paid as soon as possible.

"Second. I give and bequeath to my beloved wife, Mary L. Alderson as her own absolute property, all my furniture, bedding, carpets, stoves, pictures, and kitchen utensils, at my residence at the time of my death. I also give and bequeath to my said wife, for and during her natural life, my home place, being my residence, and the lots connected therewith, on 6th and Perry

streets, in the city of St. Charles; in lieu of any dower or any interest my wife has or might have in any of my real and personal estate, I also give and bequeath to my said wife, Mary L. Alderson, for and during her natural life, annually, the sum of six hundred ³³⁸ dollars, so that my executors shall pay her at the end of every six months the sum of three hundred dollars.

"Third. All of my personal estate, except such as is herein bequeathed to my wife, shall go and belong in equal parts to my children, Anna M. Weems, S. B. Alderson, Bettie G. Watkins, Fannie A. Durrell, R. F. Alderson, Mabel H. Alderson, the wife of my son W. A. Alderson, and W. Elmira Alderson, the wife of my son D. P. Alderson, excepting the sum of one dollar to be given to each of my two sons W. A. Alderson and D. P. Alderson.

"Fourth. My executors shall take charge of, rent out, and have exclusive control over my lands in the Point prairie and also my lands in the Cul de Sac bottoms, below the city of St. Charles, and shall pay the above six hundred dollars annually out of the income thereof to my said wife, Mary L. Alderson; and the balance of said income, less whatever my executors may think necessary to meet current expenses, shall each year be given to my said children equally, except to my sons, W. A. Alderson and D. P. Alderson, whose wives shall be entitled to receive and retain their shares respectively, each one-seventh. After the death of my wife all my real estate shall go and be divided as follows: To Anna Weems, S. B. Alderson, Fannie A. Durrell, and R. F. Robinson each one-seventh thereof; to Mabel H. Alderson, wife of my son W. A. Alderson, and W. Elmira Alderson, wife of my son D. P. Alderson, each one-seventh thereof for her sole use and benefit; to my executors one-seventh thereof in trust for my daughter, Bettie G. Watkins, and after her death then said one-seventh to be divided among ³³⁹ her children then living; my executors to have full control over and disposition of said one-seventh interest, to sell the same and reinvest the proceeds thereof, the income and proceeds of said interest to be given to my daughter from time to time, for her support, as my executors may deem advisable and necessary.

"To my sons, W. A. Alderson and D. P. Alderson, I give no interest in my real estate. But it is my wish that my executors shall remain in control and manage all my real estate until all of them agree to sell the same or any part thereof, excepting my residence and lots connected therewith, in St. Charles, Missouri, bequeathed to my wife, aforesaid. I authorize my executors to at any time sell and convey all or any part of my lands

and real estate, excepting my said residence and lots, with the same force and effect as I could have conveyed the same, and the proceeds of any and all such sales shall be divided according to the interest and rights of the legatees as herein provided; provided that my executors are charged with the payment to my wife of said sum of six hundred dollars annually during her life.

"Fifth. I hereby appoint my sons, D. P. Alderson, R. F. Alderson, and S. B. Alderson, executors of this my last will and testament, with the right of the majority to act, and request that they be not required to give bonds as such executors.

"Sixth. I hereby revoke all former wills.

"In witness whereof I have hereunto set my hand and affixed my seal in the presence of the subscribing witnesses, this sixth day of April, 1893.

"BENJAMIN ALDERSON (L. S.)

340 "We attest the above and foregoing will by subscribing our names hereto as witnesses in the presence of Benjamin A. Alderson, the testator, this the sixth day of April, 1893.

"D. W. FERGUSON,

"ALBERT S. HUGHEY."

Afterward, on the seventeenth day of October, 1895, the plaintiff Mary A. Watson instituted this proceeding in the circuit court of St. Charles county by petition in which the heirs-at-law aforesaid of the said Benjamin A. Alderson, the wives of the said William A. and David P. Alderson, and the children of the said Bettie G. Watkins were made parties defendant. Afterward, at the February term, 1896, of said court and by leave thereof an amended petition was filed, in which two of said heirs-at-law, viz., Fannie A. Durrell and Anna M. Weems and their husbands were made parties plaintiffs, and afterward at the August term, 1896, the petition by leave of court was further amended by interlineation, making another of said heirs-at-law, Robert F. Alderson, a party plaintiff. This amended petition, to which the demurrer was sustained, after setting forth said instrument of writing, the death of the said Benjamin A. Alderson, the death of his wife before his own death, the relationship of the aforesaid parties to him, and the probate of said instrument, alleges in substance that the said Benjamin A. Alderson died seised and possessed of certain real estate, described in the petition, situated in the said county of St. Charles. That on the 27th of February, 1892, the plaintiff Mary A. Watson obtained judgment against the defendant William A. Alder-

son in the circuit court of Jackson county at Kansas City, in the sum of four thousand one hundred and ninety-two dollars and fifty-two cents, and on the twelfth day of January, 1893, obtained judgment against the defendant David P. Alderson in the same court in the sum of ³⁴¹ eighteen hundred and seventy-three dollars and forty-five cents. That afterward on the twenty-third day of November, 1893, she caused transcripts of said judgments to be filed, entered upon the judgment docket and recorded, as required by law, in the office of the clerk of the circuit court of the county of St. Charles, whereby the same became a lien upon all real estate owned by said defendants William A. and David P. Alderson in said county; that afterward on the eighth day of May, 1895, she caused executions to be issued on said judgments, which on the 18th of June, 1895, were levied upon all the right, title, and interest of the said William A. and David P. Alderson, in and to the real estate aforesaid of which the said Benjamin P. Alderson died seised as aforesaid; that in pursuance of a sale under said executions so levied, she afterward, on the 30th of August, 1895, became the purchaser of all the right and title and interest aforesaid of the said William A. and David P. Alderson in and to said real estate, and thereafter received a sheriff's deed therefor duly executed, acknowledged, and dated September 4, 1895. That said instrument of writing admitted to probate as aforesaid is not the last will and testament of the said Benjamin A. Alderson, was not made and published as such, as required by law; that at the time of its execution the said Benjamin A. was of unsound mind and incapable of making a will, and that the execution thereof was procured by the undue influence of the said defendants William A., David B., and Samuel A. Alderson, over the said Benjamin A., and praying that an issue may be made up, whether said paper writing is or is not the will of said deceased; that the probate thereof be set aside, and the said paper be declared not to be the last will and testament of said deceased. The trial court, in sustaining the demurrer, held that the plaintiff Mary A. Watson, upon the facts stated, was not a person interested ³⁴² in the probate of the will, and therefore was not authorized to contest its validity, and that this action could not be maintained by the plaintiffs Fannie A. Durrell, Anna M. Weems, and Robert F. Alderson, for the reason that they take the same under the will that they would by inheritance, and hence are not interested in the probate of the will.

Whether or not the court committed error in so ruling is the

question on this appeal, to be determined by ascertaining who is a person interested in the probate of a will within the meaning of our statute of wills, which provides that: "When any will is exhibited to be proven, the court or clerk may immediately receive the proof and grant a certificate of probate, or, if such will be rejected, grant a certificate of rejection": Rev. Stats. 1889, sec. 8882. "If any person interested in the probate of any will shall appear within five years after the probate or rejection thereof, and, by petition to the circuit court of the county, contest the validity of the will or pray to have a will proved which has been rejected, an issue shall be made up, whether the writing produced be the will of the testator or not, which shall be tried by a jury, or if neither party require a jury, by the court": Rev. Stats. 1889, sec. 8888. "The verdict of the jury or the finding and judgment of the court shall be final, saving to the court the right of granting a new trial, as in other cases, and to either party an appeal in matters of law": Rev. Stats. 1889, sec. 8889. "If no person shall appear within the time aforesaid, the probate or rejection of such will shall be binding, saving to infants . . . or persons of unsound mind, a like period of five years after their respective disabilities are removed": Rev. Stats. 1889, sec. 8890.

1. As appears from the statement, when Benjamin A. Alderson died seised of the real estate in St. Charles county described in the petition, the plaintiff Mary A. Watson had judgment liens on all the real estate of the ³⁴³ defendants William A. and David P. Alderson, situated in that county, which liens might thereafter be ripened into legal title. If Benjamin A. died intestate, then at the moment of his death, the legal title to the undivided two-sevenths of said real estate descended to and vested in the said William A. and David P. and became subject to the lien of the judgments aforesaid, and, by the subsequent proceedings on the judgments, was vested in the said plaintiff, Mary A. Watson. If, on the other hand, he died testate, and the instrument of writing admitted to probate in the probate court disinheriting the said William A. and David P. was in fact the will of the said Benjamin A., then the legal title to the undivided two-sevenths of said real estate never did vest in the said William A. and David P., nor become subject to the lien of said judgments, and by the proceedings on the same the said Watson acquired nothing. Is she, under such circumstances, a person interested in the probate of that instrument as the will of the said Benjamin A., within the meaning of the statute afore-

said? is the first question presented for determination. That she has a direct pecuniary interest in the final and conclusive determination of the question of fact, whether or not said instrument is the last will of said deceased is self-evident, since upon such determination depends her title to valuable real estate. If determined in the affirmative, she has no title; if in the negative, she has title, and it would seem to follow necessarily, if the words, "any person interested in the probate of any will" are to "be taken in their plain, ordinary, and usual sense," that she is such a person, and as such authorized to institute this proceeding, in which only can that question of fact be conclusively determined. Is there anything in this statute, its purposes, history, or the rulings under it, requiring that those words shall be construed in some other limited and ³⁴⁴ technical sense that would exclude her from the right to contest the validity of this instrument, which, if established, would deprive her of the legal title to valuable real estate, which she would otherwise have? There is nothing in the text of the act itself upon which such a requirement can be based, and from the adjudications in this state no such rule can be deduced. Although this statute has been in force within its territorial limits, the same in language and meaning as it is to-day, ever since the organization of the state government and before (1 Mo. Ter. Laws, c. 39, sec. 28, p. 133; c. 143, sec. 32, p. 407; 2 Mo. Laws 1825, sec. 10, p. 792; Rev. Stats. 1835, secs. 15-18, p. 618; Rev. Stats. 1845, c. 185, secs. 17, 31-33; Rev. Stats. 1855, c. 167, secs. 16, 30-32; Gen. Stats. 1865, c. 131, secs. 15, 29-31; Rev. Stats. 1879, secs. 3974, 3980-3982), no case has yet reached the appellate courts in which this question was ever raised or decided. So that if there be a legislative intent that the words "any person interested in the probate of any will" as used in the statute, are to be used in a restricted or technical sense by which a certain class of persons only are to be embraced within its scope, in which Mrs. Watson is not included, the reason for it must be discovered in the nature of the act or its purposes as disclosed by the circumstances of its adoption. That this act was passed in place of and to remedy the defects of the common law upon the subject of the probate of wills, there can be no doubt; the proceeding under section 8882, answering to that of the probate of a will in common form, and the proceeding under section 8888, to that of the probate of a will in "solemn form" or "form of law" under the English law: *Benoist v. Murrin*, 48 Mo. 48. Both are in the nature of proceedings in rem (*Garvin v. Williams*, 50 Mo.

206; *Harris v. Hays*, 53 Mo. 90), the former ex parte and ³⁴³ provisional, the latter inter partes, final and conclusive, and providing the only method under our law by which a will of a deceased person admitted to probate in common form can be contested: *Lyne v. Marcus*, 1 Mo. 410; 13 Am. Dec. 509; *In re Duty's Estate*, 27 Mo. 43; *Kenrick v. Cole*, 46 Mo. 85.

At common law, jurisdiction of the probate of wills was exercised by the ecclesiastical courts, and the executor of a will admitted to probate in common form might at any time within thirty years be compelled, by a person having an interest, to prove it in solemn form, and even when so proven the probate was not conclusive, so far as the disposition of real estate was concerned, over which the common-law courts held that the ecclesiastical courts had no jurisdiction; hence, in an action involving the title to real estate in the latter courts, the validity of a will might be contested by the party whose title would thereby be determined, although the will had been proven in solemn form: *Hoe v. Nelthrope*, 3 Salk. 154; 2 Swinburne on Wills, pt. 6, sec. 14, and notes; 1 Woerner's Law of Administration, sec. 215. To wipe out this distinction and make such probate conclusive as to wills disposing of real as well as personal property was obviously the purpose and is the effect of the statute. In doing so, was it the intention of the legislature to deprive any person of the right to contest the validity of a will who would have had that right under the former law? Surely not. Hence, when the question under consideration first came up in this country, under the statute of Massachusetts of the year 1817, chapter 190, having the same purpose and effect as the Missouri statute, in the case of *Smith v. Bradstreet*, 16 Pick. 264, decided in 1834, the supreme court of that state held that an attachment creditor, having by such attachment a lien upon the real estate of the heir-at-law, had the right to contest the validity of a will by ³⁴⁶ which he was disinherited, Chief Justice Shaw, who delivered the opinion of the court, saying: "In this commonwealth, probate of a will is conclusive upon a devise of real estate, as well as upon a bequest of personal property, and establishes title conclusively in the heir or devisee respectively. . . . His [the creditor's] title depends upon proof of the will. An attachment constitutes a lien, a real interest in the land which may be followed up to perfect title. If the will is proved, it defeats his title; if rejected, it establishes it. The trial of this fact in the probate court is conclusive upon this

question, and the appellant has no other time, place, or forum to try it in." The logic of this position is unanswerable. The interest of such creditor in the probate of such a will is identically the same in character as that of the heir-at-law, and no argument can be made depriving him of the right to contest a will on the score of want of interest that would not deprive the heir-at-law of the same right. Descent is cast, and a will takes effect, by relation, at the moment of the death of the testator; neither heir or devisee prior to that moment had any interest in the estate of the deceased. A lien creditor whose lien attaches the moment that title is vested in his debtor by descent cast, although by virtue of his lien judgment he had no interest in the estate of the deceased, has the same direct and immediate interest in the probate of a will by which that title would be divested that an heir-at-law has. It is not interest in the estate of the deceased that authorized any person to contest a will under the statute, but interest in its devolution, in the probate of a will that determines that devolution.

If the common law still prevailed here on this subject, in an action in ejectment under that law between such a creditor and the heir or devisee for possession of the land after his lien had been ripened into legal ³⁴⁷ title as in the case in hand, he could have contested the validity of a will which would have defeated that title. Why, then, under the comprehensive terms of this statute, should he be deprived of that right? Certainly for no reason that can be drawn by analogy from that law.

In 1891 this question came before the supreme court of Minnesota in the case of *In re Langevin*, 45 Minn. 429, in which that court under a similar statute, following the supreme court of Massachusetts, held that: "The creditor in a judgment against the heir of one dying seised of real estate, which, in the absence of a will, would pass to his heir, has an interest that entitles him to contest the probate of a proposed will of deceased, which, if probated, will defeat the lien of his judgment." These two cases are the only cases that have been found in which this question has been passed upon by the courts of last resort in this country. The question may have been in the case of *Shepard's Estate*, 170 Pa. St. 323, decided by the supreme court of Pennsylvania in 1895, as appears from the statement of the case in the court below (11 Pa. Co. Rep. 133), but if so it was not decided, either by the county court or the supreme court. In the language of the judge who delivered the opinion in the county court: "The question for solution is, Has a creditor of an heir,

who takes nothing by the will of his ancestor, standing to question the validity of the ancestor's will?" That court decided that question in favor of the creditors, and upon their appeal to the supreme court that court decided that question against the creditors, and said nothing further on this subject.

That decision falls far short of reaching the question in hand, and with it we have no fault to find, for it is conceded on all hands that one who is simply a creditor of an heir of a deceased person has no direct ³⁴⁸ and immediate interest in the devolution of the estate of the deceased; whatever interest he may have must necessarily be consequential, contingent, and remote. To be a person interested in the meaning of the statute, he must be a person whose right or title is concluded by the probate, as the right and title of the plaintiff Watson to the real estate in question will be concluded by the probate of the will in this case. In such a case Shepard's case is not in point. No authority can be found in the reported cases in this country, so far as our investigation has extended, and none can be found in the text of the statute, its purposes, the character of the proceeding under it, in the analogies of the common or ecclesiastical law, or in reason, for holding that Mrs. Watson is not a person interested in the probate of the proposed will within the meaning of the statute. All these sources of authority are the other way. Hence we conclude that the court committed error in sustaining the demurrer as to her.

2. The ground upon which the demurrer was sustained as to the other plaintiffs, children of the deceased, is also untenable. Under the ecclesiastical law "when a testament is to be proved in form of law, it is required that such persons as have interest, that is to say, the widow and next of kin to the deceased, to whom the administration of his goods ought to be committed, if he had died intestate, are to be cited to be present at the probation and approbation of the testament, in whose presence the will is to be exhibited to the judge, and petition be made by the party which preferreth the will; . . . whereupon witnesses are received and sworn accordingly and are examined, every one of them severally, not only upon the allegations or articles made by the party producing them, but also upon interrogations ministered by the adverse party": 2 Swinburne on Wills, pt. 6, sec. 14, and notes. Through the medium of such interrogatories ³⁴⁹ the next of kin were enabled to contest the validity of the will "as of common right": 1 Williams on Executors, 7th Am. ed., 394. Of common right, because to them the administration of

the goods of the deceased "ought to be committed if he died intestate." This common right is secured to them by our statute, and is independent of the pecuniary results to them of the contest. They must be made parties to the contest (*Eddie v. Parke*, 31 Mo. 513), because their title to the personal estate of the deceased is involved, and their right to administer it will be divested by the probate, or established by the rejection of the instrument, and this will be so whether they would have it so or not: *Benoist v. Murrin*, 48 Mo. 48; *McMahon v. McMahon*, 100 Mo. 97. The will must go to probate or rejection whether the result will be prejudicial to their pecuniary interests or not. The right of the next of kin to contest a will bequeathing personal property, in the ecclesiastical courts, is based upon the same principle as the right of an heir-at-law to contest the validity of a will devising real estate in the common-law courts, and both rights are preserved by this statute. Hence, without elaborating this subject further, we hold that the demurrer should have been overruled in toto, and for the error of the court in not so ruling the judgment will be reversed and the cause remanded that it may be so done, and the issue, which the law and not the parties, makes, may be tried on its merits.

Gantt, C. J., Burgess and Robinson, JJ., concur in paragraph 1, and Gantt, C. J., Burgess, and Williams, JJ., concur in paragraph 2 of the opinion. We all concur in reversing the judgment and remanding the cause for trial. Robinson, Marshall, and Sherwood, JJ., expressing their views in separate opinion.

WILLS—PARTIES TO CONTEST.—Proceedings establishing or annulling wills are in rem, and bind the whole world. All persons interested may become parties and present proofs, either for or against the establishment or annulment of the will: *Wells v. Wells*, 4 T. B. Mon. 152; 16 Am. Dec. 150.

WILLS—WHEN BENEFICIARIES CAN CONTEST.—Persons who are beneficiaries in a will and who have received property thereunder cannot maintain a bill, as heirs at law of the testator, to have it declared invalid: *Madison v. Larmon*, 170 Ill. 65; 62 Am. St. Rep. 356, and note. Such beneficiary cannot contest the validity of the will without repaying the amount of the legacy or bringing the money into court: *Holt v. Rice*, 54 N. H. 398; 20 Am. Rep. 138; *Ratliff v. Baldwin*, 29 Ind. 16; 92 Am. Dec. 330.

STATE v. STEPHENS.

[146 MISSOURI, 662.]

TAXATION OF PROPERTY OF FOREIGN CORPORATIONS.—If a corporation organized under the laws of New Jersey establishes a business and thereby acquires a domicile in Kansas, and owns railway cars which are attached to such business as an incident thereto, they can be taxed in the latter state only, and not in any other state, in which they are in transitu merely.

TAXATION—SITUS.—RAILWAY CARS which are in a state only in transitu have no situs therein, and hence cannot be taxed by it. Being instruments of interstate commerce, Congress alone has jurisdiction over them, except that they can be taxed as property by the state in which their owner has acquired a domicile, and in which they have a situs.

TAXATION—TAX, WHEN A PROPERTY, AND NOT A LICENSE TAX.—A statute providing for the assessment and taxation of railway cars other than those owned by railway companies, and which makes provision for the ascertainment of the aggregate number of miles run by the cars of any owner in each year over the several lines of railway within the state, and the average number of miles covered by each of the particular class of cars in the ordinary course of business during the year, and the number of cars required to make the total mileage of each owner within one year, and that the number so ascertained shall be assessed to such owner, and upon the assessment there shall be levied and collected, in lieu of all other taxes, a state tax of two per cent, imposes a property and not a license tax, and cannot be sustained where the amount of the tax is greater than the constitution of the state permits to be imposed on property for any one year.

Edward C. Wright and Frank Hagerman, for the relator.

Edward C. Crow, attorney general, and Sam B. Jeffries, assistant attorney general, for the respondents.

000 MARSHALL, J. This is an original proceeding, by certiorari, to quash the assessment, for the years 1896 and 1897 against relator, made by the state board of equalization. It is submitted upon the petition, return, and motion to quash, which are set out in full for a better understanding of the controversy.

The petition is as follows:

"1. Lon V. Stephens is governor of the state of Missouri, having in January, 1897, succeeded his predecessor, William J. Stone, who was such governor from 1893 to 1897. Edward C. Crow is attorney general of the state, having in January, 1897, succeeded R. F. Walker, his predecessor, who was attorney general from 1893 to 1897; Frank Pitts is state treasurer, having succeeded, in January, 1897, his predecessor, Lon V. Stephens, who was state treasurer from 1893 to 1897; James M. Seibert is now and has been since January, 1893, state auditor, and A. A. Lesueur

is now and has been since January, 1893, secretary of state; the state board of equalization is now and has at all the times hereinafter mentioned been composed of the governor, attorney general, state treasurer, state auditor, and secretary of state. The matters ⁶⁶⁷ hereinafter set forth are of record in the offices of the said officers of the state board of equalization.

"2. The Armour Packing Company is now, and was at all the times hereinafter stated, a corporation, organized and existing under and by virtue of the laws of the state of New Jersey, with its chief office therein, having complied with the act of 1891, so as to do business in this state and engaged at Kansas City, in the state of Kansas, in the general packing business, that is to say, in killing and dressing food animals and the sale of meats thereof. In this business it has always been necessary to ship in cars the dressed meats from the packing-houses in the state of Kansas into and through all the states of the Union and through all the counties in this state traversed by railroads, which includes most of the counties therein; and to that end and for such purpose it has always owned a large number of refrigerator-cars specially constructed so as to preserve at a cool temperature dressed meats therein packed for shipment over the various roads of the country, which cars, when loaded and ready for shipment, are placed in the trains operated by railroad companies and hauled to their respective destinations. These cars have painted thereon 'Kansas City Dressed Beef Line,' and there is no corporation or company of that line and no person doing business in that name.

"3. The legislature of this state in 1895, passed, and the governor approved, an act in words and figures as follows:

" 'An act to provide for the assessment and taxation of railway cars other than those which are the property of railroad companies, by amending article 8 of chapter 138, Revised Statutes of Missouri, 1889, relating to assessment and taxation of railroads, by adding thereto eight new sections.

⁶⁶⁸ " 'Section 1. Car companies must file statement of mileage made by cars—railroad companies required to file statement with auditor—statements to be laid before state board of equalization—duty of state board of equalization—two per cent state tax to be levied—duty of auditor to furnish car company with statement showing aggregate mileage, et cetera—when tax is to be paid—penalty for refusal to make statement—duty of auditor and attorney general as to delinquents.

“Be it enacted by the general assembly of the state of Missouri, as follows:

“Section 1. That article 8 of chapter 138, Revised Statutes of Missouri, 1889, be and the same is hereby amended by adding thereto eight new sections, to be known and designated as sections 7723a, 7723b, 7723c, 7723d, 7723e, 7723f, 7723g, and 7723h, in words and figures as follows:

“Sec. 7723a. The president or other chief officer of every car company, car trust, mercantile company or corporation other than a railroad company operating a line of railroad, and every individual owning any stock cars, furniture cars, tank-cars, sleeping-cars, or any other kind of cars, shall, on or before the first day of January in each year, make to the state auditor a true, full, and accurate statement, verified by the affidavit of the officer or person making the same, showing the aggregate number of miles made by their cars over the several lines of railroad in this state during the year next preceding the first day of June, and a further statement showing the average number of miles traveled per day by the cars of the particular class or classes covered by the statement, in the ordinary course of business during the year.

“Sec. 7723b. The president or other chief officer of every railroad company whose lines run through or ~~over~~ into this state shall, on or before the first day of January in each year, furnish to the state auditor a statement verified by the affidavit of the officer or person making the same, showing the total number of miles made by the cars of every such car company, car trust, mercantile company, or individual over their lines in this state during the year next preceding the first day of June. Such statement shall also show, separately, the name and aggregate number of miles traveled over their lines in this state by the cars of each car company, car trust, mercantile company, or individual, and the average number of miles traveled per day by each of the particular classes of cars covered by the statement, in the ordinary course of business during the year.

“Sec. 7723c. Such statement shall be filed by the state auditor and laid before the state board of equalization at the time and in the manner as is required concerning the returns of railroad companies.

“Sec. 7723d. It shall be the duty of the state board of equalization to ascertain from said statements the number of cars required to make the total mileage of the cars of each such car company, car trust, mercantile company, or individual within

the period of one year. The board shall ascertain and fix a valuation upon each particular class of such cars, and the number so ascertained to be required to make the total mileage of the cars of each such car company, car trust, mercantile company, or individual within the period of one year shall be assessed to the respective car companies, car trusts, mercantile companies, and individuals. For the purpose of making this assessment, the board is authorized to base the assessment upon the returns of the several railroad companies, in case any such car company, car trust, mercantile company, or individual shall fail or refuse ⁶⁷⁰ to make the statement herein required; and in determining the daily average travel of such cars, the board, in so far as may be practicable, shall harmonize the statements of the several railroad companies, car companies, car trusts, mercantile companies, and individuals with respect thereto, fixing a uniform daily average travel of cars of each particular class. Such assessment shall be included in the record and proceedings of the board, and shall be filed in the office of the state auditor on its adjournment.

“Sec. 7723e. Upon the aggregate assessment and valuation of the cars of each such car company, car trust, mercantile company, or individual, there shall be levied and collected in lieu of all other taxes a state tax of two per cent.

“Sec. 7723f. On or before the first day of August in each year, the state auditor shall make out and transmit by mail to the president or other chief officer of every such car company, car trust, mercantile company, or individual, a certified statement showing the aggregate mileage of the cars of each such car company, car trust, mercantile company, and individual over the several lines of railroad in this state during the period of one year; the number of cars required to make such aggregate mileage in one year the valuation per car; the aggregate valuation of such cars, and the amount of state tax due thereon. On or before the first day of January following, every such car company, car trust, mercantile company, or individual shall pay directly into the state treasury the amount of the state tax set out in said certified statement of the state auditor.

“Sec. 7723g. If any such car company, car trust, mercantile company, individual, or railroad company shall fail or refuse to make the statement herein required, or to pay the tax herein imposed, such car ⁶⁷¹ company, car trust, mercantile company, individual, or railroad company shall forfeit and pay to the state for such failure or refusal the sum of not less than twenty-

five dollars nor more than one hundred dollars per day, for the use of the common school fund, for every day they shall fail or refuse to make such statement or to pay such taxes.

“Sec. 7723h. Whenever any such car company, car trust, mercantile company, individual, or railroad company shall fail or refuse to make such statement or to pay such tax for the period of forty days, it shall be the duty of the state auditor to notify the attorney general, giving him a full statement of all the facts under his hand and seal, whose duty it shall be to institute a suit or suits in any court of this state or of the United States having jurisdiction, in the name of the state, and at the relation and to the use of the attorney general, for the collection of such taxes, penalty, or penalties, as the case may be. The property of any such car company, car trust, mercantile company, individual, or railroad company shall be subject to seizure under execution, by the proper officer in any county in this state, to satisfy a judgment rendered for such taxes, penalty or penalties.

“‘Approved March 18, 1895.’

“4. Neither the Armour Packing Company nor any of its officers, nor anyone for the Kansas City Dressed Beef Line, made, for the year 1896, the statement required by section 7723a of the act aforesaid. On the twenty-sixth day of August, 1896, the state board of equalization did proceed to ascertain the aggregate value of the cars in this state belonging to what it designated as the Kansas City Dressed Beef Line, being in reality the cars owned as aforesaid by the Armour Packing Company, spreading upon the record, as evidence of their action, the following:

“72 “The board having under consideration the assessment and valuation of the cars of the several car companies, car trust, mercantile companies, or corporations other than those operating a line of railroad or individuals, and having heard all the evidence adduced in relation to the mileage and value of such cars, finds the names of such car companies, car trusts, mercantile companies, individuals, and corporations owning cars which are used on the several lines of railroad in the state of Missouri, to be set out in the following statement, showing, also, the aggregate mileage of the cars of each such car company, car trust, mercantile company, individual, or corporation, over the several lines of railroad in the state of Missouri during the year next preceding the first day of June, 1895; the daily average travel per car; the number of cars required to make such ag-

gregate mileage in one year; the value per car and the aggregate value of such cars in the state of Missouri, as ascertained and assessed by the board:

Name of company.	Aggregate mileage of cars in state.	Daily average travel of cars—miles.	No. of cars required to make aggregate mileage in one year.	Value per car.	Aggregate value in state.
Kansas City Dressed Beef Line.....	3,993,500	40	273	\$400	\$109,200

“5. On the twenty-sixth day of August, 1896, the state auditor made out and transmitted to the president of the Armour Packing Company, the following paper:

““Treasury Department of Missouri,

“‘Office of State Auditor,

“‘City of Jefferson.

““To the President of the Armour Packing Co.:

“‘I, James M. Siebert, state auditor of the state of Missouri, do hereby certify that the aggregate mileage ⁶⁷⁸ of the cars of the Kansas City Dressed Beef Line over the several lines of railroad in the state of Missouri for the year next preceding the first day of June, 1895, is 3,993,500 miles; that the daily average travel of such cars is 40 miles; that the number of cars required to make such aggregate mileage in one year is 273, that the value per car is \$400; that the aggregate value of the cars aforesaid subject to taxation in the state of Missouri is \$109,200; and that the state tax due thereon for the year 1896 is \$2,184.

“‘In testimony whereof, I have hereunto set my hand and affixed my official seal. Done at office in the city of Jefferson, this twenty-sixth day of August, 1896.

“‘[Seal]

J. M. SEIBERT,

“‘State Auditor.’

“6. There is no other record as to any assessment or levy under the said act mentioned in paragraph 3 than as herein stated, and the notice mentioned in paragraph 5 hereof was for the cars marked ‘Kansas City Dressed Beef Line.’

“7. The taxable property of the state of Missouri at all the dates herein stated exceeded the sum of \$900,000,000.

“8. The act of the legislature set forth in paragraph 3 hereof is unconstitutional and void, for the following reasons:

“(a) The taxes sought to be levied thereunder are not uniform upon the same class of subjects within the territorial limits of the authority levying the tax and are not levied and collected by general law, thereby contravening section 3, article 10, of the constitution of the state, and property is not taxed in proportion to its value in accordance with section 4, article 10 of the constitution.

674 “(b) The taxes sought to be levied exceed the amount authorized by section 8, article 10, of the state constitution.

“(c) The provisions of the said act are retrospective in operation, in that a tax for 1896 is levied upon the cars had and used in 1894 and 1895, thereby violating section 15, article 11, of the state constitution.

“(d) The provisions of the law contravene sections 6 and 7 of article 10 of the constitution, in that the property is exempted from all taxes of every kind except the state tax.

“(e) The act aforesaid denies to the Armour Packing Company, which is within the jurisdiction of the state, the equal protection of the laws thereof, and takes its property without due process of law, contravening article 14 of the amendments to the constitution of the United States, and section 30 of article 2 of the state constitution.

“(f) The law imposes a tax on the use of property engaged in interstate commerce, of which congress has exclusive jurisdiction, under section 8, article 1, of the constitution of the United States.

“(g) The law imposes a tax on property having no situs in the state, and upon property temporarily in the state and beyond its jurisdiction.

“(h) The law is discriminating and bases an assessment upon artificial and arbitrary rules and is in violation of fixed natural rights as well as of section 4, article 2, of the state constitution.

“9. Even if it should be held that the act mentioned in paragraph 2 hereof is valid and constitutional, still the law should be so construed as to be prospective in operation, so that the tax levied for the year 1896 is illegal, for that the law did not go into effect until the twenty-first day of June, 1895, and upon its face calls 675 for an assessment on the basis of the cars used for a time previous to the taking effect of the law.

“10. The defendants are carrying the illegal tax upon their records and the auditor threatens to notify the attorney general as required by the act aforesaid, and the latter in turn threatens that he will then proceed to institute suits to collect and enforce

such illegal tax, and these threats will be carried into force unless the act of the legislature aforesaid be declared illegal.

"Wherefore relator prays that a writ of certiorari be issued and upon the record, when certified, for a decree of this court annulling, vacating, and setting aside the said assessment made by respondents and the levy thereunder, and for such other relief as may be just.

"Second Count.

"1. Each allegation of paragraphs 1, 2, 3, 7, 8, and 10 of the first count is reaverred the same as if specifically again set forth and copied herein.

"2. On the ——— day of December, 1896, the Armour Packing Company made, for the year 1897, the statement required by section 7723a of the act aforesaid. Upon the ——— day of July, 1897, the state board of equalization did proceed to ascertain the aggregate value of the cars in this state belonging to the said company, spreading upon its record, as evidence of their action, the following:

"The board having under consideration the assessment and valuation of the cars of the several car companies, car trusts, mercantile companies, or corporations other than those operating a line of railroad or individuals, and having heard all the evidence adduced in relation to the mileage and value of said cars, finds the names of such car companies, car trusts, mercantile companies, individuals, and corporations ⁶⁷⁶ owning cars which are used on the several lines of railroad in the state of Missouri, to be set out in the following statement, showing also, the aggregate mileage of the cars of each such car company, car trust, mercantile company, individual, or corporation over the several lines of railroad in the state of Missouri, during the year next preceding the first day of June, 1896; the daily average travel per car; the number of cars required to make such aggregate mileage in one year; the value per car and the aggregate value of such cars in the state of Missouri, as ascertained and assessed by the board.

Name of company.	Aggregate mileage of cars in state.	Daily average travel of cars—miles.	No. of cars required to make aggregate mileage in one year.	Value per car.	Aggregate value in state.
Armour Packing Co.....	6,343.711	80	216	\$600	\$129,600

"3. On the thirty-first day of July, 1897, the state auditor made out and transmitted to the president of the Armour Packing Company the following papers:

" "Treasury Department of Missouri,
" "Office of State Auditor,
" "City of Jefferson.

" "To the president of the Armour Packing Co.:

" "I, James M. Seibert, state auditor of the state of Missouri, do hereby certify that the aggregate mileage of the cars of the Armour Packing Co., over the several lines of railroad in the state of Missouri for the year next preceding the first day of June, 1896, is 6,343,711 miles; that the daily average travel of such cars is 80 miles; that the number of cars required to make such aggregate mileage in one year is 216; that the average value per car is \$600; that the aggregate ^{\$77} value of the cars aforesaid subject to taxation in the state of Missouri is \$129,600, and that the state tax due thereon for the year 1897 is \$2,592.

" "In testimony whereof I have hereunto set my hand and affixed my official seal. Done at office in the city of Jefferson, this thirty-first day of July, 1897.

" "[Seal]

J. M. SEIBERT,
" "State Auditor."

"4. There is no other record as to any assessment or levy under said act of the legislature than as herein stated.

"Wherefore relator prays that a writ of certiorari issue, and upon the record, when certified, for a decree of this court annulling, vacating, and setting aside the said assessment made by respondents and the levy thereunder, and for such other relief as may be just."

The return is as follows:

"By virtue and in obedience to the said writ of certiorari aforesaid, we do hereby certify and return to the supreme court in bank that we have annexed hereto and file herewith, under the hand and seal of said board, transcripts of the two assessments for the years 1895 and 1896 (marked Exhibits A and B), certified to by us, of the proceedings relative to the assessment of taxes against relator and relator's property, described in the petition in this proceeding, and a statement of the other matters specified in and required by said writ, and we further certify and return to said court that it was the duty of said state board of equalization to fix a valuation and assessment for the purpose of taxation, under the laws of this state, on the cars of the several car companies, car trusts, mercantile companies, and cor-

porations other than those operating a line or lines of railroad, or individuals so operating said car companies, car trusts, or mercantile companies, and that for the purpose of ⁶⁷⁸ fixing said valuation and assessment said board heard evidence of car accountants and others in relation to mileage and value of such cars, and ascertained the names of such car companies, car trusts, mercantile companies, individuals, and corporations owning cars which are used on the several lines of railroad in the state of Missouri, and also the aggregate mileage of each such car company, car trust, mercantile company, or individual corporation over the several lines of railroad in the state of Missouri, during the two years respectively next preceding the first day of June, 1895 and 1896; also the daily average miles per car; likewise the number of cars required to make such aggregate mileage in one year; also the value per car and the aggregate value of all such cars in the state of Missouri, and cause the same to be spread upon its records as a part thereof, and as a basis for the levy of the taxes mentioned in the petition herein, as will be more fully seen by Exhibit A and Exhibit B hereto attached.

“And further making return, respondents say that relator’s cars were assessed for the taxes of the year 1895 as belonging to the Kansas City Dressed Beef Line.

“Respondents, further making return herein, say that they deny:

“1. That the act of the legislature set forth in paragraph 3 of the petition in this proceeding is unconstitutional and void.

“2. Respondents deny that the taxes sought to be levied thereunder are not uniform on the same class of property belonging to all subjects within the territorial limits of the authority levying the tax, and are not levied and collected by general law as provided by section 3, article 10, of the constitution of the state of Missouri.

⁶⁷⁹ “3. Respondents deny that the taxes sought to be levied exceed the amount authorized by section 8, article 10, of the state constitution.

“4. Respondents deny that the provisions of said act are retrospective in operation as to the whole of the taxes for the year 1896, levied upon cars and used in 1895.

“5. Respondents deny that the provisions of said law as set forth in paragraph 3 of the petition, providing for the taxation of this class of property, is in contravention of sections 6 and 7 of article 10 of the constitution, because the property in said law

named is exempted from all taxes of every kind except a state tax.

"6. Respondents deny that the said act mentioned in paragraph 3 of the petition herein, denies to the Armour Packing Company within the jurisdiction of the state of Missouri equal protection of the laws thereof, as contemplated by article 14 of the amendments of the constitution of the United States. And respondents, further making return, say that the assessment of the taxes and the amount thereof upon the property of the relator is uniform upon the same class of property belonging to other subjects within the territorial limits of the state of Missouri, and that said taxes are so levied and assessed by a general law, and that said taxes so levied and sought to be collected do not exceed the amount authorized by the constitution of the state of Missouri, and are not retrospective in operation so far as relator is concerned, and that said taxes do not contravene the provisions of the constitution of this state or the constitution of the United States in any manner whatever.

"Respondents having now here made a full and complete return pray that the writ be dismissed.

680 "In witness whereof, respondents hereunto subscribe their names and caused the seal of the state board of equalization and of the state of Missouri to be affixed, this ——— day of October, A. D. 1897."

The motion to quash is as follows:

"Now comes relator and moves the court:

"1. To set aside, vacate, and annul the proceedings had and assessment made by the state board of equalization upon August 26, 1896, as set forth in Exhibit 'A' to the return, for the reasons set forth in relator's amended petition and printed briefs filed herein.

"2. To set aside, vacate, and annul the proceedings had and assessment made by the state board of equalization upon July 31, 1897, as set forth in Exhibit 'B' to the return, for the reasons set forth in relator's amended petition and printed brief filed herein."

I. From these proceedings it is apparent, therefore, that the real question at issue is the constitutionality of the act of March 18, 1895: Laws 1895, p. 246. The relator claims that the act imposes a property tax, and hence is void for the many reasons assigned by it, and the respondents claim that it is a license or franchise tax, "in the nature of an excise tax on this class of corporations."

The act of 1895 is entitled "An act to provide for the assessment and taxation of railway cars other than those which are the property of railroad companies, by amending article 8 of chapter 138 of the Revised Statutes of Missouri, 1889, relating to assessment and taxation of railroads, by adding thereto eight new sections."

The sections added are numbered 7723a to 7723h, inclusive. Section 7723 of the Revised Statutes of 1889 is the ⁶⁸¹ section of the statutes which creates the state board of equalization, and gives it jurisdiction to assess, adjust, and equalize railroad property for the purpose of general taxation. Chapter 138 is devoted to the "revenue," and article 8 relates to the "assessment and taxation of railroads."

The relator is a corporation organized under the laws of the state of New Jersey, and is engaged, at Kansas City, Kansas, in the general packing business, that is, in killing and dressing food animals, and in selling the meats thereof. It owns a number of refrigerator cars, in which it ships its goods to various counties in this state, and to other states in the Union. Its cars are hauled by various railroads.

It appears from the petition that the relator's place of business is in Kansas City, in the state of Kansas, and that the cars here taxed are attached to its business as an incident thereto, and are loaded in the state of Kansas, and shipped into and through the state of Missouri. These allegations are not denied by the return, and hence they must be taken as true in this case.

Under the circumstances, the relator, though a foreign corporation as to the state of Kansas, has acquired a domicile in that state, and the cars can only be taxed in that state: *Comstock v. Grand Rapids*, 54 Mich. 641; *Dubuque v. Illinois Cent. R. R. Co.*, 39 Iowa, 56; *British Com. Life Ins. Co. v. Commissioners of Taxes*, 31 N. Y. 32; *Fargo v. Michigan*, 121 U. S. 230; *Pullman's Car Co. v. Pennsylvania*, 141 U. S. 18; *Cleveland etc. R. R. Co. v. Backus*, 154 U. S. 439; *Postal Telegraph Co. v. Adams*, 155 U. S. 688; *Adams Express Co. v. Kentucky*, 166 U. S. 171; *Hall v. American Refrigerator Transit Co.*, 24 Colo. 291; 65 Am. St. Rep. 223; *Welty on Law of Assessments*, secs. 49-51.

⁶⁸² The reason of the rule is, that the cars could not be reached for assessment and taxation anywhere else, and the company owes this just return to the state of Kansas for the protection it receives from it.

The cars are in the state of Missouri only in transitu, and have no situs in this state. Hence they are not subject to assessment or taxation in this state: *Fargo v. Michigan*, 121 U. S. 230; *California v. Railroad*, 127 U. S. 1; *Railroad Co. v. Pennsylvania*, 15 Wall. 232; *People v. Wemple*, 138 N. Y. 1; 2 Dillon on Municipal Corporations, secs. 787, 788.

Being in Missouri only in transit, for the purpose of bringing merchandise from another state into or through this state, they are instruments of interstate commerce, and this state cannot impose any tax upon them: *Western Union Tel. Co. v. Texas*, 105 U. S. 460; *Leloup v. Mobile*, 127 U. S. 640; *Pickard v. Pullman Co.*, 117 U. S. 34; *Gloucester Ferry Co. v. Pennsylvania*, 114 U. S. 196; *Railroad v. Pennsylvania*, 15 Wall. 232; *Pullman's Co. v. Pennsylvania*, 141 U. S. 18; *Pacific Exp. Co. v. Seibert*, 142 U. S. 339. Being instruments of interstate commerce Congress alone has jurisdiction over them under section 8, article 1 of the constitution of the United States, except as above indicated the cars can be taxed as property by the state in which the company has acquired a domicile and the cars have a situs.

II. But it further appears from the letter, context, and purpose of the law that the act in question imposes a tax on property and not a license tax. The title of the act calls it an "assessment and taxation of railway cars other than those which are the property of railway companies," and it is made part of the law relating to the "revenue," and is in *pari materia* with the law ¹⁸⁸³ relating to the assessment and taxation of railroad property. The whole purpose of the act was to provide a different method of reaching this species of property and subjecting it to taxation from that prescribed by law for discovering and taxing property generally, and to fix the rate of the tax to be imposed. The difficulty of locating and valuing property of this character doubtless inspired this method of reaching it. The question then is whether, as a tax on property, it is constitutional.

The method contemplated by the act is: Ascertain the number of miles actually traveled in this state by all the cars of the owner; an average is then made of all cars to ascertain the daily average of the cars; the total miles traveled per year by all the cars are divided by 365 to ascertain the number of miles actually traveled per day, and this result is divided by the average number of miles made by each car. This gives the number of cars

necessarily employed to travel the total number of miles in a year, and multiplying the number of cars by the average value of the cars, produces the total value of the property, on which a two per cent tax is required to be levied.

Section 8 of article 10 of the constitution is as follows: "The state tax on property, exclusive of the tax necessary to pay the bonded debt of the state, shall not exceed twenty cents on the hundred dollars valuation; and whenever the taxable property of the state shall amount to nine hundred million dollars the rate shall not exceed fifteen cents."

This is not a tax necessary to pay the bonded debt of the state, but is a tax for the general purposes of the state. Section 7509 of the Revised Statutes of 1889 fixes the rate of taxation for such purposes at one-fifth of one per cent as the constitutional provision, above quoted, limits it. The tax imposed by the act of 1895 ⁶⁸⁴ is two per cent, which is one dollar and eighty cents on the hundred dollars valuation in excess of the limit fixed by the constitution and the laws of the state.

In *Brookfield v. Tooley*, 141 Mo. 619, a tax of one per cent on the cash value of the goods, wares, and merchandise owned by the defendant, imposed as an occupation tax, was held to be unconstitutional, because "in direct disobedience of sections 3 and 11 of article 10 of the constitution of Missouri." And the court, speaking through Gantt, P. J., said of the tax: "After a careful investigation of the question mooted and most ably discussed by counsel, it seems palpable that this is a property tax, pure and simple. It is an obvious misnomer to call it a tax upon occupation. . . . It is sufficient to say the present tax is so plainly a property tax and an effort to evade the constitution that it is illegal and void."

Acts of the legislature authorizing the levy of a tax in excess of the constitutional limitation are void: *Overall v. Ruenzi*, 67 Mo. 203; *Ewing v. Board of Education*, 72 Mo. 436; *Arnold v. Hawkins*, 95 Mo. 569; *Black v. McGonigle*, 103 Mo. 192.

The act in question is a whole scheme and must all stand or fall together, notwithstanding section 7723a, providing for a tax of two per cent, is a separate section, and if eliminated would leave only the methods provided by the act for discovering, assessing, and taxing the property, and the constitutional rate of taxation for state purposes to apply as in other cases. For the act provides that the tax of two per cent shall be in lieu of all other taxes, and it is not reasonable to hold that the state in-

tended to exempt such property from county, city, and school taxes and to subject it to state taxes alone according to the usual rate of taxation. Such a construction would reduce the amount of taxes the company would have to pay, and would ⁶⁸⁵ not enhance the state's revenue, but would simply cut off a part of that of the county, city, and schools. The method to be employed and the rate fixed are so welded together that they must be construed as inseparable parts of one whole scheme, and must stand or fall together.

The whole thing failing, the property would be properly taxed like any other property according to the law as it existed prior to the enactment of the act of 1895, subject to what has hereinbefore been said with respect to the right of the state to tax it at all. These observations are superadded because there may be other property of other persons or corporations affected by the act which has a situs in the state and hence is subject to taxation here, just as this property is in the state of Kansas.

No multiplication of reasons or accumulation of precedents, no rounded period, or trite phrase, is necessary to illuminate the plain truth that the act of 1895 is a tax on property and violates the constitutional limit of taxation for general state revenue. The act prohibits any other tax being levied, and while the total required to be paid may not exceed the total taxation allowed by the constitution to be levied on such property for state, county, city, and school purposes, still it exceeds the amount allowed to be levied for state purposes alone, and is therefore void.

This conclusion makes it unnecessary to consider the other questions which have been so ably argued by the counsel in the case.

The motion to quash is sustained, and the record of the state board of equalization and the assessment by it of the cars of re-lator for the years 1896 and 1897, is quashed.

⁶⁸⁶ Gantt, C. J., Burgess, Brace, and Williams, JJ., express their views in a separate opinion. Robinson, J., concurs as to second paragraph. Sherwood, J., concurs as to second paragraph, and as to first paragraph thinks it must affirmatively appear from the record that the board of equalization has jurisdiction.

TAXATION OF PROPERTY OF FOREIGN CORPORATIONS.—Rolling stock of a foreign railroad company, passing across the state for the purpose of interstate commerce, is not subject to taxation in that state: *Bain v. Richmond etc. R. R. Co.*, 105 N. O. 363; 18 Am.

St. Rep. 912. As applied to rolling stock, it has been held, however, that personal property may, for the purpose of taxation, be separated from its owner, and he may be taxed, on its account, wherever it is, though it may not be at the place of his domicile: *Hall v. American etc. Transit Co.*, 24 Colo. 291; 65 Am. St. Rep. 223, and note. See the note to *Buck v. Miller*, 62 Am. St. Rep. 470; *Denver etc. Ry. Co. v. Church*, 17 Colo. 1; 31 Am. St. Rep. 252.

TAXATION—SITUS OF PROPERTY.—Visible, tangible, personal property, permanently located in another state, is taxable within such jurisdiction irrespective of the residence or domicile of the owner: *Commonwealth v. American Dredging Co.*, 122 Pa. St. 386; 9 Am. St. Rep. 116; *Denver etc. Ry. Co. v. Church*, 17 Colo. 1; 31 Am. St. Rep. 252; *Carlisle v. Pullman etc. Car Co.*, 8 Colo. 320; 54 Am. Rep. 553. See monographic note to *New Albany v. Meekin*, 56 Am. Dec. 531, 535.

TAXATION.—A PROPERTY, AND NOT A LICENSE, TAX: See the opinion in *Hall v. American etc. Transit Co.*, 24 Colo. 291; 65 Am. St. Rep. 223, 227.

CASES
IN THE
SUPREME COURT
OF
MONTANA.

BOTKIN v. KLEINSCHMIDT.

[21 MONTANA, 1.]

GUARDIAN AND WARD—LIABILITY OF SURETIES ON GUARDIAN'S BOND.—If the sureties on a bond of a guardian, who is empowered, by an order of court, to sell the real estate of his ward, obligate themselves that he will faithfully perform the duties of such trust according to law, a literal interpretation of the bond requires that the sureties should stand good for its performance; and it would be unauthorized and unjust to so construe statutes concerning bonds which guardians are required to give, as to relieve the sureties of their plain liability.

GUARDIAN AND WARD—JUDGMENT AGAINST A GUARDIAN IS CONCLUSIVE AGAINST HIS SURETIES.—The sureties on a guardian's bond, given in compliance with an order authorizing him to sell real estate belonging to his ward, and conditioned that he will faithfully execute the duties of the trust according to law, are answerable for the guardian's misappropriation of funds realized from such sale; and a judgment against the guardian declaring him to be indebted to the ward's estate, in a given sum, the amount of such misappropriation, is binding upon the sureties, though they were not parties to the suit.

GUARDIAN AND WARD—JUDGMENT AGAINST GUARDIAN FOR TOO MUCH INTEREST—COLLATERAL ATTACK.—The fact that too much interest was allowed in a judgment against a guardian, for misappropriation of the proceeds of his ward's real estate, such sale having been made under order of court, cannot be considered in a collateral action brought against the sureties on the guardian's bond to enforce their liability.

Action brought by Botkin, guardian of the person and estate of William Kohlweiss, against Kleinschmidt and others, who were sureties on the bond of a former guardian, Henry C. Yaeger. The probate court had authorized Yaeger to sell certain real estate of his insane ward, and he had given a

bond, with the defendants as sureties. This bond recited the order to sell, and was conditioned that the guardian should "faithfully execute the duties of the trust according to law." Yaeger sold the real estate mentioned for the sum of three thousand five hundred dollars, but his letters as guardian were afterward revoked, and the plaintiff Botkin was appointed and qualified as his successor. The court settled and adjudicated Yaeger's account as guardian of the estate, adjudged him to be indebted to it in the sum of four thousand five hundred and ninety-five dollars, being the amount for which the real estate was sold and the interest thereon, less some items of commission and costs, and ordered him to pay the same immediately to the plaintiff, which he failed to do. A demurrer to the complaint was overruled and the defendants answered, denying that they had assumed any obligations as to real estate proceeds, or that any judgment of debt was entered against Yaeger. The plaintiff presented in proof the record, showing the order removing Yaeger as guardian of the estate, the appointment of the plaintiff as his successor, and the judgment, wherein the court adjudged Yaeger to be indebted to the estate in the amount stated. The defendants' motion for a nonsuit was overruled, and, as they made no further defense, judgment was entered against them, and they appealed.

Toole & Wallace, for the appellants.

A. C. Botkin, T. J. Walsh, and C. B. Nolan, for the respondent.

* PEMBERTON, C. J. Counsel for appellants contend that, as the conditions of the bond sued on are not the conditions prescribed by section 387, page 370, of the Compiled Statutes of 1887, but are conditions prescribed by section 358, page 363, same statute, they cannot be held liable in this action.

Section 358 refers to the general duties and obligations of guardians, and the conditions of the bonds they are required to execute when they take charge of the estates of their wards.

Section 387 has reference to bonds which guardians are required to give before selling real estate of their wards, under order of the court, and is as follows: "Every guardian, unauthorized to sell real estate must, before the sale, give bond to the probate judge, with sufficient surety, to be approved by him, with conditions to sell the same in the manner, and to account

for the proceeds of the sale, as provided for in this chapter and chapter 7 of this title."

Counsel for appellants contend that this is a special statute, governing the execution and prescribing the conditions required in bonds before real estate of the ward can be sold by the guardian under order of the court, and that, as the conditions named in the bond in suit are not in conformity with the requirements of this section, but are such as are prescribed in said section 358, the appellants are not liable on the bond.

It will be observed that this section (387) does not prescribe any special conditions. The conditions are that the guardian will "sell the same in the manner, and to account for the proceeds ⁵ of the sale, as provided for in this chapter and chapter 7 of this title." So it will be seen that the manner of the sale of real estate, and how the proceeds thereof shall be accounted for, are not prescribed in section 387, but by this section the manner of sale and how the proceeds shall be accounted for by the guardian are such as are prescribed in the two chapters named. So that all the provisions of these two chapters, referring to the manner of sale of real estate and the accounting for the proceeds, entered into the bond executed under section 387 as much as if they had been directly referred to, or written word for word therein as conditions. And, besides, both the sections involved here are included in the same chapter. The conditions of the bond refer to the order of the court authorizing the guardian to sell the real estate. A trust was thereby confided to the guardian. These appellants obligated themselves as his sureties that he would faithfully perform the trust mentioned in the bond. A literal interpretation of the bond requires that they should stand good for its performance. A construction of the statutes that would relieve them of their plain liability would be, in our judgment, as unauthorized as unjust.

Counsel have cited authorities to the effect that sureties on the general bond of a guardian are not liable for the proceeds of the sale of real estate made by the guardian under order of the court; that the sureties on the special bond required to be given in such cases are alone liable. But these cases are not applicable. This is a case involving the liability on the special bond—not the bond given for the general administration of the ward's estate: *Withers v. Hickman*, 6 B. Mon. 292; *Powell v. Powell*, 48 Cal. 234; *Woerner's American Law of Guardianship*, 134.

Counsel for the appellants insist that the judgment of the

district court against Yaeger as guardian, whereby the status of his account was determined and he adjudged to be indebted to the estate in the amount sued for and ordered to pay over the same immediately to his successor, was rendered without notice to the sureties, and that they are, therefore, not bound thereby.

¶ Woerner says: "It is the undertaking of the surety on a guardian's bond that his principal shall discharge all his official duties; and, since one of the duties of the guardian is to pay the amount found to be due by him to the ward by a court having jurisdiction for such purpose, it follows that the judgment to that effect must be binding upon the surety, unless obtained by fraud or mistake. Hence, it is held to be a well-settled principle that the sureties in a guardian's bond are prima facie bound by a recovery against their principal, although they were not parties to the suit, and that they can relieve themselves only by showing that the amount recovered was in excess of the amount to which plaintiff was entitled, or that he was not entitled to recover at all": Woerner's American Law of Guardianship, 149. See, also, Brandt on Suretyship and Guaranty, sec. 580.

In *Brodrib v. Brodrib*, 56 Cal. 563, it is held that a judgment against the guardian in such cases is conclusive, not only against him, but against his sureties also: *Chaquette v. Ortet*, 60 Cal. 594; *Biggins v. Raisch*, 107 Cal. 210; *Deobold v. Opperman*, 111 N. Y. 531; 7 Am. St. Rep. 760.

We think by the great weight of authority the sureties in this case are bound by the judgment against their principal, notwithstanding they were not parties to the suit.

It is also claimed by appellants that judgment was rendered against Yaeger for too much interest by the district court. This matter cannot be inquired into now. The judgment of the district court is conclusive in this action. If the judgment was rendered for too great a sum, the parties aggrieved should have sought their remedy in the district court, and, failing there, should have appealed. No remedy is obtainable in this collateral action.

We are of the opinion the judgment should be affirmed, and it is so ordered.

Hunt and Pigott, JJ., concur.

GUARDIAN AND WARD—LIABILITY OF SURETIES—CONCLUSIVENESS OF JUDGMENT AGAINST GUARDIAN.—If a

guardian misappropriates, misapplies, or converts moneys of his ward, the act is a breach of his bond, for which he and his sureties are answerable: Note to Deegan v. Deegan, 58 Am. St. Rep. 750. The judgment of a court having original jurisdiction in matters of guardianship is, until reversed, modified, or impeached, conclusive, not only against the guardian himself, but also against the sureties upon his official bond. Whatever binds and concludes the guardian equally binds and concludes his sureties: Deegan v. Deegan, 22 Nev. 185; 58 Am. St. Rep. 742. An order of a county court requiring a guardian to pay over to his ward money in his hands is conclusive upon the guardian and his security upon his bond, except for fraud or mistake, as to the amount of money then actually in the hands of the guardian: Gillett v. Wiley, 126 Ill. 810; 9 Am. St. Rep. 587. The sureties are concluded by an order, on the guardian's accounting, as to the amount due from him to the ward: Note to Charles v. Hoskins, 83 Am. Dec. 885.

STATE v. DISTRICT COURT.

[21 MONTANA, 155.]

RECEIVERS—COLLATERAL ATTACK ON APPOINTMENT OF.—If it appears, upon the face of the proceedings, that a court's order appointing a receiver was without authority of law, and therefore void, the order may be assailed collaterally, and with impunity, by anybody.

CONTEMPT—DISOBEDIENCE OF VOID ORDER APPOINTING RECEIVER.—A stranger to all parties, who disobeys an order appointing a receiver, is not guilty of contempt, where the court made such order without authority of law.

Petition by Alex. J. Johnston for a writ of certiorari to the district court. It appeared from the relator's petition that an action had been commenced by J. D. Thomas and George P. Bretherton against the Thornton-Thomas Mercantile Company, a corporation, and that a receiver had been appointed, and had, under the order of the court, sold the company's stock of merchandise to the firm of Lutey Brothers, who paid to the receiver therefor the sum of three thousand two hundred and forty-one dollars and nineteen cents. The receiver deposited this sum of money to his credit, as receiver, in the bank of W. A. Clark & Brother, at Butte. The action of the court in appointing a receiver was afterward, on the application of the company, pronounced by the supreme court to be null and void, on the ground that there was nothing before the court to authorize such appointment. It was, therefore, decided that the order of appointment, and all orders of the court made subsequently thereto should be vacated. After this decision of the supreme court the creditors of the company attached the stock of merchan-

dise that had been purchased by the Lutey Brothers for debts due by the corporation. The sheriff sold the goods to satisfy the judgments against the corporation. The court then, upon application of the Lutey Brothers, directed the receiver to repay them out of moneys received from them for the goods. The receiver, in obedience to such order, then presented his check, payable to the order of himself, to the bank named, but the cashier, A. J. Johnston, the relator, refused payment. The court then, upon the receiver's application, directed Johnston to show cause why he should not pay the check of the receiver, or be punished for contempt for interfering with him in the discharge of his duties. Johnston averred that the court had no jurisdiction over him or the money; that the money deposited in the bank had been attached by the banking firm where the money was deposited; and that he and the receiver had been served with notices of garnishment. Johnston was ordered to pay the check, or be imprisoned in the county jail until he complied with the order. The respondent contended that, upon the record, the court was not warranted in issuing the writ prayed for.

John B. Welcome, and Corbett, Clayberg & Gunn, for the relator.

Campbell & Parr, for the respondent.

138 HUNT, J. We think the learned counsel for the respondents has assumed a false premise in his brief, and upon it has constructed his argument. His error lies in the very statement of the question for consideration, which he puts as follows: "Is the person with whom a receiver of a court deposits money or property subject to the order of the court?" No doubt that, if the case were one where the cashier of a depository of a receiver's funds had refused to obey the order of a court of competent jurisdiction to pay into the receiver's hands money belonging to him as receiver, and held by the depository as a credit to the receiver's account, the officer of such depository so refusing would be liable in a contempt proceeding, upon the familiar doctrine that an unauthorized interference with a receiver's possession constitutes a contempt of court: High on Receivers, sec. 164. Nor will it be denied that the liability of one who interferes with the rights of a receiver or his business by any unauthorized refusal to turn over property or funds to which the receiver is entitled, and for the delivery over of which the receiver

has given orders, would make the one so refusing guilty of a contempt of court. So far, therefore, as these general principles of equity jurisdiction which are relied upon by respondent are applicable, we do not dissent from them. We likewise agree to the proposition that, where one refuses to pay money held by him as a credit to the receiver's account, upon an order by the receiver made pursuant to an order of court, the party so refusing to pay in a contempt proceeding cannot justify his refusal upon the ground that the appointment of the receiver was improperly made, or even erroneous, for the court will not consider those matters in a collateral proceeding. The writ of certiorari being one of review limited to the determination of whether the inferior court has exceeded its jurisdiction, and regularly pursued its authority, the action of the district court after it assumed jurisdiction and took control through a receiver, however erroneous that action may have been, unless ¹⁵⁹ it was void, could not be disobeyed, and the disobedience justified by answering that the court's order was erroneously or improvidently made: *Smith on Receiverships*, 85.

But here the error of the court in adjudging petitioner guilty upon the facts alleged was one that involved an excess of the court's jurisdiction. This is apparent, under the decision of this court in *State v. Clancy*, 20 Mont. 284, where it was decided that the original complaint filed in the district court of Silver Bow county in the case of *J. D. Thomas et al. against Thornton-Thomas Mercantile Company* was "virtually a blank paper," and that for various reasons, stated in the opinion, there was no authority of law to appoint a receiver of the corporation at all upon the showing made. The case, therefore, is not one where there has been a receiver appointed by a competent court with jurisdiction over the subject matter and of the parties before it, and where the court's orders were regular, even though erroneous, but one where the court has done that which is a nullity, and where all the orders, including the one appointing a receiver, and all those subsequent thereto, are absolutely void, and entirely beyond the jurisdiction of the court that made them: *People v. Weigley*, 155 Ill. 491. Such being the state of the case, the order of the district court appointing the receiver can be assailed collaterally, and with impunity by anybody: *Van Fleet on Collateral Attack*, sec. 16.

The real question for decision, then, is whether the district court in which the receiver was appointed, and in which the court ordered that the receiver pay *Lutey Brothers* the sum of

money named in the order, had jurisdiction to grant the ultimate relief prayed for in the complaint in the original action. And as that question has been answered by this court in the negative, it follows that the court had no power in the proceedings in that action to authorize the receiver to pay over any moneys to his credit in the bank of Clark & Brother to Lutey Brothers after the same were attached in the hands of the bank. If, after our decision, the Thornton-Thomas Mercantile ¹⁶⁰ Company had gone into court, and made an application to have its property which had been taken away and sold by the receiver restored to it by him, and the court had made an order to that effect and the receiver had disobeyed the order, it may be that such disobedience would have constituted a contempt, as was held in *People v. Jones*, 33 Mich. 303; or perhaps the money collected by the receiver, who acted under an appointment that was void, could be recovered by the party entitled to it in an action in assumpsit, as in *Johnson v. Powers*, 21 Neb. 292. See, also, *O'Mahoney v. Belmont*, 62 N. Y. 133. But where a stranger to all parties to the original suit of Thomas et al. against the Thornton-Thomas Mercantile Company has disobeyed an order of court which the court had no authority in law to make, he cannot be guilty of contempt: *State v. Winder*, 14 Wash. 114; *Clark v. Burke*, 163 Ill. 334; *People v. Weigley*, 155 Ill. 491. "A party cannot be guilty of contempt of court for disobeying an order which the court had no authority of law to make": *Leopold v. People*, 140 Ill. 553; *Brown v. Moore*, 61 Cal. 432; *People v. O'Neil*, 47 Cal. 109; *Whitney v. Hanover Nat. Bank*, 71 Miss. 1009.

We are of the opinion that the writ prayed for must issue, and it is so ordered.

Pemberton, C. J., and Pigott, J., concur.

RECEIVERS — ORDER APPOINTING — COLLATERAL ATTACK.—If a court has jurisdiction, its order appointing a receiver, no matter how erroneous, cannot be collaterally attacked: *Commercial Nat. Bank v. Burch*, 141 Ill. 519; 33 Am. St. Rep. 831.

CONTEMPT—VOID ORDER.—Disobedience of an order of a court or judge, made without jurisdiction, is not a contempt. If the court or judge is without jurisdiction of the subject matter, or of the parties, or lacks power to make the order in the particular case, disobedience of such order cannot be punished as a contempt: Note to *Ex parte Lake*, 63 Am. St. Rep. 855.

HADLEY v. RASH.

[21 MONTANA, 170.]

MARRIAGE—LEGALITY OF—PRESUMPTION.—The presumption in favor of the legality of a marriage is one of the strongest known to the law.

MARRIAGE—ILLEGALITY OF—BURDEN—PROOF OF NEGATIVE.—The law requires the party who asserts the illegality of a marriage to take the burden of that issue, and prove it, though it may involve the proving of a negative.

MARRIAGE AND DIVORCE—SECOND MARRIAGE OF EACH SPOUSE—PRESUMPTION—BURDEN—NEGATIVE EVIDENCE—PROOF OF NO DIVORCE.—If a man and a woman are legally married, but they separate, never living together again, and, after a long period of years, each becomes married to another person, and the woman, upon the death of her first husband, brings an action for a decree adjudging her to be his surviving widow, and, as such, entitled to share in the distribution of his estate, and there is no evidence of any divorce, although the complaint alleges that no divorce dissolving the marriage relation between the plaintiff and the deceased had ever been granted, which allegation is denied by the answer, the presumption is, in the absence of any evidence to the contrary, that the marriage between the intestate and his second wife was valid, and the burden is on the plaintiff to prove that no divorce had ever been granted.

MARRIAGE AND DIVORCE—SECOND MARRIAGE OF EACH SPOUSE—PRESUMPTION—BURDEN—NEGATIVE EVIDENCE—PROOF OF NO DIVORCE—HEIRS.—If a man and a woman are legally married, but they separate, never living together again, and, after a long period of years, each becomes married to another person, the woman is not, upon the death of the first husband, entitled to maintain an action for a decree adjudging her to be his surviving widow, without proving that his last marriage was invalid, and, to do this, she must prove that there never had been any divorce between her and the deceased, for the presumption is, that his last marriage was legal. She is not, therefore, without proof of being the legal surviving widow, entitled to share in the distribution of her first husband's estate, though her children by him would be entitled to share in such distribution.

Action brought by the plaintiff, Elizabeth Hadley, against Manuel Rash and others for a decree adjudging her to be the surviving widow, and, as such, entitled to share in the distribution of the estate of Daniel Rash, who died intestate in Missoula county on March 14, 1895. The plaintiff and the intestate were married in Iowa, in 1858, and lived together as man and wife until 1864, when Daniel Rash left the plaintiff and never lived with her thereafter. In 1872, the plaintiff intermarried with one William Hadley, and they lived and cohabited as man and wife until the death of Daniel Rash. In 1894, the intestate and the defendant, Berthena C. Rash, intermarried and lived together as man and wife until the death of the intestate. The court decreed that Berthena C. Rash was, at the time of Daniel

Rash's death, his legal wife, and, as such, that she was his legal surviving widow, and entitled to share in the distribution of his estate. Manuel Rash, one of the defendants, and Elvira Lowdermilk were children of the plaintiff and Daniel Rash, and their right to share as heirs in the distribution of the latter's estate was not questioned by any of the parties to the suit. The plaintiff appealed from the decree.

J. M. Dixon and Bickford, Stiff & Hershey, for the appellant.

Thomas C. Marshall and Joseph K. Wood, for the respondent, Berthena C. Rash.

173 PEMBERTON, C. J. Counsel for appellant contend the decree of the court adjudging respondent Berthena C. Rash to be the legal surviving widow of the deceased, Daniel Rash, and as such widow entitled to share in the distribution of his estate, is not supported by the evidence, and is contrary to law. It is argued that this decree is based upon the legal presumption that at some time and place a divorce had been granted, by some court of competent jurisdiction, dissolving the marriage relation entered into between the appellant and Daniel Rash in Iowa in the year 1858. There is no evidence of such divorce. Counsel contend that the court held that it was incumbent upon appellant to prove that there had not been such divorce, and that it was error on the part of the court to presume such divorce, in the absence of evidence to the contrary. It is contended that there is nothing in the pleadings suggesting that there ever was such divorce of the parties. In the complaint, however, there is an allegation that the bonds of matrimony entered into between appellant and Rash had never been dissolved by divorce. This allegation, and all other allegations not admitted, are denied generally by the answer.

Counsel say that to prove that there had never been a divorce between the parties would have required the appellant to prove a negative, which in this case, they say, would have been impossible.

Treating the subject of proving a negative, Nelson, in his recent work on Divorce and Separation, volume 2, section 580, says: "But this difficulty of proof is not unusual in such cases, since it is the rule that all presumptions shall be made in favor of marriage, where matrimony was the desire of the parties."

The argument of counsel for the appellant overlooks the real issue in this case. It is an admitted fact that the respondent

and Daniel Rash were married in Missoula county in January, 1894, and lived together as husband and wife until the death of Rash. It is also a fact that the appellant attacks the validity of this marriage, and that this marriage must be decreed to be invalid before appellant can be held to be the legal ¹⁷⁴ surviving widow of Rash, and entitled, as such widow, to share in the distribution of his estate.

What burdens as to proof, then, does the law, under such circumstances, devolve upon the appellant?

Bishop, in his work on Marriage and Divorce, volume 1, section 457, lays down the rule in such cases as follows: "‘Semper praesumitur pro matrimonio.’ Every intendment of the law is in favor of matrimony. When a marriage, therefore, has once been shown, however celebrated, whether regularly or irregularly, or however proved, whether directly or by circumstantial evidence, the law raises a strong presumption in favor of its legality; so that the burden is with the party objecting, throughout, and in every particular, to prove, against the constant pressure of this presumption of law, that it is illegal and void. And it has been considered that the validity of a marriage cannot be tried like any other question of fact which is independent of presumption, because the law, besides casting the burden of proof upon the objecting party, will still presume in favor of marriage, and this presumption increases in strength with the lapse of time through which the parties are cohabiting as husband and wife. It being for the highest good of the parties, of the children, and of the community, that all intercourse between the sexes, in its nature matrimonial, should be such in fact, the law, when administered by enlightened judges, seizes upon all presumptions both of law and of fact, presses into its service all things which can help it, in each particular case, to sustain marriage, and repel the conclusion of unlawful commerce."

In *Boulden v. McIntire*, 119 Ind. 574, 12 Am. St. Rep. 453—a case very similar to the one at bar, though not so strong in its essential facts—the court collates the leading cases involving the questions under discussion here, and comes to this conclusion: "As we have seen from the authorities above cited, the law requires the party who asserts the illegality of a marriage to take the burden of that issue, and prove it, though it may involve the proving of a negative."

¹⁷⁵ In *Klein v. Laudman*, 29 Mo. 259, a case involving this doctrine, the court said: "There was not any evidence that the first husband of Mrs. Klein was dead, but, if this had been es-

tablished, we think she was entitled to the benefit of the favorable presumption that the first marriage had been dissolved by divorce." We cite, to the same effect, *Erwin v. English*, 61 Conn. 502; *Johnson v. Johnson*, 114 Ill. 611; 55 Am. Rep. 883; *Carroll v. Carroll*, 20 Tex. 731; *Cartwright v. McGown*, 121 Ill. 388; 2 Am. St. Rep. 105; and cases cited in *Boulden v. McIntire*, 119 Ind. 574; 12 Am. St. Rep. 453.

In *Teter v. Teter*, 101 Ind. 129, 51 Am. Rep. 742, speaking of the presumptions in favor of the validity of a marriage, the court uses this strong language: "The presumption in favor of matrimony is one of the strongest known to the law. The law presumes morality, and not immorality; marriage, and not concubinage; legitimacy, and not bastardy."

We think the authorities are practically uniform upon the questions presented in this appeal. In this case the appellant took upon herself the burden of showing the marriage between the respondent and Rash to be invalid. In order to do so, it was incumbent upon her to show that there never had been a divorce granted to Rash from her. It was incumbent upon her to show this fact, notwithstanding it required her to prove a negative. It was no more difficult for her to prove that there had been no such divorce, than it would have been for respondent to prove there had been a divorce granted to Rash. The appellant, when she married Hadley, certainly acted upon the presumption that Rash was either dead, or had obtained a divorce from her. Why, then, might not the respondent, with propriety, and lawfully, presume, thirty years after Rash had separated from appellant, that there was no legal impediment in the way of her marriage in good faith with him?

We are unable to discover a circumstance in this case that does not move us strongly to indulge the legal presumption of the validity of the marriage between the respondent and Rash. 170 We are impelled to such conclusion in the interest of morality, innocence, and the sanctity of the marriage relation. We are given no good reason why we should depart in this case from what seems to us to be a well-settled and just rule of legal presumption, simply to gratify the cupidity of the claimant, that hesitates at no consideration of morality or innocence, or even the preservation of her own good name and honor, in her reckless struggle for gain.

The judgment appealed from is affirmed.

Hunt and Pigott, JJ., concur.

MARRIAGE AND DIVORCE—SECOND MARRIAGE—PRESUMPTIONS.—The presumption of marriage is one of the strongest known to the law; and, when once established, it can be repelled only by the most cogent and satisfactory evidence. Even divorces have been presumed to sustain a marriage made while the partner of one of the parties to a former marriage was living: See extended note to Appeal of Reading etc. Trust Co., 57 Am. Rep. 453, 463. Compare Johnson v. Johnson, 114 Ill. 611; 55 Am. Rep. 883, and Cartwright v. McGown, 121 Ill. 388; 2 Am. St. Rep. 105, showing when a presumption of divorce from a prior husband or wife will not be indulged to sustain a second marriage. A divorce may be presumed, though there is no direct evidence thereof: Note to Cartwright v. McGown, 2 Am. St. Rep. 117. The law, in opposition to a marriage actually proved, will not indulge the presumption that one of the contracting parties was already married: Jenkins v. Jenkins, 83 Ga. 283; 20 Am. St. Rep. 316. Where a man is proved to have married a second time, such marriage is presumed to be legal, and such presumption is not overcome by proof of a prior marriage, and the fact that his first wife is living and has not obtained a divorce: Note to Voorhees v. Voorhees, 19 Am. St. Rep. 409; note to Appeal of Reading etc. Trust Co., 57 Am. Rep. 453.

MARRIAGE AND DIVORCE—SECOND MARRIAGE—NEGATIVE PROOF.—If a negative is essential to the existence of a right, the party claiming the right has the burden of proving such negative. Thus, where a divorce is presumed in favor of the validity of a second marriage, contracted while a former husband or wife is living, one whose right rests upon the supposed invalidity of the second marriage, must, in order to establish such right, remove every presumption of the legality of such marriage. He must show that there had been no divorce: Boulden v. McIntire, 119 Ind. 574; 12 Am. St. Rep. 453, and note. In such cases, the burden of proof is on the party asserting guilt or immorality, to prove that the first marriage had not ended before the second marriage: Hunter v. Hunter, 111 Cal. 261; 52 Am. St. Rep. 180.

MARRIAGE AND DIVORCE—SECOND MARRIAGE, WHEN VOID.—The marriage of a man and a woman when one of them has a husband or wife then living and undivorced is void, although the parties in contracting the second marriage acted in the honest belief of a prior divorce: Gordon v. Gordon, 141 Ill. 160; 33 Am. St. Rep. 294, and note.

BURNS v. SMITH.

[21 MONTANA, 251.]

JURISDICTION—GRANT OF—EXCLUSIVENESS.—There is nothing in the nature of jurisdiction, as applied to courts, which renders it exclusive. Jurisdiction is not a right or privilege belonging to the judge, but an authority or power to do justice in a given case, when it is brought before him; and the mere grant of jurisdiction to a particular court, without any words of exclusion, does not oust any other court of the powers which it before possessed.

JURISDICTION—ESTATES OF DECEDENTS—EQUITY—PROBATE COURTS.—The jurisdiction of chancery over the estates of decedents, though it may have been displaced, in ordinary cases, by the probate system of courts, is not abrogated by statutes conferring jurisdiction in such cases, on probate courts.

SPECIFIC PERFORMANCE OF CONTRACT TO MAKE A WILL—JURISDICTION OF COURTS.—A district court, sitting as a court of probate, does not have exclusive jurisdiction to try and determine an action brought against an estate of a decedent to enforce an agreement made by the deceased to devise a certain share of his property; but the district court, sitting as a court of equity, has, at least, a concurrent jurisdiction of such action with the district court, sitting as a court of probate, where the constitution provides that district courts shall have "original jurisdiction in all cases in law and equity where the claim is for fifty dollars or more."

SPECIFIC PERFORMANCE OF CONTRACT TO MAKE A WILL AS A REWARD FOR PERSONAL SERVICES.—A court of equity will specifically enforce a promise to leave to another the whole or a definite portion of one's estate, as a reward for peculiar personal services rendered or other acts done by the promisee, which are not susceptible of a money valuation, and were not intended to be paid for in money, provided the consideration has been substantially received at the promisor's death; and it is no objection to the enforcement of such a contract that it was entered into with a third party for the promisee's benefit, if the latter has acted under it and executed it.

SPECIFIC PERFORMANCE OF CONTRACT TO MAKE A WILL—DECREE OF, AGAINST ESTATE OF DECEDENT.—If a husband and his wife, having no children, agree with the mother of a little girl eleven years of age that, if the child will come and live with them, at their home, the husband will, in return for her companionship and obedience, leave her a child's share of his estate at his death, such contract is based upon a sufficient consideration for the promise, and, if the husband dies, without having made such provision, a court of equity will decree its specific performance against his estate, where the contract is clearly proved and shown to have been complied with on the part of the child, although the agreement contained an invalid contract of adoption.

EVIDENCE—RES GESTAE—WHAT IS PART OF TRANSACTION.—In an action to enforce the specific performance of an agreement made by a deceased person, before his death, to leave a little girl a child's portion of his estate, upon his death, in return for her companionship and obedience, if she would come and live in his family, he and his wife having no children, the conduct of the parties toward each other during the entire time from the date of the contract is part of the transaction, and whatever either party did or said during that time which sheds light upon the matter, and aids in disclosing the relations the parties sustained, and understood that they sustained, toward each other, must be construed as a part of the res gestae and admitted as such, under a statute which provides that if a "declaration, act, or omission forms part of a transaction which is itself the fact in dispute, or evidence of that fact, such declaration, act, or omission is part of the transaction."

SPECIFIC PERFORMANCE OF CONTRACT TO MAKE A WILL—PERSONAL SERVICES—WHAT IS NO DEFENSE ON PART OF HEIRS.—In an action to enforce the specific performance of an agreement made by a deceased person before his death and who had no children of his own, to leave a little girl a child's portion of his estate upon his death, in return for her companionship and obedience, if she would come and live with him and his wife, it is no defense, on the part of his heirs-at-law, that the child at one time left his home and remained away for some time, or that she did not yield him the companionship and obedience the contract demanded, where there is no intimation that the deceased intended to rescind the contract on account of such conduct.

Action for the specific performance of a contract, brought by Mattie E. Burns against Mary S. Smith, administratrix, and Norman B. Holter, administrator, of the estate of James M. Smith, deceased, and others. Mary S. Smith was the surviving widow of James M. Smith. The other defendants were the heirs-at-law of James M. Smith, who died intestate, on February 4, 1896. It appeared from the complaint that the plaintiff, at the solicitation of Smith and his wife, by an agreement made with the mother of the plaintiff, went to live with the Smiths at their home. They had no children of their own, and Smith entered into an agreement with the plaintiff's mother that if she would then surrender to him the plaintiff, then a little girl ten or eleven years of age, he would, in further consideration of such services as the plaintiff would render him as his child, and the further consideration of the companionship of the plaintiff, care for her as his own child, and adopt her. He further agreed that on his death she should receive a child's share of his estate. In pursuance of such agreement, the girl was placed in Smith's household as his child, where she was cared for, maintained, and supported as such until her marriage on January 19, 1895; and thereafter Smith continued to recognize her as his child up to the time of his death. The plaintiff performed the conditions of the contract on her part, yielding obedience to the Smiths, due from a child to its parents, rendering such services as were commonly performed by one of her age, treating and regarding the Smiths as she would her natural parents, and relying upon Smith's declarations that she was his legally adopted child and heir. The plaintiff was known and recognized by the name of Mattie E. Smith, instead of her own name, Mattie E. Kates, and was introduced by Smith as his adopted daughter. He declared her to be his adopted daughter and heir. She called the Smiths "father" and "mother" while she lived with them. In July, 1866, Smith and the plaintiff's mother signed a contract of adoption, whereby the plaintiff was declared to be adopted as the child and legal heir of Smith, and would, on his death, receive a child's share of his estate. This contract was never recorded, and the plaintiff averred, upon information and belief, that the deed of adoption had been destroyed by the defendant, Mary E. Smith. The plaintiff never knew that this contract was illegal and of no effect as a deed of adoption, until so informed by her counsel after Smith's death. Smith left an estate of about fifty-five thousand dollars, but the plaintiff was denied any right or interest therein. She presented her claim

against the estate within the time prescribed by law, but it was entirely rejected. She therefore asked for a decree of the court establishing her right to a child's share of Smith's estate, under and in accordance with the contract and agreement above stated, that such contract, when established, be enforced against the estate and the defendants; and that, upon the distribution of the estate, she be entitled to receive one-half thereof. There was a judgment for the plaintiff, and the defendants appealed from the judgment and from an order denying their motion for a new trial.

Cullen, Day & Cullen, and Sanders & Sanders, for the appellants.

Carpenter & Carpenter, and E. A. Carleton, for the respondent.

²⁶² PEMBERTON, C. J. The first question presented by this ²⁶³ appeal is as to the jurisdiction of the trial court. Counsel for appellants contend that department 2 of the district court of Lewis and Clarke county, by the established rules of that court, is the court of probate of said county, and that, having reduced the estate of James M. Smith, deceased, to its possession by issuing letters of administration, and the estate being still in course of administration, that court had exclusive jurisdiction to determine the question of the heirship of the plaintiff. This case was commenced and tried in department 1 of the district court of said county.

It is claimed that section 2840 of the Code of Civil Procedure gives exclusive jurisdiction to the probate court, or the district court sitting as a court of probate, to hear and determine this cause.

This section, among other things, provides that "any person claiming to be heir to the deceased, or entitled to the distribution in whole or in a part of an estate, may, at any time after the expiration of one year from the issuing of letters testamentary or of administration upon such estate, file a petition in the matter of such estate, praying the court or judge to ascertain and declare the rights of all persons to said estate, and all interests therein, and to whom distribution thereof should be made."

And after requiring the court or judge to give notice of the filing of such petition to the persons interested in the estate, and to take the proper proof of service of such notice, the section further provides that "the court or judge shall thereupon

acquire jurisdiction to ascertain and determine the heirship, ownership and interest of all parties in and to the property of said deceased."

In support of the view that the district court, sitting as a court of probate, has exclusive jurisdiction to try and determine the right and title of parties claiming to be heirs of an estate, counsel rely largely upon *In re Burton's Estate*, 93 Cal. 459. It is claimed that our code is borrowed from California, and that the California construction should prevail here. If we carefully examine *In re Burton's Estate*, 93 Cal. 459, we find the ²⁶⁴ court, after holding that the probate court may try and determine questions of heirship, uses this language in construing the statute quoted above: "But the provisions of the section are carefully limited to the ascertainment and determination of rights and interests claimed in privity with the estates, and are not applicable to rights or titles claimed adversely to such estates."

The question that confronts us here is, Does the plaintiff claim to be an heir of the estate of the deceased? Or is not her claim adverse to the estate? She is not an heir-at-law, nor does she claim under or through an heir of the estate. Whatever claim she has, we think, results and comes to her under and through the contract alleged to have been made with the deceased in his lifetime as set out in her complaint. But whether the plaintiff claims as an heir of the estate, or adversely thereto, we think is not of paramount importance in determining the question of jurisdiction here presented. The section relied upon does not expressly confer exclusive jurisdiction upon the district court, sitting as a court of probate, to try and determine the questions therein enumerated; nor do we think exclusive jurisdiction to do so can be implied from the language of the section.

In discussing this question, Mr. Pomeroy, in section 1153, volume 3, of his work on Equity Jurisprudence, says: "One fundamental principle should be constantly kept in mind. It underlies all particular rules, and furnishes the solution for most of the special questions which can arise. In all those states which have adopted the entire system of equity jurisprudence, whatever be the legislation concerning the powers and functions of the probate courts, and whatever be the nature and extent of the subjects committed to their cognizance, the original equitable jurisdiction over administrations does and must still exist, except so far and with respect to such particulars as it has been

abrogated by express prohibitory negative language of the statutes, or by necessary implication from affirmative language conferring exclusive powers upon the probate tribunals. This equitable jurisdiction may be ²⁶⁵ dormant, but, except so far as thus destroyed by statute, it must continue to exist, concurrent with that held by the courts of probate, ready to be exercised whenever occasion may require or render it expedient. This general principle, so familiar, so fundamental, running through all branches of the equitable jurisdiction, but so often lost sight of by American courts in dealing with the jurisdiction as applied to administrations, was admirably stated by one of the ablest of American judges: "There is nothing in the nature of jurisdiction, as applied to courts, which renders it exclusive. It is a matter of common experience that two or more courts may have concurrent powers over the same parties and the same subject matter. Jurisdiction is not a right or privilege belonging to the judge, but an authority or power to do justice in a given case, when it is brought before him. There is, I think, no instance in the whole history of the law where the mere grant of jurisdiction to a particular court, without any words of exclusion has been held to oust any other court of the powers which it before possessed. Creating a new forum with concurrent jurisdiction may have the effect of withdrawing from the courts which before existed a portion of the causes which would otherwise have been brought before them, but it cannot affect the power of the old courts to administer justice when it is demanded at their hands.' "

In a note to this section the author cites a large number of California and other cases in support of the doctrine announced in the section.

Article 8, section 11, of our constitution is as follows: "District courts have original jurisdiction in all cases in law and equity where the claim is for fifty dollars or more."

Of the jurisdiction of such constitutional courts of equity, Mr. Beach, at section 1033, in his work on Modern Equity Jurisprudence, says: "The jurisdiction of chancery over decedents' estates is well established, but in the several states of the Union special courts having jurisdiction over such estates have been generally established, called 'probate courts,' 'orphans' courts,' 'surrogate courts,' and the like; and these ²⁶⁶ possess by statute nearly all the powers formerly possessed by the courts of chancery and ecclesiastical courts in England. Courts of equity have, however, concurrent jurisdiction; and, although their

equitable jurisdiction may have been displaced in ordinary cases by the probate system, yet it is not abrogated by statutes conferring jurisdiction on probate courts. And it has been held that an act providing that probate judges shall have exclusive original jurisdiction in matters concerning decedents' estates is void, as in contravention of an organic act conferring upon other courts chancery as well as common-law jurisdiction." A great many cases are cited in the notes to this section in support of the views of the author.

We think it cannot be claimed that the district court, as a court of general original common law and equity jurisdiction, did not, at least, have concurrent jurisdiction of this action with the district court sitting as a probate court. The learned judge who presided over the probate department of the district court when this suit was instituted held that the court of probate had no jurisdiction. Whether this view of the matter is right or wrong, it is not necessary now to determine. In the great number of cases reported and cited in the briefs of the same character as this, we have not discovered that it has been questioned that courts of general chancery jurisdiction were the proper tribunals for trial. *Owens v. McNally*, 113 Cal. 444, decided by the supreme court of California July 23, 1896, is a case for specific performance of a contract, and is very like this one in its main facts. In that case the general equity jurisdiction of the superior court was not questioned, and this case was decided long after *In re Burton's Estate*, 93 Cal. 459.

We deem it unnecessary to examine in detail the great number of authorities cited by counsel, pro and con, upon this question. We think the conclusion that the trial court had jurisdiction of this cause is in harmony with the views of this court expressed in *Chadwick v. Chadwick*, 6 Mont. 566; *State v. Second Judicial Dist. Court*, 18 Mont. 481; and *In re Higgins' Estate*, 207 15 Mont. 474. All these cases define and limit the jurisdiction of district courts sitting as courts of probate.

Counsel for the appellants attacked the complaint in the court below by general demurrer, and now urge in this court that upon the allegations thereof the plaintiff is not entitled to relief. It is urged that, at the time of the execution of the written contract of adoption alleged in the complaint to have been made by and between the mother of plaintiff and the deceased, there was no statute in Montana authorizing the adoption of children, that such contracts were not permissible under the

common law, and that, therefore, the plaintiff cannot inherit any part of the deceased's estate, under the facts stated in her complaint.

In answer to this proposition it is manifest that counsel for the plaintiff are not seeking to recover under the written contract of adoption. It is not contended that plaintiff was legally adopted by deceased by such contract. It is contended that the deceased intended thereby to adopt the plaintiff as his child and heir, and thought he had done so, but that, as such contract was not authorized by law, there was in reality no such adoption of plaintiff. But it is further urged on the part of the plaintiff that under the terms of the contract, and allegations of the complaint, it is shown that plaintiff was to receive or have a child's share of the estate of the deceased at his death. It is alleged that plaintiff performed her part of this contract, and that the deceased partly performed his part thereof, but died without having conveyed a child's part of his estate to the plaintiff. It is claimed on the part of plaintiff that, although the contract is invalid as a contract of adoption, it is good and sufficient as a contract to leave the plaintiff a child's share of the deceased's estate at his death. The complaint alleges, in addition to the deceased's agreement to adopt plaintiff, that he "further agreed that on his death she should receive a child's share of his said estate." The question then is, Will a court of equity enforce this part of the contract if it shall be satisfactorily proved?

In *Jaffee v. Jacobson*, 1 C. C. A. 11, 48 Fed. Rep. 21, the court, ²⁸⁸ discussing this question, says: "We concede the law to be that a court of equity will specifically enforce a promise to leave to another the whole or a definite portion of one's estate, as a reward for peculiar personal services rendered or other acts done by the promisee, which are not susceptible of a money valuation, and were not intended to be paid for in money, provided the consideration has been substantially received at the promisor's death; and it is no objection to the enforcement of such a contract that it was entered into with a third party for the promisee's benefit, if the latter has acted under it and executed it. Such seems to be the substance of the rule fairly deducible from the authorities cited and relied upon by appellant's counsel: *Rhodes v. Rhodes*, 3 Sand. Ch. 279; *Van Dyne v. Vreeland*, 11 N. J. Eq. 371; *Sutton v. Hayden*, 62 Mo. 102; *Sharkey v. McDermott*, 91 Mo. 648; 60 Am. Rep. 270; *Haines v. Haines*, 6 Md. 435; *Pomeroy on Specific Performance of Contracts*, sec.

114, and citations." In *Godine v. Kidd*, 64 Hun, 585, 19 N. Y. Supp. 335, a case almost exactly like the one at bar, especially in the particular that the adoption of a child was attempted in the absence of a statute authorizing it, the court said: "Even though we should assume, therefore, that none of the arrangements between the parties was of original binding obligation upon the defendant's parents, yet the subsequent performance and fulfillment thereof by defendant and her parents, so that thereby the Knapps actually got all they bargained for, would furnish a sufficient consideration to support their promises as effectually as if the agreement had been of original binding obligation. What the Knapps bargained for was, at the very least, forbearance by and on the part of defendant's parents of some of their rights, and was an adequate and sufficient consideration for their promises and undertakings. . . . The adequacy of the consideration is for the parties to consider at the time of making the agreement—not for the court when it is sought to be enforced. Here, with the consent of the defendant's parents, the Knapps obtained the privilege of supervising and directing the defendant's education, her life, habits, and tastes, the formation ²⁶⁹ and development of her character, and the privilege of treating her as their own daughter, and of being regarded and loved by her as her parents. They at the time were childless, and were, no doubt, actuated by the same feelings and instincts which ordinarily move lonely and childless people to adopt as their own the child of others; and that there was resultant benefit to them is abundantly established by the evidence. The defendant not only regarded them as her parents, but in all respects conformed to the strictest requirements of an affectionate and dutiful child. Upon these facts, who would question the worth, adequacy, and sufficiency of the consideration received by the adopting parents? Lives that are drear and blank are thus oftentimes cheered and animated, and filled with new hopes and ambitions, fresh impulses, and awakened energies. These are the contributions of youthful love and affection and companionship to childless old age. But, whether or not the results expected from adopting the defendant were in all respects realized, this in no way affects the adequacy of the consideration moving from the parents of the defendant, and supporting the promise made by the Knapps."

In *Sharkey v. McDermott*, 91 Mo. 647, 60 Am. Rep. 270, the plaintiff, when a child, was given by her mother, a widow, to James and Catharine McLaughlin, under an agreement that the

McLaughlins would care for her and adopt her as their child, "and leave her their property at their death." They neglected to formally adopt the plaintiff. James McLaughlin willed all his property to Catharine, and died. Catharine died suddenly, leaving no will. The plaintiff sued the heirs-at-law of Catharine McLaughlin for a specific performance of the contract made with the McLaughlins. In this case, speaking of that part of the contract of the McLaughlins to leave the plaintiff their property at their death, the court said: "But the rights of plaintiff, if any, in this case, do not spring either from the general law applicable to parent and child, or from said statute authorizing the adoption of children, for the reason that plaintiff was not the daughter of these parties by nature, nor had she been formally adopted by them by deed duly ²⁷⁰ executed as the statute requires. Her rights in the premises, if any, depend, we think, entirely upon said agreement, and the action had thereunder by the parties thereto. This agreement was not merely and solely one to adopt the plaintiff, but was in part to leave the plaintiff the property at their death. The fact that the parties, and each of them, may have failed and neglected to execute it, so far as the adoption was concerned, should not, we think, exonerate them from its further obligation to transfer their property, when they could no longer use it, to plaintiff; but if the plaintiff is without the status of an adopted child, through no fault of her own, but through the neglect of those so promising, this is only additional ground for the enforcement of the contract as to the disposition of the property, if the necessary equitable facts and circumstances are properly alleged."

In *Healey v. Simpson*, 113 Mo. 340, the court held that where a written contract for the adoption of a child is invalid because not executed in conformity with the law of the state, yet where such contract also provided that the child should have and inherit from the estate of the promisors in the same manner and to the same extent that a child born of their union would inherit, such part of the contract would be specifically enforced in favor of the heirs of the promisee against the heirs of the promisors. In this case the court cites a large number of authorities, and sums up its views in the following forcible language: "The surrender by the mother of all control of the child, and the services and companionship of the latter, constituted valuable considerations for the promise of Brewster and his wife that she should have and inherit from the estate of said parties . . . in the same manner and to the same extent that a child born of their

union would inherit.' The influences of a child of tender years in the home circle are too sacred and holy to be estimated in dollars and cents. And when the mother sent her child to dwell in another family in a distant state, she yielded much affection and love; and Brewster by the same act gained the companionship of one who added much, no doubt, to his ²⁷¹ enjoyment of life. The sundering of natural ties, and the formation of artificial ones, for the enjoyment and gratification of the party at whose instance this is done, is held, and ought to be held, to be such a consideration as the courts will recognize as valuable, where the other party has in good faith acted on and carried out the agreement on his part. This is upon the principle that the parties cannot be put in statu quo. In the very nature of things, nine years in the life of a child so change conditions that it is out of the power of an earthly tribunal to restore the parties to their original situation and environment, and the courts therefore compel them to stand upon and abide by the record they have made."

In *Owens v. McNally*, 113 Cal. 444, the supreme court of California held that "a parol contract by decedent to leave plaintiff all his property, real and personal, if she would leave her home, and thereafter 'live with him and care for him,' is not so vague and uncertain as to preclude specific performance in an ordinary case."

In this case the court adopts with approval the following language of the supreme court of New Jersey, found in the leading case of *Johnson v. Hubbell*, 10 N. J. Eq. 332, 66 Am. Dec. 773: "There can be no doubt but that a person may make a valid agreement binding himself legally to make a particular disposition of his property by last will and testament. The law permits a man to dispose of his own property at his pleasure, and no good reason can be assigned why he may not make a legal agreement to dispose of his property to a particular individual, or for particular purpose, as well by will as by conveyance, to be made at some specified future period, or upon the happening of some future event. It may be unwise for a man to embarrass himself as to the final disposition of his property, but he is the disposer by law of his own fortune and the sole and best judge as to the manner and time of disposing of it. A court of equity will decree a specific performance of such an agreement, upon the recognized principles by which it is governed in this branch of its jurisdiction.

This case collates what the court calls "a multitude of au-

thorities," ²⁷² and, after considering them thoroughly, the conclusion is reached that the rule announced "is supported by the overwhelming weight of authority."

In most of the cases quoted above the promisors attempted in some manner to defeat the contracts entered into by them, and the courts, notwithstanding, enforced them—in several instances against the heirs and assignees of the promisors. In this respect the case at bar, as stated in the complaint, is a stronger one than any case cited above; for, as far as the allegations of the complaint are concerned, or any inference therefrom, the promisor in this case never in his lifetime sought to evade or defeat the contract it is alleged he made with, or for the benefit of, the plaintiff, but, as far as can be inferred, even from the complaint, died believing he had, by a proper contract, adopted the plaintiff, and contracted therein to leave her a child's share of his estate at his death; so that we are of the opinion that the contract on the part of the deceased to leave to the plaintiff a child's share of his estate is sufficiently alleged in the complaint, and that such contract should be enforced, if sufficiently established by the proof. We come to this conclusion more readily as we are of the opinion that the parties to the alleged contract never contemplated that the services of plaintiff were to be or could be compensated in money, and because the parties cannot now be placed in statu quo. Besides, there are no intervening rights of third parties or innocent holders of the estate involved. There is nothing harsh or hurtful to anyone in such proceeding. No fraud or imposition is alleged, or hinted at even, in the record. So that if the contract as alleged is clearly established, as we think it must be, it should, in equity, under the great weight of authority, be enforced: *Van Dyne v. Vreeland*, 11 N. J. Eq. 370; *Brinton v. Van Cott*, 8 Utah, 480; *Townsend v. Vanderwerker*, 160 U. S. 184; *Pflugar v. Pultz*, 43 N. J. Eq. 440.

Is the contract to leave to the plaintiff a child's share of the estate of deceased at his death sufficiently established by the evidence to authorize a court of equity to decree a specific performance ²⁷³ thereof? Mr. Foot, an insurance agent, drew the contract. He is not certain, but thinks there was something in the contract about making plaintiff Smith's heir. He has no positive recollection as to whether the contract provided that she should inherit as Smith's own child. He knows that Smith wanted a contract showing his intention to adopt plaintiff. The mother of the plaintiff testifies positively that the contract did

contain the provision that plaintiff should have a share of his estate at the death of Smith, as his child—his only child. She says Mr. Foot read the contract over to her twice after it had been signed by the Smiths. We see no such conflict as is contended for between the evidence of these two witnesses. Mr. Foot does not recollect as distinctly as the mother. He does not contradict her. It is not strange that his memory should not be as good as the mother's in respect to the provisions of this contract. He was, perhaps, in the habit of drawing contracts for people. It is fair to suppose the mother was not. Mr. Foot had no particular reason for remembering the terms of this contract. The mother did. It was to her, perhaps, the most important document she ever executed. It concerned immediately the welfare and happiness of her daughter. It is not strange, then, that the terms of this contract, which was to influence so largely the happiness and destiny of her daughter, should make a deep and lasting impression on her mind. And, besides, if, as Mr. Foot says, Mr. Smith wanted a contract written showing his intention to adopt plaintiff, it is fair to presume that the contract, as prepared, did contain something about making plaintiff his heir, or providing that she should have a child's share of his estate at his death. Such would have been the effect of a legal adoption. From Mr. Foot's evidence, Smith wanted and intended to legally adopt plaintiff. But if any real conflict existed between these two witnesses, let us look further at the evidence. This written contract, as shown by the record, has been lost or destroyed. It is shown by the neighbors of the Smiths—very many of them—in substance, that deceased dearly loved the plaintiff. He spoke of her to some as his ²⁷⁴ heir—as his adopted daughter. He introduced her to others as his daughter. He so treated and cared for her for years. Then, when she was to be married, he insisted it must be at his house. She married with his consent and approval. She received his blessing as if his own child. He gave to her a home as a man would to his own daughter. When plaintiff's child was born, the deceased congratulated and felicitated himself upon the happy event of being a grandfather. And it seems that in a biographical sketch of Mr. Smith, published in the history of Montana, he states that he had adopted plaintiff. From all the declarations and acts of the deceased, as shown by the record, it seems clear to our minds that deceased not only intended to make such a contract as would permit the plaintiff at his death to have a child's share of his estate, but that he did make such

contract. The record shows that the deceased entertained great affection for the plaintiff. She occupied perhaps a closer relation and position to his heart, in his old and childless days, than any other person on earth. It is not to be wondered at, then, that he should desire to make suitable provision for her happiness and maintenance. A jury has found that he did make such a contract as would carry out his intention and desire in this respect. Hon. Henry N. Blake, the judge who tried the case, approved the findings of the jury in this respect, as well as in every issue submitted to them. Hon. Henry C. Smith, the successor in office of Judge Blake, heard the motion for a new trial, and overruled it; holding, in an ably written opinion, that the contract in question was clearly established by the proof. After the finding of this issue in favor of the plaintiff by the jury, and the action of two chancellors in adopting and approving such finding as clearly established by the proof, we must hesitate to disturb and reverse such action and result. We think such disposition of the case is but the carrying out of the cherished intention and desire and contract of the deceased in relation to his estate. The deceased had the right to dispose of his property as he pleased, and his contract to dispose of it, when free from fraud, imposition, and surprise, and being reasonable and ²⁷⁵ moral, will be carried out and enforced by a court of equity. This is equity. This is right. It is real justice to carry out and enforce such contracts according to the intention of the parties in such cases: *Leyson v. Davis*, 17 Mont. 220.

Counsel for appellants contend that the evidence of the witnesses as to the acts and declarations of deceased with reference to the relation plaintiff sustained toward him while living in his family were inadmissible. We think the *res gestae* extended over the entire time between July, 1885, when the contract is alleged to have been made, to the death of the deceased. The conduct of the parties toward each other during that entire time is part of the transaction, and whatever either party did or said during that time which sheds light upon the matter, and aids in disclosing the relations the parties sustained, and understood that they sustained, toward each other, must be construed as part of the *res gestae*. We think this evidence was admissible, under section 3126 of the Code of Civil Procedure, which is as follows: "Where, also, the declaration, act, or omission forms part of a transaction which is itself the fact in dispute, or evidence of that fact, such declaration, act, or omission is part of the transaction." In nearly all of the cases cited and quoted

above, in cases like this, the acts and declarations of the parties explanatory of their relations toward each other, and disclosing and explaining the conditions, terms, and contracts supporting these relations, have been admitted in evidence.

Counsel for appellants say plaintiff abandoned the performance of her part of the contract with the deceased, or did not sufficiently perform the same to authorize a decree of specific performance. It is also claimed that plaintiff did not yield that obedience to the Smiths that the contract relied on demanded of her.

It is in evidence that on one or more occasions the plaintiff left the home of the Smiths, and on one occasion remained away some time. It is in evidence that plaintiff and Mrs. Smith did not always agree and get along harmoniously. Mr. ²⁷⁶ Smith, it seems, was aware of this, and regretted it. It is not necessary for us to discuss the question as to who was at fault—the child or Mrs. Smith. It is in evidence that Mr. Smith on one of these occasions went after plaintiff, and brought her home; saying at the time he would have her back if it cost him half of his property. The evidence of some of the witnesses is to the effect that Mr. Smith was grieved that his wife and plaintiff sometimes disagreed. But we agree, in relation to these questions of nonperformance of the contract and want of proper obedience on the part of plaintiff, with Judge Smith in his able opinion overruling appellants' motion for a new trial, that these were matters of which Mr. James M. Smith was the sole judge. Smith had no intention on account of these things to rescind the contract. Long after the absences of plaintiff from Smith's home, which are urged as showing an abandonment or nonperformance of the contract on the part of plaintiff, she lived at the Smith home, treated and regarded as a daughter by Smith, without any intimation on his part that he was dissatisfied, or intended to rescind the contract, and so lived there, treated as Smith's child, until her marriage.

We believe we have substantially treated, if not in detail, all the questions presented by this appeal. Some minor matters, such as who destroyed the contract, whether deceased left a will, and whether plaintiff was driven from the Smith home by ill-treatment of Mrs. Smith, we think immaterial. We think that it is sufficiently alleged in the complaint, and established by the proof, that deceased contracted to leave plaintiff a child's share of his estate at his death—conditioned, of course, upon her performing the contract on her part. We think it is shown

that she did perform the contract to the satisfaction of the deceased, the sole judge of those matters. We believe it was the desire and intention of the deceased that the plaintiff should have a child's share of his estate at his death, and that he contracted, and intended to contract, to that effect. We see no reason why, under the facts and circumstances of this case, the wishes and contract of the deceased in ²⁷⁷ the premises should not, equitably, and in justice to all parties interested, be carried out and enforced.

The judgment, decree, and order appealed from are affirmed.

Hunt and Pigott, JJ., concur.

JURISDICTION—ESTATES OF DECEDENTS—EQUITY—PROBATE COURTS.—Although the settlement of the estates of deceased persons is committed to probate courts by statute, courts of equity have concurrent jurisdiction, with courts of probate, of such matters, and will exercise it when the powers of the probate courts are inadequate for the purposes of perfect justice: *Trotter v. Mutual etc. Life Assn.*, 9 S. Dak. 596; 62 Am. St. Rep. 887, and note.

SPECIFIC PERFORMANCE TO DEVISE.—A contract to make a will may be enforced, and, if not performed, a recovery may be had for its violation: *Note to Grant v. Grant*, 38 Am. St. Rep. 393. If a young child is given by its parents to its uncle and aunt to be as their own, under an agreement to adopt and rear it, to nurture and educate it, and, at their death, to leave it all their property, and it takes their name, not knowing its own father and mother, but recognizing its uncle and aunt as such, and lives with them for a number of years, and until they die, possessed of real property which they do not, either by deed or will, transfer to it, there is such a part performance by the parties as will entitle the child to a decree giving it the title to the property, by way of specific performance of the contract: *Kofka v. Rosicky*, 41 Neb. 328; 43 Am. St. Rep. 685. But compare note to this case and *Grant v. Grant*, 63 Conn. 530, 38 Am. St. Rep. 379, showing the effect of a parol agreement to make a will.

RES GESTAE—GENERAL RULE.—*Res gestae* are the circumstances, facts, and declarations which grow out of the main fact, are contemporaneous with it, and serve to illustrate its character: *Pinney v. Jones*, 64 Conn. 545; 42 Am. St. Rep. 209.

KELLY v. CLARK.

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PLEADING—DISREGARDING SURPLUS ALLEGATIONS. If a plaintiff avers more than is necessary, and fails to sustain immaterial and redundant averments, but does prove all the material facts upon which a right to relief is based, and no motion to correct the pleading has been made, it will be treated as sufficient, and the surplus allegations disregarded.

CORPORATIONS—UNPAID STOCK—ENFORCEMENT OF SHAREHOLDER'S INDIVIDUAL LIABILITY—PROOF OF AC-

TUAL FRAUD.—The plaintiff, in an action to enforce the statutory, individual liability of a stockholder of a corporation for unpaid stock need not prove actual fraud, where the shareholder, with full knowledge of the facts, has taken stock for property, the par value of which stock was known, at the time of its issuance, to be grossly in excess of the fair value of the property acquired by the company, but can recover upon allegations sufficient to admit such proof, though he fails to prove other allegations in his pleading charging actual, intentional fraud on the part of the shareholder sued. All that he is required to prove is a fraud upon the law, and a deliberate and advised overvaluation of the property so taken is such a fraud.

CORPORATIONS—UNPAID STOCK — ENFORCEMENT OF SHAREHOLDER'S INDIVIDUAL LIABILITY—PROOF OF LEGAL FRAUD.—All that is necessary to establish legal fraud, in an action to enforce the statutory, individual liability of a stockholder of a corporation, who has taken stock for property, and to take the stock out of the immunity assured to stock honestly issued, is to prove two facts: 1. That the stock issued exceeded in amount the value of the property, in exchange for which it was issued; 2. That the officers of the corporation, deliberately and with knowledge of the real value of the property, over-valued it, and paid in stock for it an amount which they knew was in excess of its actual value.

CORPORATIONS—UNPAID STOCK—ENFORCEMENT OF SHAREHOLDER'S INDIVIDUAL LIABILITY — RESORT TO EQUITY.—If a statute making stockholders of a corporation individually liable to its creditors to the amount of their unpaid stock for all acts of the company until the whole amount of stock subscribed for shall have been paid in does not prescribe any remedy, a judgment creditor whose execution against the corporation has been returned nulla bona, may obtain adequate relief in equity against the stockholders.

MINES—MINING COMPANIES—LIABILITY FOR UNPAID STOCK.—The doctrine that the shareholders of a corporation are liable for unpaid subscriptions, when stock has been issued for property at an overvaluation, is applicable to mining corporations as well as to others.

MINES—MINING COMPANIES—FRAUD UPON CREDITORS—ILLUSTRATION—LIABILITY FOR UNPAID STOCK.—Notwithstanding a statute which enables the trustees of a corporation to purchase mines necessary for their business, and to issue stock to the amount of the value thereof, which stock so issued shall be declared and taken to be the full paid stock, and not liable to any further call, if they purchase a mine which the stockholders know is worth not over one hundred and twenty-five thousand dollars, and pay for it in stock whose par value is seven million five hundred thousand dollars, which stock the shareholders, with full knowledge of the facts, repurchase at two and one-half per cent of its par value, the transaction is fraudulent as to a creditor, and the stock will be treated as unpaid to the extent of the difference between the actual value of the mine and the nominal value of the stock, where the constitution prohibits the issue of stock for property not actually received, and declares void all fictitious increase of stock, and where the statute makes all the stockholders individually liable to creditors, to the amount of their unpaid stock, for all acts of the company, until the whole amount of stock subscribed for shall have been paid.

MINES—MINING COMPANIES—HOLDER OF SHARES, WHO IS—LIABILITY FOR UNPAID STOCK.—If mining stock is issued to a person having knowledge of all the surrounding facts, he becomes its holder and cannot escape his statutory, individual

liability to creditors of the corporation, for an unpaid balance, on the ground that he did not sign the stock subscription list; and especially is this true where he accepted the stock issued to him with knowledge that it was issued for a mine worth only about one and two-thirds per cent of the total stock subscribed.

CORPORATIONS—LIABILITY ON UNPAID STOCK FOR TORTS OF.—A holder of unpaid stock in a corporation is answerable for the torts of the company under a statute which makes all stockholders individually liable to the amount of their unpaid stock "for all acts of" of the company until the whole amount of stock subscribed for shall have been paid. Liability for "acts of" the corporation plainly includes liability for claims for damages consequent upon torts.

CORPORATIONS — CREDITOR'S CAUSE OF ACTION AGAINST SHAREHOLDER ACCRUES, WHEN.—No cause of action accrues in favor of a creditor of a corporation against a shareholder thereof, who is liable on unpaid stock for a tort of the corporation, until the creditor has liquidated his claim, or reduced it to judgment, and has, except where it appears useless to proceed against the company, failed to make the amount of his ascertained claim, or judgment, out of the assets of the corporation.

Suit by Charles Kelly against Joseph K. Clark, the Fourth of July Mining Company, and others. The defendant mining company was organized as a corporation on December 19, 1889. Its capital stock named in the articles of incorporation was \$7,500,000, consisting of 750,000 shares of \$10 each. The articles were signed by J. K. Pardee, S. T. Hauser, E. Zimmerman, W. F. Sanders, T. H. Kleinschmidt, J. K. Clark, and L. Teuscher. These persons were named in the articles as trustees, and became the trustees of the corporation, which was immediately perfected in its organization by the election of the defendant, J. K. Clark, as president, S. T. Hauser, as vice-president, T. H. Kleinschmidt, as treasurer, C. B. Garrett, as secretary, and J. K. Pardee as manager. At a meeting of the trustees, on December 19, 1889, the corporation accepted a proposition from J. K. Pardee to exchange its entire issue of capital stock for a seven-eighths interest in the Fourth of July Mine, and such interest was conveyed to the corporation. The trustees thereupon directed that the company deliver to T. H. Kleinschmidt, trustee for J. K. Pardee, by agreement with the said trustees, all of the capital stock of said company, to be distributed by Kleinschmidt as Pardee should direct. The complaint alleged that this transfer was brought about by the trustees for the purpose of fraudulently relieving themselves and other stockholders from personal liability on their stock. Other material averments of the complaint as to this transaction and transfer are in the opinion. The complaint then averred that the plaintiff had, on June 28, 1894, recovered a judgment against the defendant mining com-

pany in the sum of \$15,600 and costs, for damages on account of personal injuries received by the plaintiff while in the service of the defendant company and under contract with it; that execution had issued upon the judgment, but that it was returned wholly unsatisfied; and that the defendant mining company was wholly insolvent. The prayer of the complaint was to have the defendants decreed to be the holders of unpaid stock, and that each should pay into court the amount to which the stock held by him was unpaid, until enough should be paid to satisfy the plaintiff's claim. Clark, in his answer, averred his good faith in the transaction mentioned, asserted that the mine was of the reasonable value of \$7,500,000, and denied the fraud alleged in the complaint; and also alleged, for an affirmative defense, that the injury suffered by the plaintiff, and for which he recovered judgment, was received by him more than three years before the commencement of this action, and that all the stock which he ever bought or owned in the defendant company was so bought more than four years prior to the commencement of this action. All of the defendants were exonerated except Clark, who was held liable for the plaintiff's claim. He appealed from an order denying his motion for a new trial.

Clayberg & Corbett, John B. Welcome, William H. De Witt, and Thomas C. Bach, for the appellant.

C. B. Nolan and T. J. Walsh, for the respondent.

314 HUNT, J. Appellant's counsel, in their opening brief, declare they find difficulty in telling whether the respondent's action was brought upon the theory that defendant was liable, as a subscriber of stock, for the difference between what he actually paid therefor and the par value thereof, or whether it is sought to charge appellant with fraud, as a director of the company. This difficulty arises, argue counsel, because it appears by the complaint that the theory of respondent is that the trustees fraudulently, and to relieve themselves of personal liability, caused all the capital stock to be issued to Pardee in payment of the property, which they claim was of the value of only \$75,000. Counsel say: "Actual fraud" is charged, but, because it is not alleged or proved how Kelly was put in any different position by reason of the issuance of the stock in payment of the property in excess of its actual value than he otherwise would have been, they conclude no damage was proved to have come to him. Solution of this difficulty being of importance, an exami-

nation of the findings of the jury is appropriate in order to understand the exact facts to which must be applied the principles that should control.

Considerable testimony was heard bearing directly upon the issues submitted to the jury, and the following facts were found: 1. That the trustees of the corporation, when they directed the issuance of 750,000 shares of stock in payment of a seven-eighths interest in the mine, did not actually believe that the said interest was worth the par value of said stock, namely, \$7,500,000; 4. That the par value of the seven-eighths interest in the mine at the time of the purchase by the trustees of the corporation was \$125,000; 5. That the trustees of the corporation, at the time they agreed to issue all of the stock of the company to Pardee et ³¹⁵ al. in payment of a seven-eighths interest in the mine, knew, or might have ascertained by the exercise of reasonable diligence, that the par value of the stock paid for such interest was in excess of the actual value of the property purchased; 6. That the defendant Clark, in taking part at the meeting of the trustees of the corporation held on December 19, 1889, did not participate therein with the intent to relieve himself or other stock purchasers from a personal liability to the stock that he or they might acquire; 7. That from information of the mine that defendant Clark had on December 19, 1889, there was no reasonable ground to believe that a seven-eighths interest was apparently worth the amount of the par value of the shares; 8. That Clark at that time did not honestly believe that a seven-eighths interest in the mine was apparently worth the amount of the par value of the shares; 9. That the apparent value of a seven-eighths interest in the mine at that time was not the amount of the par value of the shares; 10. That the defendant Kleinschmidt, in participating at the meeting of the corporation of December 19, 1889, did not intend to relieve himself or other stock purchasers from a personal liability on the stock that he or they might acquire.

A motion was made to the district court to reject the findings of the jury, with the exception of those numbered 6 and 10. This was denied, and all the findings of the jury were adopted by the court except 6 and 10, and in addition the court found as follows: 11. That all of the stock of the corporation standing in the name of Kleinschmidt, with the exception of 250,000 shares, were held by him as trustee for Pardee, under the trust agreement referred to in the complaint; 12. That the remaining 250,000 shares held by said Kleinschmidt were held by him as

trustee for the company, and were treasury stock, donated to the corporation by Pardee at the first meeting of its board of trustees after the agreement between him and the company by which the entire issue of the ³¹⁶ capital stock was to be paid to him for a seven-eighths interest in the mine; 13. That all the stock issued to Kleinschmidt was issued to and stood on the books of the company in the name of T. H. Kleinschmidt, trustee, and that the trust in Kleinschmidt for Pardee and the company was created by direct resolution and previous authority of the company itself, and that the company was privy to the creation of both trusts.

The learned judge who presided at the trial of the case drew the following conclusions of law: 1. That defendants Kleinschmidt and Seligman were not liable for the claim of the plaintiff; 2. That the defendant Clark was liable.

What led to the exoneration of any defendants other than Clark is immaterial. The case before us presents for consideration Clark's attitude only.

We regard this action as one brought to collect from Clark, a stockholder in the Fourth of July Mining Company, a corporation organized under chapter 25 of the fifth division of the Compiled Statutes of the state of Montana of 1887, the amount of a judgment debt against the corporation, under the provisions of section 457 of chapter 25.

That section provides as follows: "The stockholders of every company incorporated under the provisions of this article (chapter) shall be severally and individually liable to the creditors of the company in which they are stockholders, to the amount of unpaid stock held by them respectively, for all acts of and contracts made by such company, until the whole amount of capital stock subscribed for shall have been paid in."

The respondent's complaint is in the nature of an equitable petition, instituted in behalf of himself and all the creditors of the corporation, upon the ground that defendant holds a large amount of unpaid stock, and that by the statute he is individually liable to the amount of such unpaid stock for the acts of and contracts made by the Fourth of July Company, until enough of the capital stock held by him shall be paid in to satisfy respondent's claim. That such is the main theory ³¹⁷ upon which the respondent proceeded is evident by the pleadings, by the evidence, and by the judgment. The complaint substantially averred that defendant Clark owned 173,800 shares of the stock of the company; that 750,000 shares were transferred for

a seven-eighths interest in a mine, worth no more than \$75,000; and that the trustees, of whom defendant was one, knew at the time of the conveyance of the mining interest referred to that such seven-eighths interest was worth no more than \$75,000; that the defendants and certain others, knowing that the mine was not worth more than \$75,000, agreed to organize the corporation, and that the capital stock thereof should be \$7,500,000; that each member of such association agreed to take, and did take, a certain number of shares in the company, at twenty-five cents per share; that defendant, having taken his shares with the full knowledge that the par value of the stock exchanged for the mining property was grossly in excess of the true value of the property, and, having full knowledge of the transaction antecedent to the issuance of the stock, thereby became the holder of unpaid stock except in the proportion of \$75,000 to \$7,500,000. The prayer is to have defendants decreed to be holders of unpaid stock, and that they each pay into court the amount to which the stock held by him is unpaid, until enough shall be paid to satisfy plaintiff's claim.

These allegations were sufficient to permit plaintiff to prove that the stock had not all been paid in, as required by section 458, fifth division, of the Compiled Statutes, which is as follows: "The trustees of such company may purchase mines, manufactories, and other property necessary for their business, and issue stock to the amount of the value thereof in payment thereof, and the stock so issued shall be declared and taken to be full stock, and not liable to any further call; neither shall the holders thereof be liable for any further payments under the provisions of section 457 of this chapter; but in all statements and reports of the company to be published, this stock shall not be stated or reported as being issued for cash paid into the company, but shall be reported in this respect, according to the facts": *Boynton v. Hatch*, 47 N. Y. 225.

³¹⁸ The findings establish that the stock was not paid in as required, and that the seven-eighths interest in the mine was worth only one and two-thirds per cent of the paid-up value of stock exchanged for it. Evidential matters contained in the complaint, reciting the history of the formation of the corporation and the *modus operandi*, are not inconsistent with the theory pursued, and upon which recovery was had. It may be true that plaintiff believed that actual fraud was a necessary element of his case—that is, that to recover it was essential to prove that defendant intended, when the exchange of the stock for the mine

was made, to relieve himself from personal liability to the stock that he might acquire; but even so, still plaintiff should not be turned out of court unless actual fraud is necessary in order to prove the statutory liability. If fraud can be proved by showing that the managers of a corporation have advisedly issued stock for property, the par value of which stock was known at the time of its issuance to be grossly in excess of the fair value of the property acquired by the company, the plaintiff, in an action to enforce the individual liability of a stockholder who has taken with full knowledge of the state of affairs, can recover upon allegations sufficient to admit such proof, even though he has failed to prove other allegations in his pleading wherein he has charged actual intentional fraud on the part of the shareholder sued. This is upon the principle that if a plaintiff aver more than is necessary, and fail to sustain immaterial and redundant averments, but does prove all the material facts upon which a right to relief is based, and no motion to correct the pleading has been made, it will be treated as sufficient, and the surplus allegations disregarded.

Defendant's counsel, though, exaggerated the difficulty complained of. There was no misunderstanding of the real basis of plaintiff's cause of action when they wrote their supplemental brief, wherein they argue that it appears from the pleadings, and particularly from plaintiff's complaint, that plaintiff did not rely, and could not have relied, upon the fraud which is made the basis of this action, for the reason that ³¹⁹ plaintiff asserts his cause of action against the company is by reason of a judgment, on account of personal injuries. Again, they thus refer to plaintiff's attitude: "He invokes the rule that the persons who perpetrated the fraud of which he complains are personally liable to him because of the fraud which they perpetrated, and at the same time shows that he could not have relied upon any such fraudulent misrepresentation, and that he could not have been induced to take the company as his debtor or to become the creditor of the company upon the theory that the shares of stock were fully paid up, and that the corporation had \$7,500,000 worth of assets." Appellant's counsel then argue that plaintiff has not brought himself within the rule of equity which he invokes, but from which he "has expressly excluded himself by his pleading."

Respondent is not denied relief in equity. The statute imposing the individual liability upon the shareholder prescribes

no remedy, and gives no form of redress. In this respect it differs from somewhat similar laws of several states; for instance, Missouri, where, under section 2517 of the Revised Statutes of Missouri of 1889, execution may run directly against a shareholder for his liability on unpaid stock, where a judgment creditor of the corporation has issued execution, and the same has been returned nulla bona. But the great current of authority is that creditors in such suits may go into courts of equity, which will afford adequate remedy: *Norris v. Johnson*, 34 Md. 485; *Harris v. First Parish of Dorchester*, 23 Pick. 112; *Crawford v. Rohrer*, 59 Md. 599; *Thompson on the Liability of Shareholders*, sec. 258.

Having now ascertained that plaintiff and defendant are not far apart in their lines of thought as to the scope of the issues raised by the pleadings and findings, we can proceed upon the deduction that there is no reliance upon actual intentional fraud; that that theory is eliminated from the case; and that, therefore, if the action can be sustained, it must be because fraud upon the law flows as a necessary legal inference from the facts that have been found.

The findings of fact adopted by the court are not attacked ³²⁰ for insufficiency of evidence to justify them. We have, nevertheless, scrutinized the testimony in trying to arrive at a proper answer to the main legal proposition necessary to be decided. We have viewed the matter from several standpoints. We have considered that it was a mine that the corporation was giving its stock for, and that the purposes of the company were mining; also, that the value of mining property is honestly often inmoderately rated by those who estimate its probable value by some slight indication of an ore body of commercial worth. We have considered the showing made by the development work on the property when the corporation was created. We have made every reasonable allowance for the unwarranted hopes of fortune that doubtless filled the minds of the defendant and his associates when they launched their enterprise upon the commercial world. We have even included allowances of fair profit to the promoter in trying to get at the fair value of the entire property as it was turned over to the company. But with all this there is nothing to contradict or shake the effect of the evidence from which it appears so clearly that there was absolutely nothing substantial upon which any man possessed of the most ordinary business capacity could have believed that \$7,500,000 was the reasonable value of a seven-eighths interest

in the Fourth of July Mine. It must, therefore, stand as true that the property which the corporation received from Pardee as full payment for the stock was worth only \$125,000 when turned over to the company.

Authority to trustees of corporations to purchase mines, manufactories, and other property necessary to their business, and issue stock to the amount of the value thereof in payment therefor, which stock so issued shall be declared and taken to be full paid stock not liable to any further calls, is a specific grant of power to buy any species of property necessary to the business of the company by paying therefor in stock; but, in exercising the authority given, the par value of the stock so issued must be put against the fair value of the property purchased. The language "to the amount of the value ^{and} thereof," used in section 458, means the actual or the fairly estimated value of the property exchanged for the shares of stock delivered in payment. Constructions of the language quoted which permit any valuation to be put upon the property which the parties to the transaction please, and to issue in payment therefor stock of a par value grossly in excess of the true value of the property, we believe to be evasive and erroneous. The statute neither allows a grossly excessive value to be put upon the property sold in order to deliver it over in consideration of a large amount of stock, the par value of which is far in excess of the fair value of the property, nor does it authorize property to be sold at far less than its value, in consideration of payment in stock worth on its face more than the property so acquired actually or fairly estimated is worth.

Corporations are generally formed to execute undertakings which individuals cannot carry out with safety or facility, and to avoid personal liability in execution of such projects. But the legislature prescribes the terms of the contract entered into between the people and the incorporators. Entire immunity from individual liability is not invariably incidental to the grant of a charter or articles of corporate existence. If legal conditions are complied with by the organizers of corporations, the immunity follows as a matter of law; but, if they are not, an individual liability to the shareholders arises, imposed by the same power which granted the right of corporate existence, and whereby creditors may make their claims good. Such we believe to be the correct rule, and such we think is the doctrine announced by the courts and text-writers who have reasoned upon the sounder principles of law. We shall not attempt to do more

than cite a few recent cases which sustain our views in clear and unmistakable language.

The supreme court of the United States, by Justice Hunt, in *Upton v. Tribilcock*, 91 U. S. 45, announced this salutary rule: "The capital stock of a moneyed corporation is a fund for the payment of its debts. It is a trust fund, of which the directors are the trustees. It is a trust to be managed ⁸²² for the benefit of its shareholders during its life, and for the benefit of its creditors in the event of its dissolution. This duty is a sacred one, and cannot be disregarded. Its violation will not be undertaken by any just-minded man, and will not be permitted by the courts. The idea that the capital of a corporation is a football to be thrown into the market for the purpose of speculation, that its value may be elevated or depressed to advance the interests of its managers, is a modern and wicked invention. . . . The capital paid in and promised to be paid in is a fund which the trustees cannot squander or give away."

Within these principles, many courts of the highest respectability have laid down rules we have stated. The use of the term "trust fund" we approve of as understood by the late decision of the supreme court in *Hollins v. Brierfield Coal etc. Co.*, 150 U. S. 371, and as substantially followed by our court in *Ames etc. Co. v. Heslet*, 19 Mont. 188; 61 Am. St. Rep. 496. Speaking of property held "in trust" for creditors, Justice Brewer said in the federal case cited: "Yet all that is meant by such expressions is the existence of an equitable right which will be enforced whenever a court of equity, at the instance of a proper party and in a proper proceeding, has taken possession of the assets. It is never understood that there is a specific lien or a direct trust." There is no direct and express trust attached to the unpaid liability of a stockholder as an asset of an insolvent corporation; but an equity does arise in favor of a creditor of such a corporation which will be upheld in the creditor's favor, and which will inure to the benefit of the creditor before it will be held to belong to the separate entity, the corporation itself. A simplified way of expressing the attitude of the creditors of a corporation which is insolvent toward the corporation is to say that in such an event "all the creditors are entitled in equity to have their debts paid out of the corporate property before any distribution thereof among the stockholders": *Wabash etc. Ry. Co. v. Ham*, 114 U. S. 587. That the liability for unpaid ⁸²³ stock is an asset of an insolvent corporation has been frequently decided: *Sanger v. Upton*, 91 U. S. 56; *Hawkins v.*

Glenn, 131 U. S. 319; Hatch v. Dana, 101 U. S. 205; Beach on Private Corporations, sec. 117.

Judge Peckham, in 1890, announcing the unanimous opinion of the court in *Gamble v. Queens County Water Co.*, 123 N. Y. 21, construed the manufacturing act of that state, which is similar to section 458 of the Montana Compiled Statutes. He said: "We think that, under the manufacturing act, the company cannot issue its stock as full paid at anything less than its par value. The act makes special provision for the exercise of the power to issue stock in payment of property purchased by the company. Whatever the right of a corporation under the general powers pertaining to it as a corporation might be, we must look to the provisions of the statute where it specifically grants such power to find the terms and conditions upon which it is to be exercised. By section 2 of chapter 40 of the laws of 1848, the trustees of a manufacturing corporation, founded under the act, are empowered to purchase property necessary for their business, and to issue stock to the amount of the value thereof in payment therefor; and the stock so issued shall be declared and taken to be full paid stock, and not liable to any further calls. We think this language must mean that the amount of the nominal or par value of the stock must be put against the value of the property purchased; otherwise, we should have such a case as \$100 in cash purchasing \$100 of stock at par, under a subscription to the capital stock of the company, while the same \$100, if first turned into property to be sold to the company, might purchase double the quantity of the stock if the stock were only of the actual value of fifty per centum of its par value. The stock would issue only at its actual value in return for property, but, in return for cash, it would only issue at its par value. In other words, if the stock were really worth but fifty per cent of its par value, actual cash would purchase only half as much stock as could ⁸²⁴ be purchased with an equal value in property. This was never meant. And I think the expression that the stock thus issued for property purchased is to be taken as full paid-up stock, and that it is to be issued to the amount of the property purchased, must mean that it is to be issued at its par value.

"It may be said that this construction prevents a corporation from purchasing property and paying for it with its stock, where actual value of the stock is enough below its par value to make the difference in a large purchase very appreciable. That may be so. But it was undoubtedly the object of the

statute to make the full paid stock that is issued the representative, dollar for dollar, of the money or property that has been paid in for its purchase, so that the company would start off in business with money or property of the full value of its paid-up capital."

The supreme court of Missouri, with no dissent, in the very late case of *Van Cleve v. Berkey*, 143 Mo. 109 (decided the same week that the case before us was submitted), in construing a statute permitting subscribers to pay for stock by labor done or property actually received, said: "Where the law permits subscribers to pay for stock by labor done or property actually received, it means that the corporation must receive in labor or property what it was reasonably worth in money. Corporations must own property for the purposes of their legitimate business, and, if a man contracts to take shares in the corporation, he must pay for them, to use a homely phrase, 'in meal or in malt.' He must either pay in money or in money's worth. And it is the rule laid down by the supreme court of this state, which the learned referee seems to have overlooked, that the property or labor turned into the corporation as payment for shares of stock must be a fair, just, lawful, and needed equivalent for the money subscribed."

In *Wallace v. Carpenter etc. Mfg. Co.*, 70 Minn. 321, 68 Am. St. Rep. 530, decided in December, 1897, the supreme court of Minnesota used the following apt language: "A certificate for paid-up shares in a corporation is simply a written statement in the name of the corporation that the holder ³²⁵ thereof is a stockholder, and that the full par value of his shares has been paid to the corporation. If the shares in fact have not been so paid for, the certificate that they have been is a false representation that the assets of the corporation have been increased to the amount of the par value of the stock so issued. And, when a corporation represents that it has a paid-up capital of a given amount, it represents to the business world that, at the time it issued the stock, it received money or property to the full par value of its stock. The issuing of the stock of a corporation as paid up when it is not so in fact is a public and a private wrong—a cheat and a fraud—which enables the corporation to obtain credit and property by false pretenses. Ethically the legislature might, with the same propriety, authorize an individual to misrepresent his assets for the purpose of obtaining credit as to authorize a corporation, other than a mining corporation, to issue watered stock."

In *Stout v. Hubbell*, 104 Iowa, 499, decided after the case at bar was submitted, the supreme court of Iowa said: "For this court has held, as to creditors of a corporation, that when property is received by the corporation, at an excessive valuation, in payment for shares of its capital stock, it is only a payment to the extent of the value of the property received, and that owners of such stock are liable to creditors for the difference between the actual value of the property and the face value of the stock."

To like effect are the somewhat older but modern decisions in *Elyton Land Co. v. Birmingham etc. Co.*, 92 Ala. 407; 25 Am. St. Rep. 65; *Wetherbee v. Baker*, 35 N. J. Eq. 501; *Bailey v. Pittsburg etc. Co.*, 69 Pa. St. 334; *Douglass v. Ireland*, 73 N. Y. 100; *Goodrich v. Dornan* (N. Y. C. P. 1891); 14 N. Y. Supp. 879; *Roman v. Dimmick*, 115 Ala. 233.

There have been numerous contrary decisions, a leading case being *Phelan v. Hazard*, 5 Dill. 45, Fed. Cas. No. 11068, cited to us by appellant. But, not stopping to distinguish the cases, the courts of the United States have not of late followed ³²⁰ *Phelan v. Hazard*, 5 Dill. 45, and we believe it can be safely said that there has been a steady advance in later years to the view that, in exchanging stock for property under a statute similar to section 458, each must be valued honestly at its fair worth, and the amount of stock issued as paid up shall not be greater than the value of the property purchased.

This brings us to the contention that there can be no liability unless it is proven that the shareholder, in assenting to the purchase of property for stock and the overvaluation thereof, and in capitalizing the enterprise, actually intended to perpetrate a fraud upon the creditors of the corporation; in other words, that he intended actually and by furtive motive to perpetrate a fraud. Bearing in mind always that this appellant, Clark, was one of the original parties to the purchase of the mining property referred to in the findings, and actively participated as a trustee in the company formed, and immediately thereafter became a stockholder, with full knowledge of the fact that the stock had been paid for by a seven-eighths interest in the mine, which was knowingly grossly overvalued, the application of the law becomes quite simple. Upon this question, too, there are decisions in support of the appellant's theory, but again we shall curtail the results of our investigation by observing that in the later opinions those principles obtain which we believe to be the more just to creditors generally. Upon what rational basis can it be said that the trustees or share-

holders of a corporation have a right to deliberately take, in payment for the stock of the company, property intentionally and most unfairly overvalued? Where is the authority to do it? What the justification for it in the code to which the trustees must turn? These questions are not replied to by saying that the common law permitted such a practice; for, if it did, section 458 of the laws of Montana (Compiled Statutes 1887), and the constitution, section 10, article 15, do not. Certainly, the common law did allow directors of a corporation to receive property or services in payment for stock, either from original subscribers or from those to whom the original subscribers sell stock; but whether the ³²⁷ common law sanctioned an intentional gross overvaluation of property sold for stock in the corporation is, at least, doubtful. To pursue that inquiry, however, is not important, for the statute (section 458) is the specific grant of power under which the conditions are prescribed as to when the stock is paid up when it has been issued for property, and to that directors and shareholders must look for a guide in their conduct in and about such transactions, while section 457 creates the liability.

In *Terry v. Little*, 101 U. S. 216, Chief Justice Waite said: "The individual liability of stockholders in a corporation is always a creature of statute. It does not exist at common law. The first thing to be determined in all such cases is, therefore, What liability has been created?"

In *Camden v. Stuart*, 144 U. S. 104, Justice Brown clears up evident misapprehension of the former decisions of that court by the following statement: "In view of our decisions in *Sawyer v. Hoag*, 17 Wall. 610, *Scovill v. Thayer*, 105 U. S. 143, and the numerous cases arising out of the failure of the Great Western Insurance Company, it is manifest that the resolution adopted at the directors' meeting of December 29, 1880, that, upon paying \$4,000 or their proportions of the same, the capital stock of \$150,000 should be deemed to be fully paid, was wholly ineffectual as against the creditors of the company. It is the settled doctrine of this court that the trust arising in favor of creditors by subscriptions to the stock of a corporation cannot be defeated by a simulated payment of such subscription, nor by any device short of an actual payment in good faith. And, while any settlement or satisfaction of such subscription may be good as between the corporation and the stockholders, it is unavailing as against the claims of the creditors. Nothing that was said in the recent cases of *Clark v. Bever*, 139 U. S.

96, *Fogg v. Blair*, 139 U. S. 118, *Handley v. Stutz*, 139 U. S. 417, was intended to overrule or qualify in any way the wholesome principle adopted by this court in the earlier cases, especially as applied ³²⁸ to the original subscribers to stock. The later cases were only intended to draw a line beyond which the court was unwilling to go in affixing a liability upon those who had purchased stock of the corporation, or had taken it in good faith in satisfaction of their demands."

And in *Lloyd v. Preston*, 146 U. S. 630, it was held a bona fide creditor of a corporation could enforce actual payment by the subscribers to the capital stock of the company where the evidence was convincing that the overvaluation of the property transferred to the railway company in pretended payment of the subscription to the capital stock was so gross and obvious as, in connection with other facts, clearly established a case of fraud.

It is not necessary to show an actual fraudulent intent in order to establish a legal fraud. "Simulated payments," as the supreme court in *Handley v. Stutz*, 139 U. S. 417, 11 Sup. Ct. 530, calls payments of subscriptions to capital stock where property is grossly and obviously overvalued, do not constitute excuses for defeating the trusts arising in favor of the creditors of a corporation.

The quantum of proof essential in actions similar to this one has been directly considered by several courts. In *Douglass v. Ireland*, 73 N. Y. 100, it was said: "A deliberate and advised overvaluation of property . . . is a fraud upon the law. . . . It is in a direct violation of the policy as well as the terms of the law, which demand payment either in money or property at its value of all the capital stock of the company as a condition of immunity to the stockholders from liability for debts of the corporation. The payment of an amount of property in excess of its value does not depend upon any fraudulent intent other than that which is evidenced by the act of knowingly issuing stock for property to an amount in excess of its value. All that is necessary to establish the legal fraud and take the stock issued out of the immunity assured to stock honestly issued . . . is to prove two facts: 1. That the stock issued exceeded in amount the value of the property in exchange for which it was issued; and 2. ³²⁹ That the trustees deliberately, and with knowledge of the real value of the property, overvalued it, and paid in stock for it an amount which they knew was in excess of its actual value."

The property in that case was worth \$68,000, the capital stock issued being \$300,000. This case last cited was approved of in the later case of *National Tube Works Co. v. Gilfillan*, 124 N. Y. 302. There the property was found to be worth \$75,000, but it was procured by giving \$300,000 worth of stock for it. The court approved of a charge to the jury directing them that "the fraud it consummated by the issue of stock as full paid stock which has not been fully paid; and it does not depend upon any fraudulent intent other than that which is evidenced by the act of knowingly issuing stock for the property in an amount in excess of its value. All that is necessary to establish legal fraud is proved in two facts," et cetera. The court even went to the extent of holding that there is "no exemption from liability because credit was imprudently given by the creditor, or because he supposed that the property of the corporation was sufficient to pay its debts."

The New York cases are approvingly upheld in the very able opinion of the supreme court of Missouri in *Van Cleve v. Berkey*, 143 Mo. 109, where the court said it was satisfied that the weight of American authority was against the appellants' contention on the facts of that case, and that the appellants were liable without other proof of fraud than was afforded by the transaction itself. The transaction spoken of was this: A corporation was organized under the laws of Illinois, and was to have a capital of \$100,000, subscribed by the parties in interest to whom the full amount of stock as subscribed was issued as full paid, in consideration of a transfer to the corporation of an invention of little actual value. The evidence showed that all the defendants acted in good faith so far as their actual intentions were concerned, and none of them was moved by any actual fraudulent intent in the transaction. About ten per cent of the amount subscribed was advanced by the original subscribers, but one B. received \$90,000 of the capital stock of the corporation for an invention.

⁸³⁰ Upon the question of fraud the case is parallel to this. The court also adopts the language of the supreme court of Alabama in *Elyton Land Co. v. Birmingham etc. Co.*, 92 Ala. 423, 25 Am. St. Rep. 65, disapproving of the statements made by Mr. Cook, in section 47 of his book on *Stocks, Stockholders, and Corporation Law*, to the effect that attempts made, in instances where stock was issued for the property taken at an overvaluation, to hold the party receiving such stock liable for its

full par value, less the actual value of the property received from him, have usually been unsuccessful.

The supreme court of Nebraska, in *Gilkie etc. Co. v. Dawson etc. Co.*, 46 Neb. 333, expressly lay down what is sufficient proof in accordance with the New York decisions. Judge Harrison, for the court, said: "Where an agreement is made whereby stock is knowingly and advisedly issued as paid in full, though not partially paid for, it may be set aside by creditors, and the enforcement of payment in full of the subscription for the stock obtained for the satisfaction of the debts of the corporation. . . . Where property is conveyed to a corporation as payment of a subscription for stock, it is insufficient to satisfy the liability of subscribers to the creditors of the corporation if there has been a fraudulent overvaluation of the property—an overvaluation knowingly and advisedly made."

Clark on Corporations, in a logical discussion of the proposition, says that the better opinion is that an actual fraudulent intent need not be shown in order that the person who pays for his stock in property may be held liable to creditors on the ground that the property was overvalued. His summary of the law is as follows: "Laying aside all questions as to whether there is an actual intention to defraud, such transaction would be a fraud in law, both upon dissenting stockholders and upon persons dealing with the corporation on the faith of its stock being fully paid up, and it would be just as invalid as against creditors as a payment for stock in money at a discount. If the nature of the property and the extent ³⁸¹ of the overvaluation are such that the overvaluation may possibly have been due to error of judgment, then, to render the transaction invalid as against creditors, actual fraud must be shown, and the question is one of fact. If, on the other hand, the overvaluation is so gross and obvious that it could not have been due to mere error of judgment, the transaction will be held fraudulent as a matter of law. This seems to be the fair result of the cases, if the opinions are read in the light of the facts actually before the court."

In *Northwestern etc. Ins. Co. v. Cotton Exch. etc. Co.*, 46 Fed. Rep. 22 (decided in 1891), a bill was brought by a judgment creditor of a corporation, alleging, in substance, that the stock of the corporation of the value of \$125,000 was paid by conveying a lot and building at a valuation of \$200,000, but which in reality was only worth \$157,000. The bonds of the corporation, secured by mortgage on the building, were issued to the defend-

ants to make up the deficit, the defendants being stockholders and directors in the company which owned the building and made the conveyance, and they personally knew of the overvaluation, and were benefited by it. The same arguments were advanced before Judge Thayer that are usually advanced in like cases, namely, that the bill did not show that there was any fraud in the transaction by which the stock was paid for, inasmuch as it did not aver that the stock was intentionally overvalued. Judge Thayer decided that the persons to whom the stock was issued were aware of the overvaluation, and, although the bill was said to show no actual fraud in the transaction, the court regarded an intentional valuation of property to the extent and made under the circumstances disclosed by the bill as fraudulent, "in the sense that a complainant is bound to allege and prove fraud. . . . The law regards such a transaction as constructively fraudulent so far as the corporation's creditors are concerned; or, to state the proposition in a different form, the payment of a stock subscription in such manner and under such circumstances is invalid, and not binding on a creditor of the corporation, and, where the law ³³² determines the quality of a transaction described in a pleading, it is unnecessary to aver that it was invalid or fraudulent." The learned judge who decided the last referred to case had before him and which was binding upon him, the case of *Coit v. Gold Amalgamating Co.*, 119 U. S. 343 (decided in 1886), which is quoted as holding to the doctrine that actual fraud, as heretofore defined, must be shown by a creditor seeking to fix the individual liability of a shareholder. But it is plain that nothing in that decision was regarded as inconsistent with the rule laid down in the New York decisions heretofore cited. *Coit v. Gold Amalgamating Co.*, 119 U. S. 343, was an action by a judgment creditor against the defendant company to compel the stockholders to pay what he claimed was due and unpaid on the shares of the capital stock held by them. The capital stock was fixed at \$100,000 and the property was turned over for that amount of stock. It was said that, although "the corporators may have placed too high an estimate upon the property, its valuation was honestly and fairly made." The court, after saying that, where full paid stock is issued for property received, there must be actual fraud in the transaction to call stockholders to account, added: "A gross and obvious overvaluation of the property would be strong evidence of fraud." We fail to see where this language at all conflicts with the opinion of Judge Thayer in *Northwestern etc.*

Ins. Co. v. Cotton Exch. etc. Co., 46 Fed. Rep. 22, or with our own view that when there is superadded to a gross and obvious overvaluation the element of deliberation in having grossly overvalued the property, and knowledge in having done so, fraud is a necessary legal inference from such facts, for in such a case good faith in valuing the property is entirely wanting. It is a fraud upon the law.

So, also, in *Thayer v. El Pomo Min. Co.*, 40 Ill. App. 344, it was decided that the stockholders in an insolvent corporation were liable to creditors unless they had given for their stock "the equivalent of money or in money's worth." That was a mining case, and the corporation was organized with a capital of \$1,000,000, divided into \$10 shares. The appellant ³³³ recovered a judgment against the corporation, which, being unsatisfied, he sought to make good under the statutes making the stock of shareholders liable. The property transferred to the corporation was worth but little more than 10 per cent of the amount of the stock of the company. There, as in the case at bar, it was considered a fair conclusion that none of the incorporators had any idea that the property was worth \$1,000,000, but adopted that sum as a convenient one for the amount of stock to be issued. As between themselves, connected with the organization, the court said there could be no ground of complaint; but, as to creditors, the law regarded the nominal capital of the company, besides its actual assets, as a fund to which they might look for satisfaction. From many former cases in Illinois the rule was deduced that the stockholders of an insolvent corporation will be liable to creditors unless there has been given for the stock the equivalent of money or in money's worth. "No fiction," say the court, "however innocently adopted, is a defense against creditors." In the latest decision in Illinois (1895)—*Coleman v. Howe*, 154 Ill. 458; 45 Am. St. Rep. 133—entire good faith in valuing property is required, and "where the overvaluation is so great that the fraudulent intent appears on its face, and is not explained, the court will hold it to be fraudulent, as a matter of law."

In *Elyton Land Co. v. Birmingham etc. Co.*, 92 Ala. 407, 25 Am. St. Rep. 65, it was held that the absence of fraudulent motive on the part of a trustee does not give validity to a mere simulated execution of the trust. An averment of fraud in reference thereto is unnecessary.

In the expression of the foregoing views of our own and those adopted by us from other courts, we do not mean to be under-

stood as going to the extent of holding that a stockholder may be successfully charged by a creditor of a corporation as a holder of unpaid stock where the property given in exchange for the stock does not eventually prove to be as valuable as it was believed to be at the time of the transfer, nor that unwise judgment or indiscretion alone are sufficient. ⁸³⁴ The judgment of men is too apt to be erroneous in relation to the valuations of property. This is especially true in new countries, where mining excitements frequently prevail, and values fluctuate rapidly and to an unusual extent. An honest mistake of judgment would seem to be a complete defense to such an action, but no such feature is presented in the case under consideration. Good faith in the valuation put upon the property is what the law demands, and all that it demands. By "good faith" is meant actual belief in the value put upon the property—the belief that a prudent and sensible business man would hold in the ordinary conduct of his own business affairs. Beliefs based upon visionary speculative hopes, unwarranted by existing conditions or facts, and without reasonable evidence from the then present appearances, are not such beliefs as will relieve the shareholders. Such is the true rule, we think, and such is the one that the law intends shall be applied.

Higher authority than the statutes also exist to prohibit a corporation's issuing stock except for property actually received. The constitution of the state, section 10, article 15, provides as follows: "No corporation shall issue stocks or bonds, except for labor done, services performed, or money and property actually received; and all fictitious increase of stock or indebtedness shall be void. The stock of corporations shall not be increased except in pursuance of general law, nor without the consent of the persons holding a majority of the stock first obtained at a meeting held after at least thirty days' notice given in pursuance of law."

In *Elyton Land Co. v. Birmingham etc. Co.*, 92 Ala. 407, 25 Am. St. Rep. 65, a clause in the constitution of Alabama, almost identical with section 10 quoted, was construed as effective against transfers of property deliberately and intentionally overvalued to corporations for their stock. We approve of this construction.

The constitution of Missouri, article 12, section 8, contains a substantially similar clause; and in *Van Cleve v. Berkey*, 143 Mo. 109, the supreme court decided it applied to a case like the ⁸³⁵ one before us, saying: "It is impossible to escape the con-

viction that in this state, whatever may be the case in some of the other states, the 'American trust doctrine,' as suggested by Mr. Justice Harlan, has indeed been re-enforced by its constitution and statutes and that the proposition that the stock of a corporation must be paid for 'in meal or in malt'—in money or in money's worth—is not a mere figure of speech, but really has the significance of its terms; it may be paid for in property, but in such case the property must be the fair equivalent in value to the par value of the stock issued therefor; that it is the duty of the stockholders to see that it possesses such value; that when a corporation is sent forth into the commercial world, accredited by them as possessed of a capital in money, or its equivalent in property, equal to the par value of its capital stock, every person dealing with it, unless otherwise advised, has a right to extend credit to it on the faith of the fact that its capital stock has been so paid for, and that the money, or its equivalent in property, will be forthcoming to respond to their legitimate demands—in short, that it is the duty of the stockholder, and not the creditor, to see that it is so paid."

Earnestly have appellant's counsel sought to convince us that mining corporations are sui generis, and that the doctrine of liability of shareholders for unpaid subscriptions, when stock has been issued for property at an overvaluation, is not applicable to such bodies. To fortify their arguments, they rely upon Judge Hoffman's opinion in *In re South Mountain Con. Min. Co.*, 7 Saw. 30; 5 Fed. Rep. 403, and the opinion by Judge Sawyer in the same case, reported again in 8 Saw. 366; 14 Fed. Rep. 347. The foundation of Judge Hoffman's remarks is based upon two notions: 1. That the amount of the capital stock of a mining corporation is usually fixed at a purely arbitrary sum, and divided into as many shares as convenience or caprice may dictate; and 2. That the capital stock of a mining company neither bears nor is intended to bear the slightest relation to the real value of the property—"a value nearly always conjectural, and very often imaginary." A ³³⁶ complete answer to both points lies (1) in the constitutional provision of this state which says that "no corporation shall issue stocks except for . . . money or property actually received"; and (2) in the law (Comp. Stats. 1887, div. 1, sec. 458), wherein the grant of power to the trustees of a corporation to purchase mines necessary for their business enables them to issue stock to the amount of the value thereof, which stock so issued shall be declared and taken to be the full paid stock, and not liable to any further call. There

was no such statute in California when the cases cited were decided, and, so far as we are advised, it does not appear that the court considered the effect of the constitutional prohibition of that state (Const., art. 12, sec. 11) against issuing stock except for property actually received. Judge Sawyer also wrote of the common custom, and said that mining corporations in California were organized and carried on upon principles in respect of their capital stock wholly different from banking and like commercial corporations having a subscribed capital stock. No reference is made to statutory rules fixing liability for unpaid shares, or extending authority to buy mines. Custom and common knowledge allowed and looked for any capitalization of a mining company, and nothing to the contrary justified the court in holding against the weight of these arguments. Such is fairly the quite persuasive reasoning of the learned judge.

Morawetz, in his valuable book, cites these two decisions, and sustains their doctrine in the following language: "While the customs of business men with regard to the methods of organizing and managing particular classes of corporations cannot control the established rules of law, such customs must often be taken into consideration in construing agreements made in view of the prevailing condition of affairs. Thus, it has long been the general practice both in New York and in California to organize mining corporations with a nominal capital bearing little or no relation to the real capital which the shareholders propose to contribute, and to issue the entire stock as fully paid up in consideration of ³⁸⁷ mines whose market value is much below the amount of the stock so issued, and whose real value is generally nothing. This practice is so universal and so notorious that a person who contracts with any ordinary mining company may usually be presumed to have contracted with a view only to such security as the property transferred to the company may furnish, irrespective of the capital indicated by its charter. A person so contracting would therefore have no equitable claim against the shareholders for unpaid capital if their shares were declared paid up as between themselves and the company. It is to be observed, also, that the nominal capital of a mining company, by the very nature of the mining business, cannot, as a rule, furnish an indication of the company's actual capital. The property of a mining company is naturally of an extremely fluctuating and uncertain character. Moreover, it is acquired for the sole purpose of being exhausted and distributed among the shareholders in the form of dividends, and not as a perma-

ment fund with which to carry on business": Morawetz on Private Corporations, sec. 830.

The intimation that New York, like California, excepts shareholders in mining corporations from statutory liability, is inadvertent, for *Douglass v. Ireland*, 73 N. Y. 100, involved the responsibility of shareholders in a corporation for furnace and mining purposes. The two California cases alone uphold the text. As said before, however, those cases were not decided on statutes similar to the New York manufacturing act, quoted in *Boynton v. Hatch*, 47 N. Y. 225, and identical with the Montana statutes, and for this reason are not wholly pertinent. But we go farther, and are constrained to overthrow their fallacious doctrine of expediency, and to rest our decision upon the law as it is written, and upon the common principles of moral honesty, within its letter and its spirit.

Sifted of specious consideration addressed to judges to regard practices long prevalent in certain mining states, where no laws existed placing mining and manufacturing corporations on an equality, and the warped doctrine we are asked to lay down leads to this: Incorporators of mining companies ~~838~~ should be permitted to violate the law, and deliberately deceive the public, but the incorporators of manufacturing enterprises should not; and this notwithstanding the truth that the same specific statutes grant no greater powers to one than to the other, and fix the same liabilities upon the shareholders in each.

Counsel assert positively that there is no such thing as the market value of a mine. This court said in *Montana Ry. Co. v. Warren*, 6 Mont. 275, that even a prospect has a value. "The only questions are whether a prospect has a value that may in law be called a market value, and, if so, whether there is proof in this case of any market value. Has a 'prospect'—an undeveloped mine—any market value? A full, positive answer to that is that 'prospects' are sold in the market every day. Certainly, property so sold has a market value. The records of Silver Bow county will probably show more transfers by sale of property, such as is known as 'prospects,' than of any other kind of real estate. They are frequently sold upon execution, foreclosure, and partition sales. They are subject to daily litigation in our courts." These remarks were "well said," wrote Justice Brewer in affirming that decision, in *Montana Ry. Co. v. Warren*, 137 U. S. 348. Its holding was also followed in *Maloy v. Berkin*, 11 Mont. 138, and *Northern Pac. etc. Ry. Co. v. Forbis*,

15 Mont. 452; 48 Am. St. Rep. 692, and a like rule reiterated in *O'Keefe v. Dyer*, 20 Mont. 477. The rationale of the California cases can also be accounted for, not only by an absence of statutory conditions which confront the incorporators of mining companies in Montana, but by remembering that when the opinions of Judges Sawyer and Hoffman were delivered, in 1881 and 1882, the science of mining in Western America was and had been far behind its present systematism. The engineer of mines was by no means so accessible or so well informed by knowledge of past experience of development in mines in this country as he has since become, and the light of his professional learning was not nearly so universally spread. It was only a few years before ³³⁰ those decisions were pronounced that the universities of America first conferred degrees for proficiency in special courses of mining. In such surroundings, and amid the fewer opportunities for ascertaining with reasonable reliability the value of a mine, the custom of which the California judges wrote sprung up in the early days of California; and, because of its well-known origin and hold, the law and the courts were reluctant to interfere with it. But that it was a pernicious custom is indisputable. It led to deceit, and to fictitious estimates being placed on mining property by the incorporators, for their own gain. Shares in a mine, at a few cents each, allured the unsuspecting and venturesome. The experiences of the custom are filled with disappointment and ruin to investors, rich and poor. All these matters may have been the controlling reason for the adoption of the more honest policy of our laws. Judge Buck, whose opinion as a district judge was read to us on the argument of this case, adverted to the argument of custom in this way: "This custom has made the very word 'mine' in financial centers of the world almost synonymous with conspiracy to defraud. The caution of capital has become so trepid that I believe it is no exaggeration to state that many a half-worked rich mine lies idle to-day in the mountains of this state through this cause alone."

The supreme court of Utah, in *Salt Lake Hardware Co. v. Tintic Milling Co.*, 13 Utah, 423, makes no exception in favor of mining corporations; nor does the supreme court of Illinois in *Thayer v. El Pomo Min. Co.*, 40 Ill. App. 344; nor does the supreme court of Wisconsin, in *Gogebic Inv. Co. v. Iron Chief Min. Co.*, 78 Wis. 427, 23 Am. St. Rep. 417; nor does the supreme court of Iowa, in *Oliphant v. Mining Co.*, 63 Iowa, 332; nor does the supreme court of Oregon, in *Hodges v. Mining Co.*,

9 Or. 200; nor does the court of appeals in New York, in *Douglas v. Ireland*, 73 N. Y. 100.

But, whatever may have been the reason of the old system, things have changed. Estimating the value of a mine is no longer the result of hasty conjecture. Former methods ³⁴⁰ have given way to scientific tests, based upon geological conditions, underground surveys and measurements, careful examinations of ore in sight, the known history of ore bodies in the vicinity, the method and cost of treatment of the ore, together with facilities for its transportation to markets. Now, too, there is a known definition of rights which the courts have step by step established in expounding principles by which the miner shall have preserved to him the greatest benefit of his discovery. These reasons may likewise have weighed with the legislature when it refused to extend greater immunity to stockholders in mining than in certain other corporations formed under the laws of the state.

It is next contended that it does not appear that appellant, Clark, was a subscriber, or had ever agreed to become a subscriber, to any stock. This is upon the theory that there is no actual contract to pay on the part of the shareholders who accept stock in mining corporations as full paid without having signed a formal subscription for the same. Section 457, heretofore quoted, imposes the liability of shareholders to creditors to the amount of unpaid stock, for all acts of and contracts made by the company. Section 458, *supra*, provides that "stock issued in payment for the mining property, to the amount of the value of the property, shall not be liable for any further payments under the provisions of section 457." To give any effect at all to this clause, stock issued in payment of mining property must be included. This is obvious. It cannot mean liability to the shareholder in a manufacturing, and exemption to a stockholder in a mining, company. Failure to have signed a formal stock subscription list cannot relieve appellant. The stock was issued to him, and with knowledge of all the surrounding facts, he became the holder of it. This was enough: See the late case of *Smith v. Ferries etc. Ry. Co.* (Cal. Dec. 28, 1897), 51 Pac. Rep. 710. Where stock has been issued, the holder has impliedly subscribed for it. If it has not been issued, yet if he has subscribed to a formal subscription list agreeing to take it, as such subscriber, he may be deemed liable to the amount for which it ³⁴¹ is unpaid: *Taylor on Corporations*, sec. 511. The supreme court of Iowa, in *Jackson v. Traer*, 64 Iowa, 469, held that the

simple acceptance of stock by one who never became a stockholder by subscription rendered the holder liable. Where the person sought to be charged has already taken the stock by an acceptance of the certificates, the need of a written agreement to do that which he has done is dispensed with and the relation of shareholder exists: *Shickle v. Watts*, 94 Mo. 410; *Lloyd v. Preston*, 146 U. S. 630; *Webster v. Upton*, 91 U. S. 65.

Appellant says that plaintiff cannot recover upon the theory that there has been a fraudulent overvaluation of the property, because his cause of action arises out of tort, and not out of contract. This revives the argument already considered and disposed of—that, to recover, plaintiff must show that he relied upon the fraudulent overvaluation of the mine. Counsel overlook the full significance of the language of the statute, whereby the liability exists, not for debts due by the corporation, but for all acts of and contracts made by it. *Spelling on Corporations*, section 909, says that damages arising from the commission of torts by a corporation's agent cannot be recovered where the liability is for debts only; but, where the terms "debts" and "liabilities" are used, "the combination seems sufficiently comprehensive to include all acts and species of obligation and wrong for which a civil action would lie, except such as are purely penal in character." "All acts of and contracts by the corporation" are very comprehensive words, and certainly afford no ground whereon the courts can exclude acts of wrong independent of contract. In an early case in New York—*Heacock v. Sherman*, 14 Wend. 58—the word "debt" was regarded as limited to claims arising out of contract, but the court was of opinion that the word "demand," by itself, would include a claim for damages arising out of the wrong of the corporation. Many statutes imposing this individual liability upon shareholders fix it only for payment of debts contracted by the corporation; but in section 457, as if to overcome the restrictions put upon the meaning ³⁴² of the term "debt" by the courts, the legislature has avoided the use of any such legal technical word, and extended the liability for all acts of, as well as all contracts by, the company. The statute cannot be evaded. Liability for acts of the corporation plainly includes liability for claims for damages consequent upon torts: *Powell v. Oregonian Ry. Co.*, 36 Fed. Rep. 726. Plaintiff, claiming in tort, had to fix his claim as a creditor in order to avail himself of his remedy; hence it was obligatory upon him to first establish his claim against the corporation. We regard the liability of the shareholders under

our statutes as secondary, not primary. They cannot be held until it appears that the corporation is insolvent. Thompson on Corporations, section 3521, writes that regularly the creditor, before invoking the aid of a court of equity, must have exhausted his remedy at law; "and the usual proof of his having done so is the recovery of a judgment, and the return of an execution nulla bona." To like effect is Spelling on Corporations, section 904. This appears to us to be just and equitable: *Powell v. Oregonian Ry. Co.*, 36 Fed. Rep. 726.

What we have already says refutes the final argument of appellant—that, if plaintiff relies upon the statutes, his action is upon a liability created by statute; hence his remedy is barred by the statute of limitations: Comp. Stats. 1887, div. 1, sec. 42; Laws 1893, p. 50. Respondent was injured May 26, 1891. He recovered a judgment June 28, 1894, and instituted this action August 13, 1894. When plaintiff sued for damages for his injuries, he sued the company. His claim was thereafter merged in a judgment against the corporation. Now, as a judgment creditor, he is suing other defendants—individual stockholders—to make them pay the amount of his judgment. But, as the shareholders are only secondarily liable, they could not have been proceeded against on an unliquidated demand until the judgment against the corporation was taken, or the demand was liquidated, and the company was insolvent: *Powell v. Oregonian Ry. Co.*, 36 Fed. Rep. 726. The better rule in such cases is that no cause of action accrues against the shareholder ⁸⁴⁸ until the creditor has failed to make the amount of his judgment or ascertained claim from the assets of the company, or unless, perhaps, in certain cases, it appears to be useless to proceed against the corporation: *Hawkins v. Glenn*, 131 U. S. 319; *Scoville v. Thayer*, 105 U. S. 143.

Several minor errors are assigned. They have been attentively examined, but are not well founded, and require no discussion.

The conclusions we have reached in this case are in accord with those bolder interpretations which uphold, rather than impair, the letter of the constitution and the laws of the state. Enforcement of the liability in this, the first action brought before this court involving the important questions considered and determined, may be a hardship; yet the policy upon which the statutes are founded is most wholesome. In the course of the history of the state, the maintenance of those principles which we have followed will intercept the further growth of a

system by which "wildcat" corporations have done grievous wrong to the public generally.

The law has said to the incorporators of mines: "You must not issue as paid in more stock in exchange for property taken than will fairly represent what the property is worth. It thus exacts no more from you than it does from the incorporators of manufacturing schemes. You must be fair and honest in valuing your mining properties, so that your capital stock may be assumed to represent what is actually paid in. It requires no impossibilities from you, but it insists on identically the same good faith from you as a miner that it calls for from your neighbor as a manufacturer. By obeying its commands, you are perfectly free from individual liability; but, by palpably and advisedly evading them, you run the risks consequent upon your evasion."

The judgment and order appealed from are affirmed.

Pemberton, C. J., and Pigott, J., concur.

PLEADING—SURPLUSAGE.—Unnecessary allegations in pleading may be disregarded. Thus, where a replication presents a sufficient reply to the plea of the defendant, and also contains a further allegation which is unnecessary, such allegation may be disregarded as mere surplusage: *Allemania Fire Ins. Co. v. Peck*, 133 Ill. 220; 23 Am. St. Rep. 610. Compare *Chicago etc. R. R. Co. v. Dillon*, 123 Ill. 570; 5 Am. St. Rep. 559.

CORPORATIONS—UNPAID STOCK—ENFORCEMENT OF SHAREHOLDER'S INDIVIDUAL LIABILITY—TAKING PROPERTY FOR STOCK—FRAUD—EQUITY.—A stockholder in a corporation, whether a purchaser or an original subscriber, is liable until his stock is fully paid up: *Note to Sprague v. National Bank*, 64 Am. St. Rep. 34; and any arrangement between stockholders and the corporation to issue stock as fully paid for, though only partly paid for in fact, either in money or property, and by which the corporation does not get the benefit of the full price of the stock in good faith, may be valid and binding between the corporation and the stockholders; but it is invalid as to the creditors of the former, and may be set aside at their instance, and full payment of the stock enforced for the satisfaction of the corporate debts: *Elyton Land Co. v. Birmingham etc. Elevator Co.*, 92 Ala. 407; 25 Am. St. Rep. 65. Entire good faith must be exercised in valuing property taken by a corporation for stock. A margin will be allowed for honest differences of opinion as to such value, but deliberate and intentional overvaluation is not permissible; and when such overvaluation is grossly excessive, and intentionally made, though without actual fraud, it is invalid as to corporation creditors, who may proceed against the stockholders individually as for unpaid stock subscriptions: *Note to Sprague v. National Bank*, 64 Am. St. Rep. 34; notes to *Buck v. Ross*, 57 Am. St. Rep. 68; *Shields v. Clifton Hill Land Co.*, 45 Am. St. Rep. 725; *Gogebic Inv. Co. v. Iron Chief Min. Co.*, 78 Wis. 427; 23 Am. St. Rep. 417; *Coleman v. Howe*, 154 Ill. 458; 45 Am. St. Rep. 133, and note. If subscribers for corporate stock pay for the same in property known by them to be worth much less than the par value of the stock, they will be liable to

creditors of the corporation for such difference: *Note to Elyton Land Co. v. Birmingham etc. Elevator Co.*, 25 Am. St. Rep. 83; and a purchaser of stock which has not been fully paid up, or which has been paid for in property at a gross overvaluation, who has notice of the facts, is liable to the same extent as the party who transfers it to him: *Note to Sprague v. National Bank*, 64 Am. St. Rep. 34. Fraud in taking property in payment of stock will be presumed where the value of such property is well known or might have been easily learned, and it has been taken at an exaggerated valuation. Where an overvaluation is so great that a fraudulent intent appears on its face, and is not explained, the court will hold it to be fraudulent as a matter of law. Thus, if stock of the par value of three hundred thousand dollars is issued for property worth only one-fourth of that sum, the overvaluation is so gross that it must be regarded as fraudulent on its face: *Coleman v. Howe*, 154 Ill. 458; 45 Am. St. Rep. 133. See, also, *Elyton Land Co. v. Birmingham etc. Elevator Co.*, 92 Ala. 407; 25 Am. St. Rep. 65; *Gates v. Tippecanoe Stone Co.*, 57 Ohio St. 60; 63 Am. St. Rep. 705. No action at law, independent of statute, can be maintained by creditors of a corporation, against its stockholders, to compel the payment of unpaid subscriptions, but proceedings must be had in equity: See monographic note to *Thompson v. Reno Sav. Bank*, 3 Am. St. Rep. 811, 816, on the liability of stockholders to creditors of corporations for corporate debts. After a creditor has established his debt at law, and the property of the debtor has been placed in such a condition, or is of such a nature that it cannot be subjected to an execution at law, relief may then be had by the creditor in a court of chancery: *Tatum v. Rosenthal*, 95 Cal. 129; 29 Am. St. Rep. 97, and note. This case shows when a complaint in an action in the nature of a creditor's bill, to compel the subscribers to the capital stock of an insolvent corporation to pay in the unpaid portion of their subscriptions, to be applied to the satisfaction of a judgment obtained against the corporation, is sufficient. In an action against the stockholders of an insolvent corporation to compel them to contribute to the payment of its debts, it is only necessary, in order to make out a prima facie case, to establish that they have not, in good faith, paid the par value for the stock of the corporation: *Gogebic Inv. Co. v. Iron Chief Min. Co.*, 78 Wis. 427; 23 Am. St. Rep. 417.

MINES—MINING COMPANIES—UNPAID STOCK—LIABILITY OF SHAREHOLDERS—RIGHTS OF CREDITORS.—That the creditors of a mining corporation have no recourse against the purchasers or holders of stock for the difference between the par value and the price at which the shares were sold, see note to *Thompson v. Reno Sav. Bank*, 3 Am. St. Rep. 817. Contra, see *Gogebic Inv. Co. v. Iron Chief Min. Co.*, 78 Wis. 427; 23 Am. St. Rep. 417.

CORPORATIONS—WHO IS SHAREHOLDER—SUBSCRIPTION LIST.—It is not necessary to the validity of a subscription for stock in a corporation, that it should be made in a book for that purpose: *Note to Holland v. Duluth Iron etc. Co.*, 60 Am. St. Rep. 486. See *Butler University v. Scoonover*, 114 Ind. 381; 5 Am. St. Rep. 627.

A JUDGMENT AGAINST A CORPORATION IS CONCLUSIVE IN AN ACTION TO ENFORCE UNPAID SUBSCRIPTIONS TO CAPITAL STOCK, and the stockholders are concluded in such action, though the complaint does not allege the indebtedness upon which the judgment was rendered: *Tatum v. Rosenthal*, 95 Cal. 129; 29 Am. St. Rep. 97. A corporation is liable for its torts: *Note to Hoboken Printing etc. Co. v. Kahn*, 59 Am. St. Rep. 589.

STATUTE OF LIMITATIONS—ACTION FOR UNPAID SUBSCRIPTIONS—CAUSE OF ACTION.—In cases of unpaid stock subscription, a cause of action does not accrue in favor of a creditor and against a stockholder until judgment is obtained and execution re-

turned *nulla bona*, and the statute of limitations commences to run from that date: *Washington Sav. Bank v. Butchers' etc. Bank*, 107 Mo. 133; 28 Am. St. Rep. 405; note to *Hospes v. Northwestern Mfg. Co.*, 81 Am. St. Rep. 650. Compare *Hunt v. Ward*, 99 Cal. 612; 37 Am. St. Rep. 87. The statute of limitations begins to run when the cause of action accrues: Note to *Winchester etc. Turnp. Co. v. Wickliffe*, 66 Am. St. Rep. 360.

HAUPT v. BURTON.

[21 MONTANA, 572.]

SCIRE FACIAS—OBTAINING REMEDY BY ACTION—ABOLISHMENT OF FORM.—Although the form of the ancient writ of *scire facias* has been abolished by the statutes of Montana, the remedies obtainable by the writ may still be enforced in that state by a civil action.

JUDGMENT — REVIVOR OF—CUMULATIVE REMEDY.—The mode of enforcing a judgment by execution, obtained by leave of court after a lapse of five years from the entry of judgment, is a cumulative remedy, in no way affecting the right to revive the judgment by suit for that purpose.

JUDGMENT—REVIVOR OF, BY ACTION.—A judgment may be revived by a civil action, under a statute providing that there shall be but one form of civil action, notwithstanding the existence of another statute authorizing an execution to issue, by leave of court, after five years from the entry of judgment.

A JUDGMENT FOR THE POSSESSION OF LAND MAY BE REVIVED by a civil action, and the judgment should be that the plaintiff have execution against the defendant and his successors.

JUDGMENT — ACTION UPON — CONSTRUCTION OF STATUTE.—A state statute providing that an action on a judgment of "any court of the United States, or of any state or territory within the United States," shall be commenced within six years, is applicable to judgments rendered by the courts of the state having such a statute, where it contains no exception.

JURISDICTION OF COMPLAINT TO REVIVE A JUDGMENT.—Under statutes providing that a civil action is commenced by filing a complaint, and that the life of a judgment is six years, a complaint to revive a judgment, filed within six years after the date thereof, confers jurisdiction, though the summons is not served until after that time has expired, and notwithstanding a statute providing that the court is deemed to have jurisdiction in a civil action from the time of the service of the summons.

ASSIGNMENT—WHEN ASSIGNEE SHOULD SUE IN HIS OWN NAME.—Under a law requiring all suits to be brought in the name of the real party in interest a suit to revive a judgment should be brought in the name of the assignee thereof.

Action by Haupt and others, against Burton and others, to revive a judgment. From a judgment for the defendants the plaintiffs appealed.

William Scallon and F. T. McBride, for the appellants.

Ella Knowles Haskell and E. B. Howell, for the respondents.

⁵⁷³ HUNT, J. On March 20, 1886, Michael Hickey, George W. Stapleton, and J. C. Robinson obtained a judgment in the district court of Silver Bow county against the respondents for the possession of a certain piece of ground. Execution was not issued until March 19, 1892. The sheriff did not oust the defendants under the execution, and they remained in possession. On the same day, March 19, 1892, H. L. Haupt and George H. Casey, having succeeded to the interests of Hickey and Stapleton in said judgment, commenced this action to revive the said judgment. On September 8, 1896, they thereafter filed their amended complaint. The original complaint set up the judgment and the fact that it had not been satisfied, and that defendants still remained in possession. The prayer was for judgment for the possession of the ground. The amended complaint more elaborately set up the judgment, and the issuance and return of the execution, and prayed that the judgment might be revived, and that execution issue thereon. Defendant Burton answered separately, denying the title in Haupt and Casey to the interest of Hickey and Stapleton in the judgment, and pleading the statute of limitations. The replication denied the material averments of the answer. The other defendants likewise answered, pleading the statute of limitations and other matter. This was replied to by a denial of the affirmative allegations of the answer.

Upon the trial of the case, the defendants objected to testimony being introduced by plaintiffs, for lack of jurisdiction in the court, because the complaint did not state facts sufficient to constitute a cause of action, and because it appeared on the face of the complaint and pleadings that the cause of action was barred. The court sustained the defendant's objections, and ordered judgment against plaintiffs and in favor of defendants. The plaintiffs appeal.

We regard this proceeding as an action to revive a judgment. We say "an action" to revive, because, under the Compiled Statutes of 1887, which obtain herein, there was a remedy by action; and even under the common law, although scire facias was a judicial writ, yet, because the defendant ⁵⁷⁴ might thereupon plead, scire facias was accounted in law to be "in the nature of an action": Coke's Institutes, *524. By section 410, page 171, of the Compiled Statutes of 1887, the writ of scire facias was abolished in the following provision: "The writ of

scire facias, the writ of quo warranto, and proceedings by information in the nature of quo warranto, are abolished. The remedies obtainable in these forms may hereafter be obtained by civil actions under the provisions of this chapter." The language "this chapter" may confine the abolition of the writ itself to those instances where it could have issued in public matters brought within the scope of the particular chapter of which section 410 is but a part. However, there being no provision in the chapter referred to specially pertinent to scire facias to revive a judgment, possibly the legislature did not intend, in the language used, to abolish the writ, except where it could have been used as affecting public remedies; but, if this is so, the effect would be to leave the right to revive a judgment by writ of scire facias wholly unaffected by section 410; so we must look at other provisions of the Compiled Statutes. We note in passing that that clause of our statute just quoted (section 410) is identical with section 424 of the South Carolina Code of Civil Procedure. The "chapter" referred to in the South Carolina code (S. C. Rev. Stats. 1893, c. 2), like the "chapter" of the Compiled Statutes of Montana, had to do particularly with actions for the usurpation of office and other public cases. In *Lawton v. Perry*, 40 S. C. 255, doubt was expressed as to the true signification of the words "this chapter," the court hesitating to apply them to the whole Code of Civil Procedure, although it was decided upon other grounds that the writ of scire facias was altogether abolished in that state. It is not material here, though, whether said section 410 does affect the ancient writ, inasmuch as its form was abolished by the adoption of other sections of the Montana code, though, we think, the remedies obtainable by the writ may still be enforced by civil action: *United States v. Ensign*, 2 Mont. 396; *Lawton v. Perry*, 46 S. C. 255.

Section 1 of the Code of Civil Procedure (Compiled Statutes of 1887), provides "that there shall be in this territory [state] but one form of civil action for the enforcement or protection of private rights and the redress or prevention of private wrongs, which shall be the same at law and in equity." Civil actions in the courts are commenced by filing a complaint: Code Civ. Proc., sec. 66. It is doubtless true the revival of the judgment described in plaintiff's complaint might have been effectually accomplished by motion for leave to issue execution, under section 349 of the Code of Civil Procedure, which authorizes an execution to issue after a lapse of five years from the

entry of judgment after obtaining leave of the court upon motion with notice to the adverse party. This procedure was considered in *Peters v. Vawter*, 10 Mont. 201. But the mode of enforcing a judgment by issuing execution under section 349 of the Code of Civil Procedure, is a cumulative remedy, in no way affecting the right to revive the judgment by suit for that purpose: *Rowe v. Blake*, 99 Cal. 167; 37 Am. St. Rep. 45. The right of revivor by suit is recognized in *United States v. Ensign*, 2 Mont. 396, while the right of revivor by motion is sustained in *Peters v. Vawter*, 10 Mont. 201. In the leading case of *Carter v. Coleman*, 12 Ired. 274, it was decided that, where there was a dormant judgment, plaintiff might have a scire facias to revive and an action to recover the amount of the judgment both pending at the same time; and that a judgment on the scire facias could not be pleaded in bar of the action of debt. And in *McDonald v. Dickson*, 85 N. C. 248, upon a case where motion for leave to issue execution had been granted, it was held execution might be had on a judgment, and at the same time action on it could be prosecuted by leave of court: *Freeman on Judgments*, sec. 440; *Garibaldi v. Carroll*, 33 Ark. 568; *Am. & Eng. Ency. Pl. & Pr.* 1088.

Either proceeding—that by motion, or that by filing of a complaint where revivor is the remedy sought—has for its object a means to secure to the judgment creditor the fruition of his judgment. In either case the court's power and jurisdiction are complete. Neither is an independent new action; and ⁵⁷⁶ although where, as in the case before us, a complaint is filed setting up the original judgment obtained, the form is necessarily by a separate action, still, no matter what the form may be and what the practice, after all it is but the continuation of the old action, and but a means to revive an antecedent judgment that might otherwise have become valueless or inoperative so far as the right to issue execution goes. The defenses to the action are limited. The jurisdiction may be assailed, or the existence of the record attacked, or payment or accord or discharge and satisfaction may be set up; but in no case can matters be determined which were settled in the original suit: *Smith v. Stevens*, 133 Ill. 183; *Freeman on Judgments*, sec. 443.

The life of a judgment under section 41 of the Code of Civil Procedure (Compiled Statutes of 1887) was six years. It was accordingly necessary for plaintiffs to bring their suit within that time after date of the judgment sought to be revived. This they did, and, by so doing, have acquired a standing in court.

The original complaint was not wholly defective. It set up the judgment, and while, perhaps, it was defectively stated, there was a cause of action pleaded. The amended complaint is perfectly good.

The fact that plaintiffs seek to revive a judgment in a real action cannot affect the principle of the right of revivor. Why should not the same rule prevail in real as does in personal actions? The original judgment was for possession of land, and the judgment here should be that plaintiffs have execution, and be given possession, as against defendants and their successors: Freeman on Judgments, sec. 443; 21 Am. & Eng. Ency of Law, 855; Kennebec Purchase v. Davis, 1 Me. 309.

It is argued that section 41, division 1, of the Compiled Statutes of 1887, which provides that an action upon a judgment of "any court of the United States, or of any state or territory within the United States, shall be commenced within six years," is inapplicable to judgments rendered by the courts of this state; and we are cited to Pitzer v. Russel, 4 Or. 129, and Burns v. Conner, 1 Wash. 6, which hold ⁵⁷⁷ that way. The great weight of authority is against those decisions, and we believe that, in the absence of any exception from the statute of actions upon judgments of the courts of this state, they are within the letter of the code. It has been so decided by the following cases: Hummer v. Lamphear, 32 Kan. 439; 49 Am. Rep. 491; approved in Schuyler Co. Bank v. Bradbury, 56 Kan. 355; McDonald v. Dickson, 85 N. C. 248; Mason v. Cronise, 20 Cal. 217; Rowe v. Blake, 99 Cal. 167; 37 Am. St. Rep. 45.

It is said that the jurisdiction of the court expired on the twentieth day of March, 1892. This argument proceeds upon the ground that a lien of a judgment being for six years under page 139, section 307, of the Compiled Statutes of 1887, execution cannot issue after six years, and upon the further ground that by page 79, section 80, of the Compiled Statutes of 1887, from the time of the service of a summons in a civil action, the court is deemed to have jurisdiction; whereas here the summons was not served until May 21st, two months after six years had expired. This argument is refuted by repeating that, when plaintiffs filed their complaint within the six years after the date of judgment, they commenced their action under section 66 of the Code of Civil Procedure, and the omission to serve the summons within the aforementioned six years does not deprive the court of jurisdiction, or the plaintiffs of their right to sue upon the judgment within the time prescribed: Trenouth v.

Farrington, 54 Cal. 273; *Crim v. Kessing*, 89 Cal. 478; 23 Am. St. Rep. 491.

In statutory proceedings to have execution issued upon motion, under section 349, heretofore cited, different rules may obtain, but we need not consider them here, as plaintiffs have proceeded by the form of another action.

Nor is there any attempt by this action to modify the judgment or the record upon which it is based. The original judgment was obtained by Michael Hickey, G. W. Stapleton, and J. C. Robinson. Revivor is sought in the name of H. L. Haupt and George H. Casey, the purchaser of the interest of J. C. Robinson, deceased. It also appears by the complaint of record that Haupt and Casey succeeded to the interests of Hickey and Stapleton through conveyances in due form. As ⁵⁷⁸ the real parties in interest, therefore, we hold plaintiffs herein had a right to institute this action. Where the judgment has passed by assignment to a third person, the determination of the proper parties plaintiff in a suit to revive depends upon the statutes of the particular jurisdiction: *Black on Judgments*, sec. 488. In Montana, the law requiring all suits to be brought in the name of the real party in interest, a remedy by proceedings in scire facias should be sued out in the name of the assignees: See *McGregor v. Wells, Fargo & Co.*, 1 Mont. 142.

Nothing in *Boyd v. Platner*, 5 Mont. 226, conflicts with this opinion, for that case only decided that parties not shown to be interested in the judgment sought to be revived cannot obtain the benefits of revivor. The showing here is, that plaintiffs in this action have an interest entitling them to the relief sought. It follows that the district court erred in sustaining defendant's motion for a nonsuit, and awarding judgment to defendants.

Judgment reversed, and cause remanded for further proceedings. Remittitur forthwith.

Pigott, J., concurs.

Pemberton, C. J., disqualified.

JUDGMENTS — REVIVING OF — ACTION—SCIRE FACIAS.—
In some of the states, the method of reviving judgments is now by action, the remedy by scire facias having been abolished. In other states, a judgment may be revived by either scire facias or action: See monographic note to *Frierson v. Harris*, 94 Am. Dec. 222, on scire facias to revive judgment. A scire facias to revive a judgment is not a new action, but the continuance of an old one: *Rice v. Moore*, 48 Kan. 590; 30 Am. St. Rep. 313; note to *Frierson v. Harris*, 94 Am. Dec. 223.

ACTION—COMMENCEMENT OF—WHAT IS.—The issuing of the writ is the commencement of the action: *Ross v. Luther*, 4 Cow. 158; 15 Am. Dec. 841, and monographic note thereto, on what is the commencement of an action. An action is commenced when a summons and complaint are delivered to the sheriff with the intent that they shall be actually served: *Montague v. Stelts*, 87 S. C. 200; 34 Am. St. Rep. 736, and note showing that the issuing of the summons is the commencement of the action. An action is commenced within one year after the cause thereof accrued, if, within that time, a complaint is filed, and a summons issued in good faith, though it is not served within the year: *Georgia Home Ins. Co. v. Holmes*, 75 Miss. 390; 65 Am. St. Rep. 611.

ASSIGNMENT.—A JUDGMENT may be assigned: *Citizens' Nat. Bank v. Loomis*, 100 Iowa, 266; 62 Am. St. Rep. 571, and note; and the assignee may maintain an action thereon in his own name: *Roberts v. Corbin*, 26 Iowa, 815; 98 Am. Dec. 146.

CASES
IN THE
SUPREME COURT
OF
NEBRASKA.

GAYLORD v. NEBRASKA SAVINGS & EXCHANGE BANK.

[54 NEBRASKA, 104.]

NEGOTIABLE INSTRUMENTS — SPECIAL INDORSEMENT.—An indorsement of a note in the words, "pay to the order of ———, Mary W. Gaylord," the signer being the payee of the note, is not a general indorsement, and does not transfer the legal title by mere delivery of the note.

NEGOTIABLE INSTRUMENTS—ASSIGNMENT.—If a negotiable note is assigned by a writing separate and distinct from the note itself, the title is thereby transferred, but the assignee is not entitled to protection as a bona fide purchaser of negotiable paper transferred before due.

ESTOPPEL IN PAIS—QUESTION FOR JURY.—An estoppel in pais, well pleaded, presents a question of fact for the jury.

J. A. McIntosh, for the plaintiff in error.

S. Cobb, for the defendant in error.

105 RYAN, C. This action was brought by Mary W. Gaylord in the district court of Douglas county against the Nebraska Savings and Exchange Bank for the value of a certain promissory note which plaintiff alleged the bank had wrongfully converted to its own use. This note was dated December 15, 1891, and by its terms was payable to Mary W. Gaylord, or order, December 15, 1896, with interest at the rate of six per cent per annum, evidenced by semi-annual coupons. The defenses of the bank will probably be best understood if there is given a portion of the undisputed history of this note subsequent to its execution.

Ralph E. Gaylord, a member of the firm of Muir & Gaylord, was the only son of Mary W. Gaylord. The note in question was

taken by him in settlement of some controversy, and was, with a mortgage securing it, sent in a letter to plaintiff January 2, 1892. In this letter, addressed to Mrs. Gaylord in Florida, there was the following language: "Now I want, at the first opportunity, to dispose of this note and mortgage for you so as to lend the money for you at a better rate of interest. I think I can do this soon. That I may have everything ready for this, I enclose the bond for your indorsement and an assignment of the mortgage for your signature and acknowledgment. On the back of the note and each coupon you will see the words, 'Pay to the order of.' Please sign your name 'Mary W. Gaylord' on the pencil line drawn under those words, eleven places in all. Also please sign your name to the assignment on the line ¹⁰⁸ marked 'x,' and have it witnessed and acknowledged before a notary public. . . . I cannot put in the name of the assignee, for I don't know to whom I may sell this." These instructions were complied with in respect to the note at least; and with the indorsements, as indicated, it and the mortgage were returned to Ralph E. Gaylord, at Omaha. The form of indorsement on the bond and on each coupon attached thereto was as follows: "Pay to the order of Mary W. Gaylord."

There were denials in the answer of the bank, and there were also averments that the firm of Muir & Gaylord acted within the scope of its powers in transferring said note and mortgage to the bank, but there was no evidence to sustain these defenses, and Mrs. Gaylord testified that the above quotation from the letter of her son indicated the only manner in which he, or the firm of which he was a member, was authorized to use the note and mortgage. The answer of the bank, however, contained the following averments: "Further answering defendant says that it did on the ninth day of March, 1892, loan to Muir & Gaylord, F. D. Muir, and Ralph E. Gaylord, the sum of eight thousand dollars (\$8,000), lawful money of the United States, and did receive from the said Muir & Gaylord, F. D. Muir, and Ralph E. Gaylord, their promissory note for the payment of the said eight thousand dollars (\$8,000) and interest six months after date. Defendant alleges that it did on the ninth day of May, 1892, loan to the said F. D. Muir and Ralph E. Gaylord the further sum of eight hundred dollars (\$800) and receive the promissory note of the said F. D. Muir and Ralph E. Gaylord for the payment of the said eight hundred dollars (\$800) and the interest ninety days after date. Defendant further says that at the time of the loan

to the said Muir & Gaylord of the said eight thousand dollars (\$8,000), to wit, on March 9, 1892, the said Muir & Gaylord had in their possession under their control the assignment ¹⁰⁷ heretofore referred to, duly executed by the plaintiff herein, that they also had in their possession the real estate coupon bond hereinbefore referred to and payable to the order of the plaintiff, and that said bond was at that time indorsed in words and figures following, to wit, 'Pay to the order of [signed] Mary E. Gaylord,' and defendant did receive from the said Muir & Gaylord said coupon bond and mortgage, together with the assignment thereof, from said Muir & Gaylord as collateral security to the above notes of the said Muir & Gaylord, as they had a right to do, and the said Muir & Gaylord had full authority and right to assign the same." The averments of the answer were denied in plaintiff's reply. On the trial there was introduced in evidence an assignment signed and acknowledged by Mary W. Gaylord. This was written on a piece of paper separate and distinct from the note and mortgage. The date of the certificate of acknowledgment made by a notary public in Florida was January 8, 1892. This assignment was filed for record in the office of the register of deeds of Douglas county July 10, 1894, and, while its primary object seems to have been to transfer the mortgage, there was contained in it an assignment of the note to the Nebraska Savings and Exchange Bank. Mrs. Gaylord testified that when she signed the assignment it was not drawn to the Nebraska Savings and Exchange Bank. This was not contradicted, neither was there any effort to show by whom or when the name of the bank was written in. The evidence of the officers of the bank was to the effect that the bank made the two loans pleaded in the answer in reliance upon the note and mortgage which it received as collateral security from Muir & Gaylord when the first of the two loans were made to them. This was the condition of the evidence when the court instructed the jury to find for the defendant, and accordingly there was a verdict and judgment.

In the consideration of this case we shall not attempt to discuss the negotiability of the note, but, for the argument's ¹⁰⁸ sake, will assume that it was negotiable in form. It was held in *Doll v. Hollenbeck*, 19 Neb. 639, where a negotiable promissory note had been assigned by a writing separate and distinct from the note itself, that the assignee was not entitled to protection as a bona fide purchaser of negotiable paper transferred before due, and this holding was approved in *Colby v. Parker*, 34 Neb.

510. As between the parties to this action, therefore, this assignment merely operated to transfer the note and mortgage. The indorsement of the note as pleaded in the answer was in this language, "Pay to the order of [signed] Mary E. Gaylord." It is probable that the transcript incorrectly shows the initial letter as "E" instead of "W," and we shall therefore lay no stress on the variance between the name of the payee and the name as in the answer alleged to have been indorsed. If the indorsement is to be considered as above quoted, it is clear that it is not a general indorsement, but is an indorsement intended, when completed, to be limited to whatever name shall be inserted in the blank. From this incomplete indorsement we must conclude that when the bank took the note as collateral security the payee had not yet determined to whom she would make the transfer. If the bank has correctly pleaded the indorsement according to its understanding, it was bound to know when the note was offered to it that the payee had, as yet, neither an intention to name an indorsee nor the design of making a general indorsement. If, however, the indorsement is to be treated as though there was no intention to complete it in the future by inserting the name of the indorsee it would read, "Pay to the order of Mary W. Gaylord." To effect a transfer in this view of the indorsement it would be necessary that Mary W. Gaylord should indorse the note anew. Under such circumstances, nothing was really effected by the indorsement, for she could equally as well in the same manner transfer the paper as payee. We are, therefore, of the opinion that the indorsement on the note in the condition ¹⁰⁰ in which it was when by the bank it was received as collateral security did not vest the legal title in the bank. Its rights as transferee depend upon the assignment made separately, and this, as we have already seen, merely operated to transfer the title and not to afford protection as to an innocent purchaser of negotiable paper before due.

The answer of the bank, in so far as it specially pleaded an estoppel as against the plaintiff, has already been quoted. It was proper that this defense should be specially pleaded: *Nebraska Mortgage Loan Co. v. Van Kloster*, 42 Neb. 746; *Erickson v. First Nat. Bank*, 44 Neb. 622; 48 Am. St. Rep. 753; *Gregory v. Kenyon*, 34 Neb. 640; *Scroggin v. Johnson*, 45 Neb. 714. The testimony of plaintiff, that she did not authorize her son, or the firm of which he was a member, to use the note as collateral security, was uncontradicted. Whether or not the bank furnished the money on the faith of this collateral, and whether or not it

was deceived into doing so by representations of the agent of plaintiff apparently sanctioned by her acts or negligence, were questions of fact which should have been submitted to the jury. It was erroneous peremptorily to direct a verdict for the defendant, and the judgment of the district court is therefore reversed and this cause is remanded for further proceedings.

NEGOTIABLE INSTRUMENTS — SPECIAL INDORSEMENT.—A negotiable instrument, specially indorsed by the payee or made payable specially cannot be recovered on by anyone except the special indorsee or payee, unless it appears either that it is reindorsed or reassigned by the special indorsee or payee, or that he has recovered satisfaction: *Mitchell v. Fuller*, 15 Pa. St. 268; 53 Am. Dec. 594; *Pickering v. Cording*, 92 Ind. 306; 47 Am. Rep. 145. Where one has paid value for a promissory note payable to order, and takes a transfer of it by delivery only, without indorsement, he acquires title, but not the rights of a bona fide purchaser: *Moore v. Miller*, 6 Or. 254; 25 Am. Rep. 518.

NEGOTIABLE INSTRUMENTS—ASSIGNMENT.—One who acquires a note by assignment acquires no better title than had the payee: *Helena Nat. Bank v. Rocky Mt. Tel. Co.*, 20 Mont. 379; 63 Am. St. Rep. 628; *Haskell v. Mitchell*, 53 Me. 468; 89 Am. Dec. 711; *Bowman v. Halstead*, 2 A. K. Marsh. 200; 12 Am. Dec. 380.

ESTOPPEL—PLEADING—WHEN A QUESTION OF LAW.—An estoppel in pais must be pleaded: *State v. East Fifth Street Ry. Co.*, 140 Mo. 539; 62 Am. St. Rep. 742. When the facts necessary to create an estoppel are admitted, or clearly and conclusively established, the court may declare the law applicable to such facts without submitting them to the jury: *Wachter v. Phoenix Assur. Co.*, 132 Pa. St. 428; 19 Am. St. Rep. 600.

MILLER v. STATE INSURANCE COMPANY.

[54 NEBRASKA, 121.]

LIMITATIONS OF ACTIONS—SPECIAL LIMITATIONS BY CONTRACT.—A contract which provides that no action shall be brought thereon, or for a breach thereof, unless within a time therein specified, which is different from the time fixed by statute for bringing an action on such contract or for a breach thereof, is against public policy and cannot be enforced.

LIMITATIONS OF ACTIONS.—LIMITATIONS FIXED BY CONTRACT other than the period prescribed by the statute of limitations are void.

C. H. E. Heath and Paul & Templin, for the plaintiff in error.

Long & Mathew, for the defendant in error.

¹²² **RAGAN, C.** Eugene Miller files here a petition in error to review a judgment of the district court of Sherman county dismissing an action brought therein by him against the State Insurance Company of Des Moines, Iowa.

Miller's suit was upon an ordinary insurance policy issued by the defendant in error agreeing to indemnify him for any loss the insured property might sustain by reason of fire or lightning within a certain time. The policy provided that the insurance company should not be liable for any loss thereunder unless a suit for such loss was brought within six months of the date of the loss or damage, any statute of limitations to the contrary notwithstanding. Among other defenses to the action, the insurance company interposed that Miller's suit was not brought within six months after the happening of the loss sued for. The case was tried to the court without a jury, and the court found specially as follows: "The court finds, under the pleadings and the evidence, in favor of the plaintiff as to all issues raised by the pleadings, except as to the issue that the action was not brought within six months from the time the cause of action accrued, as provided in the policy, and upon that issue the court finds in favor of the defendant." Upon this finding the court dismissed Miller's action. The statutes of this state provide in what time all actions may be brought, and a contract which provides that no ¹²³ action shall be brought thereon, or for a breach thereof, unless within a time therein specified, which is different from the time which the statute fixes for bringing an action on such contract, or for a breach thereof, is against public policy, and will not be enforced by the courts of this state: *Barnes v. McMurtry*, 29 Neb. 178. In *Eagle Ins. Co. v. Lafayette Ins. Co.*, 9 Ind. 443, such a clause was held to be absolutely void. *Phoenix Ins. Co. v. Rad Bila Rora Lodge*, 41 Neb. 21, was a suit on an insurance policy which contained a clause similar to the one in question here. Discussing the validity of such a provision in a contract, Irvine, C., while admitting that a respectable line of authorities supports the validity of such a stipulation, said: "In no case, however, has effect been given to such a provision in this state. Notwithstanding the authorities upon the subject, the writer would hesitate to commit himself to the views that the parties to a contract may bind the courts to a period of limitations other than that prescribed by statute." The court adopts the views of the commissioner as expressed in that case, and declines to be bound to a period of limitations fixed by any contract other than the period prescribed by the statute.

The judgment is reversed and the cause remanded, with instructions to the district court to enter a judgment in favor of the plaintiff in error upon the special findings made by the court.

LIMITATIONS OF ACTIONS—LIMITATIONS BY CONTRACT. The rule laid down by the principal case does not seem to be supported by the weight of authority. In *McFarland v. Railway etc. Assn.*, 5 Wyo. 126, 63 Am. St. Rep. 29, it was held that it was lawful for the parties to a contract of insurance, by a provision inserted therein, to reduce or limit the time within which an action may be brought upon such contract, provided a reasonable time remains, after that allowed for the performance of conditions precedent, in which to bring suit: See, also, the note to this case; *Fullam v. New York Union Ins. Co.*, 7 Gray, 61; 66 Am. Dec. 462, and note. This rule is in harmony with the doctrine that a party may waive a constitutional or statutory provision for his benefit: *Lee v. Tillotson*, 24 Wend. 337; 35 Am. Dec. 624, and note. See note to *Baker v. Braman*, 6 Hill, 47; 40 Am. Dec. 388.

TUKEY v. OMAHA.

[54 NEBRASKA, 370.]

MUNICIPAL CORPORATIONS—INDEBTEDNESS.—If the governing body of a municipality is authorized by vote of the people, and only thereby to incur a debt for a particular purpose, such purpose must be strictly complied with, and the terms of the authority granted be strictly and fully pursued.

MUNICIPAL CORPORATIONS—INCURRING UNAUTHORIZED DEBT—BONDS.—If a proposition contemplating the purchase of land and the issue of bonds to secure a site for a market place and the erection thereon of a market house is adopted by vote by the electors of a city, an attempt by the municipal authorities to erect a market house on land already belonging to the city, and used for another purpose, is a substantial departure from the terms of the vote and unauthorized.

MUNICIPAL CORPORATIONS—UNLAWFUL DISPOSITION OF PUBLIC MONEY—INJUNCTION BY TAXPAYER.—A resident taxpayer may maintain suit to restrain the municipal authorities of a city from illegally disposing of the moneys of the municipality, or the illegal creation of a debt which he, in common with other property owners, may otherwise be compelled to pay by taxation.

W. J. Connell and Estabrook & Davis, for the appellants.

G. W. Doane, for the appellee.

373 IRVINE, C. There is in the city of Omaha a tract of land, occupying one city block, and known as "Jefferson Square." This has for many years been used as a public park, and a considerable sum of money has been expended in improving it and adapting it to such use. In 1893, by ordinance, the mayor and council submitted to the electors of the city a proposition for the issuing of bonds "to pay the cost of securing a site for a market place and erecting a market house thereon." The propo-

sition was carried, and thereafter, by another ordinance, Jefferson Square was designated as the site for the erection of a market house, and a resolution was passed directing the board of public works, under the direction of the city engineer, to clear and grade the square, preparatory to the erection of the market house. These officers were proceeding to comply with the resolution, when the plaintiff, showing no interest other than as a taxpayer of the city and a citizen thereof, brought this action to restrain the city and the officers named in the resolution from entering upon the square for the purpose indicated. On final hearing, the injunction granted at the commencement ³⁷⁴ of the suit was made perpetual, and the defendants appealed.

An important question involved in the record, and one which has received a masterly discussion in the briefs, relates to the character of the city's title to the land, and whether it has been charged with a perpetual use as a park so that it is not within the authority of the city to divert it, under any circumstances, to a different use. While the district court seems to have passed on that question, it seems to us that it cannot be logically reached until certain other questions are disposed of; and the conclusion we have reached on these disposes of the case without a decision of the underlying question. No opinion is therefore expressed on the broad question referred to.

As the city charter stood at the time of the proceedings complained of the mayor and council had power "to erect and establish market houses, and market places, and locate such market houses and market places on any streets, alleys, or public grounds, or on any land purchased for such purpose": Comp. Stats. 1893, c. 12 a, sec. 62. It was evidently under this grant that the city undertook to act. The title of the ordinance submitting the proposition was as follows: "An ordinance providing for submitting to the legal electors of the city of Omaha, at a general election to be held in said city on the 7th of November, 1893, the question of issuing bonds of the city of Omaha to the amount of two hundred thousand dollars to pay the cost of securing a site for a market place and erecting a market house thereon." The proposition voted on, as embodied in the ordinance, was as follows: "Shall bonds of the city of Omaha in the sum of two hundred thousand dollars be issued for the purpose of paying the cost of securing a site for a market place, not less than a block in size, and erecting a market house thereon, such market place to be on such block in said city north of Leavenworth street,

south of Cuming street, ³⁷⁵ and east of Twentieth street, as may be designated by the mayor and council by ordinance after advertisement for bids of not less than four weeks, the said market house to be erected thereon to be in size at least two hundred and sixty-four feet by sixty feet, two stories in height, the lower story to be devoted to market house purposes, and the second story to contain a public assembly hall, the said bonds to run not more than twenty years and to bear interest, payable semi-annually, at a rate not to exceed five per cent per annum, with coupons attached, the said bonds to be called 'market house bonds,' and not to be sold for less than par, the proceeds of said bonds to be used for no other purpose than paying the cost of securing such site and erecting such market house, the said bonds to be issued from time to time as may be required during the years 1894 and 1895." The authority of the city government in the use and expenditure of the fund so provided was limited and strictly defined by the terms of the proposition so ratified by vote of the people. Beyond any doubt this proposition contemplated, not the issuing of bonds to the amount of two hundred thousand dollars for the erecting of a market house on land already owned by the city and devoted to another purpose, but the purchasing of land for a market place, and the erection of a market house on the land so purchased. Contending against this construction, counsel for the appellants call attention to the use, both in the title of the ordinance and in the proposition itself, of the word "securing" instead of "purchasing," and to the failure to designate any particular amount to be appropriated to the purchase of land. It is thence asserted that the voters could not have been influenced by the fact that any particular sum was to be so used, that a site might have been purchased for a nominal sum, and that the use of the word "secure" indicated an intention to permit the use of the fund to pay abutting damages and other expenses incident to the process of appropriating to this use and adapting thereto land already belonging to the city, but theretofore devoted ³⁷⁶ to other purposes. We cannot believe that the electors so understood it. The statute contemplates two things—market places and market houses—the distinction between the two being carefully preserved throughout the section. By "market place" was evidently meant something more than land occupied by a market house. This distinction is preserved in the title and in the body of the ordinance, the only connection therein being the requirement that the market house shall be erected on the mar-

ket place. The proposition delimits an area within the city within which the market place is to be located, and we think we may, perhaps, take notice of the fact that the area designated is in the most thickly populated portion of the city. The proposition requires that the designation of a site shall be made after advertisement for bids—clearly bids for the sale of land to the city. This last feature unmistakably indicates the intention to purchase land for the purpose. Every part of the ordinance reinforces that inference. When we recur to the alternative power in the charter to locate market places on streets, alleys, or public grounds, or else on land purchased for the purpose, the intent of the proposition adopted becomes a demonstrated fact. That when the governing body of a municipality is authorized by a vote of the people, and only thereby, to incur a debt for a particular purpose, such purpose must be strictly complied with, and the terms of the authority granted be strictly and fully pursued, is so well settled that it would be idle to cite authorities on the proposition. That the mayor and council, in attempting to erect a market house on land already belonging to the city and used for another purpose, were departing from the terms of the vote in a material respect, and so diverting the funds at their disposal to an unauthorized purpose, is evident on a moment's reflection. We may take notice of the fact that American cities have largely grown up without adequate provision for parks and public pleasure grounds, and that many cities, including Omaha, after reaching an ³⁷⁷ advanced period of development, have found it necessary, at enormous expense, to purchase and improve land for parks. A large proportion of a city's inhabitants is therefore always jealous of any attempt to vacate parks already existing, or to divert them, in whole or in part, to other purposes. That feeling may have been so strong that it would have led to the rejection of the market house proposition, had it not, by its language, excluded the possibility of its bringing about the destruction of one of the parks. Again, two hundred thousand dollars is a large sum to devote wholly to the construction of a market house. If land was to be purchased within the designated area, it was certain to require a large portion of the sum voted wherewith to make the purchase. Men might be willing, from the necessity of the case, to vote bonds to the amount of two hundred thousand dollars where a purchase of land was to be made, but not to incur so large a debt for the construction of a building on land already owned.

It is argued that the plaintiff, merely as a taxpayer, showing no special interest, cannot be heard to complain. Some early cases lend color to this argument, but they are all readily distinguishable. In *Normand v. Otoe County*, 8 Neb. 18, it was said that taxpayers might maintain an action to restrain county commissioners from an illegal exercise of their power, but that it must appear that they would be greatly or irreparably injured by the acts sought to be prevented. That was a proceeding to restrain the commissioners from carrying out a contract made with a lawyer to bring a suit for the county against the plaintiffs, it being alleged that the sum to be paid the lawyer was exorbitant. Clearly those particular taxpayers were properly denied relief. In *Parody v. School Dist.*, 15 Neb. 514, it was said that the plaintiff must show some special damage not common to the public. The opinion shows that there was no assignment of error and no brief, and that the court was "left wholly in the dark" as to the questions presented. The purpose of the action was to restrain the removal of a schoolhouse. It ³⁷⁸ does not appear from the report that the plaintiff had children of school age, that he was a taxpayer, or that the proposed removal would entail any expense. He therefore showed no interest whatever. In *McLaughlin v. Sandusky*, 17 Neb. 110, it was said that it must appear that the plaintiff would suffer an injury. The plaintiff sued, not as a taxpayer, but as a landowner, to prevent a road supervisor from opening a ditch from a highway upon his land. Relief was refused because there was no proof that his land would be injured. On the other hand, the right of a taxpayer to maintain a suit to restrain officers from wasting or unlawfully expending public funds, has been several times affirmed: *Follmer v. Nuckolls County*, 6 Neb. 204; *Solomon v. Fleming*, 34 Neb. 40; *Ackerman v. Thummel*, 40 Neb. 95; *Morris v. Merrell*, 44 Neb. 423. In a lucid discussion of the question in his work on *Municipal Corporations*, Judge Dillon says (*Dillon on Municipal Corporations*, sec. 914 et seq.) that the right of a taxpayer in such a case has been affirmed in many states and that it is now almost the universal doctrine. Of course, he must bring himself within some equitable principle. In the case before us, he has done this by seeking to prevent the violation of a trust, and the squandering of a trust fund for a purpose contrary to the trust. The right of a stockholder of a private corporation to so intervene is firmly established in cases where the governing body refuses to protect the rights of the stockholders or is itself the wrongdoer. As Judge Dillon suggests, there are still stronger

reasons for permitting a taxpayer to assert the same right where the officers of a municipal corporation, charged with the protection of the property, are themselves violating the trust and diverting it from its proper use. Judge Dillon's views on the subject have been cited and adopted by the supreme court of the United States in *Crampton v. Zabriskie*, 101 U. S. 601, where Mr. Justice Field says: "Of the right of resident taxpayers to invoke the interposition of a court of equity to prevent an illegal disposition of the moneys of the county or the illegal creation of ³⁷⁹ a debt which they, in common with other property holders of the county, may otherwise be compelled to pay, there is at this day no serious question."

Affirmed.

MUNICIPAL CORPORATIONS — INCURRING UNAUTHORIZED INDEBTEDNESS—BONDS.—If municipal bonds are authorized to be issued for the purpose of procuring a suitable site and the erection thereon of a suitable building for a town hall, in such manner as to the town council may seem expedient and for the best interest of the town, the bonds cannot be avoided in the hands of innocent purchasers, on the ground that their proceeds were misapplied by the erection of a building for purposes not contemplated by the statute: *Jones v. Camden*, 44 S. C. 319; 51 Am. St. Rep. 819, and extended monographic note thereto. On defenses to municipal bonds, see monographic note to *De Voss v. Richmond*, 98 Am. Dec. 664-691. Municipal corporations can bind taxpayers only in the mode prescribed by law, and cannot substitute any other: *Violet v. Alexandria*, 92 Va. 561; 53 Am. St. Rep. 825, and note; *Sutro v. Pettit*, 74 Cal. 332; 5 Am. St. Rep. 442.

MUNICIPAL CORPORATIONS—UNLAWFUL DISPOSITION OF PUBLIC MONEY—INJUNCTION BY TAXPAYER.—A court of equity, at the instance of a taxpayer, may restrain municipal corporations and their officers from making unauthorized appropriations of the corporate funds, and from making payments of illegal claims: *Stevens v. St. Mary's School*, 144 Ill. 336; 36 Am. St. Rep. 438, and note; *Stallcup v. Tacoma*, 13 Wash. 141; 52 Am. St. Rep. 25; *Chicago v. Collins*, 175 Ill. 445; 67 Am. St. Rep. 224.

FUNKE v. ALLEN.

[54 NEBRASKA, 407.]

SALES—REFUSAL OF VENDEE TO PERFORM—MEASURE OF DAMAGES.—On the breach of a contract of executory sale by the vendee by a refusal to receive the property, the vendor's measure of damages, in general, is to the extent of his actual injury, which ordinarily is the difference between the contract price and the market value at the time and place of the breach.

C. E. Magoon, for the plaintiffs in error.

S. L. Geisthardt, for the defendants in error.

⁴⁰⁷ HARRISON, C. J. The plaintiffs in error were dealers in crockery and queensware in Lincoln, and, at the solicitation of a traveling salesman for defendants in error, a firm dealing in crockery and queensware in Philadelphia and New York, delivered to him a written order for a future shipment by the latter firm to the former of twenty toilet sets. Subsequently, there was some correspondence between ⁴⁰⁸ the two firms relative to the order and the goods, the subjects of its terms, in the course of which it is claimed by plaintiffs in error there was a cancellation or renunciation of the order. After this is claimed to have occurred, the vendor shipped the goods to Lincoln to plaintiffs in error, but they would not receive them. This action was instituted by the vendors to recover the price of the goods, it being alleged that they had been duly tendered to the vendees. Of the issues joined by the pleadings there was a trial in the district court of Lancaster county, the jury being instructed as follows: "The jury are instructed that under the pleadings and the evidence in this case the plaintiff is entitled to recover the sum of one hundred and three dollars and interest thereon from July 1, 1891, at the rate of seven per cent per annum, and your verdict shall be for the plaintiffs and against the defendants for that amount. The total amount to this date is one hundred and twenty-seven dollars." There was a verdict in accordance with this instruction and judgment rendered thereon.

In this error proceeding it is contended for the vendees that inasmuch as they had withdrawn the order, if it constituted a breach of the contract of purchase, the vendors were not entitled to sue for and recover the agreed price, but a different measure of damages should have been applied and enforced. Under the evidence adduced, it was a question for the court to determine whether the order for the goods had been countermanded, and on this point we will say that we are of the opinion that of the letters written by the vendees to the vendors there was one which by a fair construction can mean nothing more nor less than that the goods were not wanted by the vendees and would not be received by them under the then existent order. The letter was clear and specific to such effect. That such a letter constitutes a countermand of an order for goods, see *Peck v. Freese*, 101 Mich. 321. This order was an incomplete or executory contract. The title to the goods had not passed to the vendees at the time they countermanded ⁴⁰⁹ the order. Their doing so was a breach of the contract, for which they became liable to the vendors in damages. If the contract

of sale is executory, the title has not passed to the vendee. On breach of the contract by the vendee by a refusal to receive the property, the vendor's measure of damages, in general, is to the extent of his actual injury, which ordinarily is the difference between the contract price and the market value at the time and place of the breach: Tiffany on Sales, Hornbook series, sec. 125; pp. 231, 232; 2 Benjamin on Sales, 4th ed., b. 5, secs. 1117, 1118, p. 971; 2 Sutherland on Damages, 359; 5 Wait's Actions and Defenses, art. 3, sec. 2, p. 608; 21 Am. & Eng. Ency. of Law, 578-580, cases cited and discussion in note 2; Hale v. Hess, 30 Neb. 42; Scott Lumber Co. v. Hafner-Lothman Mfg. Co., 91 Wis. 667; Keeler v. Schott, 1 Pa. Sup. Ct. 458; 38 Week. Not. Cas. 316; Neal v. Shewalter, 5 Ind. App. 147; Todd v. Gamble, 67 Hun, 38; 21 N. Y. Supp. 739; Ridgley v. Mooney, 16 Ind. App. 362; Browning v. Simons, 17 Ind. App. 45; Lawrence Canning Co. v. Lee Mercantile Co., 5 Kan. App. 77; Miller v. Burch (Ky., June 9, 1897), 41 S. W. Rep. 307; Heiser v. Mears, 120 N. C. 443.

There are authorities which lend support to the doctrine that the vendor in such a contract of sale may treat the goods as belonging to the vendee regardless of his refusal to receive them, and sue for and recover the contract price as his damages; but the weight of authority is to the contrary and favorable to the rule which we have hereinbefore stated. In the opinion in the case of Lincoln Shoe Mfg. Co. v. Sheldon, 44 Neb. 279, it was stated by this court: "Where a vendee refuses to perform, the vendor has either of two remedies—he may keep the property made the subject of the contract and sue the vendee for damages for a breach of his contract, and in such case his measure of damages will be the difference between the contract price of the property and its actual value at the date of the vendee's breach of ⁴¹⁰ the contract; or the vendor may tender the property made the subject of the contract to the vendee, and then in a suit upon the contract the vendor's measure of damages will be the contract price of the property." But the decision of the case hinged upon the proposition that the contract in question was one of subscription for shares of stock and not of sale and purchase, and the rule of the measure of damages for a breach of a contract of sale by a vendee was not directly in question or involved in the action, and its announcement was not necessary to the decision; and what was then said was not authoritative, to the extent at least that the doctrine was stated to be that the vendor may tender the property to the vendee, and in a suit upon the contract the measure of his damages, if he re-

covers, be the contract price. There are many cases arise wherein the particular facts and circumstances warrant a departure from the general rule, call for an exception therefrom, and in which the doctrine to which we have last referred is applicable and governing, but it is not so in a case such as the one at bar.

It follows that the judgment of the district court must be reversed and the cause remanded.

SALES—BREACH OF CONTRACT TO BUY—MEASURE OF DAMAGES.—Upon a breach by the buyer of a contract to buy goods, the measure of damages is the difference between the contract price and the market price of the goods at the time of the breach: *Murray v. Doud*, 167 Ill. 868; 59 Am. St. Rep. 297. and note thereto citing other cases in support of the rule.

DRUMMOND CARRIAGE COMPANY v. MILLS.

[54 NEBRASKA, 417.]

APPEAL BONDS—JUDGMENT AGAINST SURETY.—The district court, on the rendition of a judgment by it against an appellant from a justice's judgment, has no jurisdiction to render a like judgment against the surety on the appeal bond.

BAILMENTS—LIEN OF BAILEE—COMMON LAW AND STATUTORY LIENS.—In the absence of specific agreement, a person who has bestowed labor and skill on a chattel bailed to him for that purpose, and thereby improved it, has a lien on it for the reasonable value of his labor, or the right to retain it until paid therefor, and such common-law lien may, under special circumstances, be superior to prior existing contractual or statutory liens on the same property.

MORTGAGES OF CHATTELS.—THE TITLE to mortgaged chattels remains in the mortgagor until foreclosure of the mortgage.

MORTGAGES OF CHATTELS—LIEN FOR REPAIRS—PRIORITY.—If a mortgagor of chattels retains possession and can be said to have an express or implied authority from the mortgagee to procure repairs to be made on the mortgaged property, the common-law lien thereon for such repairs and the right to enforce it is superior to the lien of the mortgage.

B. N. Robertson, for the plaintiffs in error.

W. H. De France, for the defendant in error.

418 **HARRISON, C. J.** This, an action of replevin, was instituted by defendant in error March 22, 1894, before a justice of the peace in Douglas county to recover the possession of a "Breton buggy," and in a trial he was given judgment for the relief demanded. An appeal was perfected to the district

court, wherein the defendant in error was again successful. He there obtained judgment against the carriage company, and also against the surety on the appeal undertaking. The carriage company and the surety on the appeal bond present the case to this court for review.

It is contended for the party who signed the appeal ⁴¹⁹ undertaking that the district court had no jurisdiction to render the judgment it did against him. The question presented was discussed and determined in the case of *Selby v. McQuillan*, 45 Neb. 512, and it was stated that the district court, on the rendition of a judgment against an appellant, had no jurisdiction to render a like judgment against the surety in the appeal bond; and, following the doctrine then announced, we must hold that the judgment against the surety in this case was without the jurisdiction of the court and cannot stand.

The trial in the district court was without a jury and on an agreed statement of the facts as follows:

"That W. P. Wilcox was, on and prior to July 1, 1891, a physician engaged in the actual practice of his profession in the city of Omaha, Nebraska; that on September 12, 1889, said Wilcox purchased a physician's phaeton, or carriage, from the defendant, and that from the date of its purchase until on or about the thirteenth day of May, 1892, the said Dr. Wilcox used the said carriage in his professional business as a physician and surgeon; that on July 1, 1891, said Dr. W. P. Wilcox made, executed, and delivered, for a valuable consideration, being money actually loaned, his certain promissory note to the plaintiff for three hundred and fifty dollars, due one year after date; that no payments have been made on said note, and the same is due. To secure said note the said Dr. W. P. Wilcox made and delivered a chattel mortgage to plaintiff covering the said physician's phaeton, or carriage, a horse and harness. The said mortgage was filed in the office of the county clerk of Douglas county, Nebraska, in accordance with law, on the third day of August, 1891, a copy of which is hereto attached and made a part of this stipulation, marked 'Exhibit A.'

"The plaintiff was well acquainted with the buggy in controversy and knew at the time he took his mortgage that it was used by Dr. Wilcox in his business as a physician. Dr. Wilcox and the plaintiff rode out in the buggy quite frequently in the evenings. The plaintiff ⁴²⁰ was with Dr. Wilcox at the office of the Drummond Carriage Works, defendant, at one time previous to May, 1892, after his mortgage was given, and when Dr.

Wilcox run the buggy in there for repairs, which bill of repairs was paid by Dr. Wilcox. About the 13th of May, 1892, said Dr. Wilcox took the buggy mentioned in the mortgage, and in controversy herein, to the defendant for repairs, and, pursuant to agreement between the defendant and Dr. Wilcox, the buggy was to be repaired. The bill for the same agreed upon was sixty dollars, to be paid in cash when the work was done. A copy of the memorandum of repairs to be done, and which were actually done, on the carriage, is hereto attached, marked 'Exhibit B' and made a part of this stipulation. The original was, on or about May 13, 1892, mailed by defendant to Dr. Wilcox. The repairs done on the buggy were reasonably necessary for the careful preservation of the carriage, and the bill for the same is well and reasonably worth sixty dollars, no part of which has been paid. The buggy was completed, and the bill was due on the 1st of July, 1892. The plaintiff is a resident of Omaha, Nebraska, and has resided therein ever since the twelfth day of September, 1889.

"About the 1st of June, 1892, said Dr. W. P. Wilcox left the city of Omaha for Colorado, to be gone an indefinite period of time. Said Dr. Wilcox was absent from the city from about the 1st of June, 1892, until about the 15th of March, 1894. During the time of said Wilcox's absence from the city, as aforesaid, the plaintiff supposed the buggy was in the barn of the father of said Wilcox, and did not know different until about the 21st of March, 1894, when he was notified by said Wilcox that the said buggy was in the possession of the defendant. In the mean time, the plaintiff had made no inquiries about the whereabouts of the buggy, neither had he made any inquiries about the horse and harness, and when this action was commenced the plaintiff did not know where the horse and harness were. Plaintiff never has pressed the said Wilcox for the money secured by the ⁴²¹ note and chattel mortgage and never calculated to do so. While Dr. Wilcox was using the buggy in his professional business, he had all his repairing done at the carriage works of the defendant, and the buggy was in the defendant's shop for repairs, and the defendant did small repair work on the buggy twelve different times between the date of its purchase, September 12, 1889, and May 1, 1891. The first actual knowledge that the plaintiff had of the buggy being in the possession of the defendant was obtained from the said Dr. Wilcox on or about March 21, 1894. Immediately after said notification, plaintiff demanded possession of said buggy from defendant, and upon refusal of defend-

ant to deliver up the possession of said buggy to plaintiff, plaintiff commenced this cause of action. The defendant made no inquiries of Wilcox when he took the buggy to its place of business for repairs, as to whether the buggy was incumbered or not, nor did the said Wilcox say anything about it to the defendant. The buggy has been in the continuous possession of the defendant from the spring of 1892. The defendant is a corporation duly organized under the laws of Nebraska, and engaged in the manufacture and sale and general repair work of wagons, carriages, and other kinds of vehicles. The defendant, when demand was made on it for the possession of the buggy, refused to deliver the same to the plaintiff until its bill for repairs, as above stated, was paid, and then and there notified the plaintiff that it claimed a lien upon said buggy for the work and labor and material performed and used in repairing said buggy. The value of the buggy was seventy-five dollars at the commencement of this action. The defendant and all the officers thereof, at the times when said repairs were agreed upon and made, had no actual knowledge of said mortgage, nor were they aware of the existence of such a mortgage until the month of March, 1894."

It is urged by counsel for the carriage company that it had a lien by force of law on the buggy for the amount of its bill of charges for repairing the buggy, which continued ⁴²² so long as it retained possession of the buggy under a claim of lien for such services. The principle invoked is, if property is delivered to a person to be by his skill and labor, or by adding thereto property of his, enhanced in value, and he performs the labor, or adds his own property to that delivered and thereby increases the value of the latter, he may retain possession of it until paid for his labor or materials. This is a doctrine of the common law, and the right is usually denominated a common-law lien, and it exists under a state of facts such as we have just detailed, unless there is a contract inconsistent with such lien, or some modifying circumstances which are in conflict with any such right, or disclose an intent not to claim the right. "A mechanic of any kind has a lien upon all personal property for manufacture or repairs, while it remains in his possession. . . . A carriage-maker for repairs upon a carriage": See 6 Wait's Actions and Defenses, 149, and cases cited. Persons have by common law the right to detain goods on which they have bestowed labor, until the reasonable charges therefor are paid: 2 Kent's Commentaries, 635. In the absence of specific agreement, if a party has bestowed labor and skill on a chattel bailed to him for such pur-

pose and thereby improved it, he has by general law a lien on it for the reasonable value of his labor, or the right to retain it until paid for such skill and labor: *Bevan v. Waters*, 3 Car. & P. 520; *Scarfe v. Morgan*, 4 Mees. & W. 270; *Lord v. Jones*, 24 Me. 439; 41 Am. Dec. 391; *Grinnell v. Cook*, 3 Hill, 491; 38 Am. Dec. 663. This right rests on principles of natural equity and commercial necessity: 2 Kent's Commentaries, 634. No lien exists at common law for the agistment of cattle: *Chapman v. Allen*, 2 Cro. Car. 271; *Jackson v. Cummins*, 5 Mees. & W. 342; *Wallace v. Woodgate*, 1 Car. & P. 575; nor in favor of one to whom a horse has been delivered to be stabled, taken care of, fed, and kept: *Judson v. Etheridge*, 1 Crompt. & M. 742. In such cases, a lien for the charges will only arise by virtue of a statute or special agreement in ⁴²³ the nature of a pledge. . . . "The case of an agistment does not fall within that principle, inasmuch as the agister does not confer any additional value on the article, either by the exertion of any skill of his own or indirectly, by means of any instrument in his possession": *White v. Smith*, 44 N. J. L. 105; 43 Am. Rep. 347; *Jackson v. Cummins*, 5 Mees. & W. 342.

We refer to the agister's lien for the purpose of directing attention to the fact that it is not a lien which has been recognized as arising by force of the general or common law or as having any existence at common law, but has its origin in, or is the creature of, statutory provision, and that the reasoning employed and rules announced by this court in reference to agister's liens are not forceful or applicable herein in regard to the lien claimed. The legislature of the territory, when the state was a territory, passed the following act: "So much of the common law of England as is applicable and not inconsistent with the constitution of the United States, with the organic law of this territory, or with any law passed or to be passed by the legislature of this territory, is adopted and declared to be law within said territory": Comp. Stats., c. 15, sec. 1. The right to the common-law lien would exist in this state unless inconsistent with our statutory law, and we cannot discover wherein it is inconsistent with, or has been abrogated by, statute, hence must determine it in force. In regard to the recognition and enforcement of common-law rules, it is said by this court in the opinion in the case of *Wilson v. Bumstead*, 12 Neb. 1: "In the application of the principles of the common law, where the precedents are unanimous in the support of a proposition, there is no safety but in a strict adher-

ence to such precedents. If the court will not follow established rules, rights are sacrificed, and lawyers and litigants are left in doubt and uncertainty while there is no certainty in regard to what, upon a given state of facts, the decision of the court will be." We must conclude that a common-law lien existed in favor of the ⁴²⁴ carriage company for the amount due it for the repair of the buggy; and it remains further to determine whether it took precedence of the lien of defendant in error's chattel mortgage. The lien of the mortgage was created and perfected by the filing prescribed by law, long prior to the services, et cetera, of the carriage company in repairing the buggy, and there is no dispute in regard to time of attachment of either lien.

It now becomes necessary to allude again to some of the facts which appeared of evidence in the cause, more especially to bring out distinctly the position occupied by defendant in error relative to any repairs which became necessary to the useful existence of the buggy, and its possible future appropriation to the satisfaction of the indebtedness, the payment of which was secured by the chattel mortgage. The mortgage provided in terms that until default by the mortgagor in the performance of specified conditions or until the happening of certain indicated events, he should keep possession of the mortgaged property, and one of the enumerated events by the occurrence of which the mortgagee should at his option be entitled to take possession thereof was this: "If the said party of the first part [the mortgagor] shall so negligently or improperly use or care for said property as to subject the same to probable loss or material depreciation of the value thereof"—from which it seems probable that it was in contemplation of the parties that the mortgagor would, of course at his own proper cost and charge, have the buggy repaired, if necessary, during the time of its use by him and the existence of the mortgage. It was also of the evidence that defendant in error saw the buggy and rode in it frequently, and had knowledge of its being repaired by the carriage company at least once when he was present, and it was run into the carriage company's place of business to be by it repaired.

We may now turn to the rules of law which we deem applicable to the state of facts developed in evidence herein. The legal title to the buggy was in the mortgagor. ⁴²⁵ He was the owner thereof. The mortgagee had but a lien thereon: *Musser v. King*, 40 Neb. 892; 42 Am. St. Rep. 700; *Randall v. Persons*,

42 Neb. 607; *Camp v. Pollock*, 45 Neb. 771; *Gould v. Armagost*, 46 Neb. 897. It may be said that a lien which arises by force of the common law may be, under special circumstances, superior to prior existing contractual or statutory liens on the same property. In *Darlington on Personal Property*, page 48, it is stated on this subject: "And though in general a lien cannot be created without authority of the owner, liens for repairs take precedence of prior mortgages where such repairs were necessary for purposes within the intention of the mortgage; e. g., repairs on vessels or carriages, which the mortgagor was to continue to use." A lien on property, by operation of the common law, may have precedence of an existing mortgage: *Jones' Chattel Mortgages*, sec. 474; *Herman on Chattel Mortgages*, 308. In the case of *White v. Smith*, 44 N. J. L. 105, 43 Am. Rep. 347, it was said: "*Williams v. Allsup*, 10 Com. B., N. S., 417, is the leading case on this subject. In that case the plaintiff, a shipwright, retained a vessel for his charges for repairs, as against a mortgagee under a prior mortgage. The mortgage had been recorded pursuant to the merchants' shipping act. The vessel was left in the mortgagor's possession and control for use, and was condemned as unseaworthy. The shipwright's charges were for necessary repairs, made by the mortgagor's direction without the knowledge of the mortgagee. The court sustained the shipwright's lien for repairs, against the claim of the mortgagee. The course of reasoning which led to this result, as expressed in the opinions of the judges, is as follows: Erle, C. J., said: 'I put my decision on the ground that the mortgagee, having allowed the mortgagor to continue in the apparent ownership of the vessel, making it a source of profit and a means of earning wherewithal to pay off the mortgage debt, the relation so created by implication entitles the mortgagor to do all that may be necessary to keep her in an efficient
426 state for that purpose. The case states that the vessel had been condemned as unseaworthy by the government surveyor, and so was in a condition to be utterly unable to earn freight or to be an available security or any source of profit at all. Under these circumstances, the mortgagor did that which was obviously for the advantage of all parties interested. He puts her into the hands of the defendant to be repaired, and, according to all ordinary usage, the defendant ought to have a right of lien on the ship so that those who are interested in the ship, and who will be benefited by the repairs, should not be allowed to take her out of his hands without paying for them. . . . It

is to be observed that the money expended in repairs adds to the value of the ship; and looking to the rights and interests of the parties generally, it cannot be doubted that it is much to the advantage of the mortgagee that the mortgagor should be held to have power to confer a right of lien on the ship for repairs necessary to keep her seaworthy.' Willes, J., said: 'By the permission of the mortgagees the mortgagor has the use of the vessel. He has, therefore, a right to use her in the way in which vessels are ordinarily used. Upon the facts which appear on this case, this vessel could not be so used unless these repairs had been done to her. The state of the things, therefore, seems to involve the right of the mortgagor to get the vessel repaired, not on the credit of the mortgagees, but upon the ordinary terms, subject to the shipwright's lien. It seems to me that the case is the same as if the mortgagees had been present when the order for repairs was given.' Byles, J., said: 'As it is obvious that every ship will, from time to time, require repairs, it seems but reasonable, under circumstances like these, to infer that the mortgagor had authority from the mortgagees to cause such repairs as should become necessary to be done, upon the usual and ordinary terms. Now, what are the usual and ordinary terms? Why, that the person by whom the repairs are ordered should alone be liable personally, but ⁴²⁷ that the shipwright should have a lien upon the ship for the work and labor he has expended on her. Nor are the mortgagees at all prejudicially affected thereby. They have a property augmented in value by the amount of the repairs': See, also, *Scott v. Delahunt*, 5 Lans. 372; *Hammond v. Danielson*, 126 Mass. 294; *Tucker v. Werner*, 2 Misc. Rep. 193; 21 N. Y. Supp. 264; *Corning v. Ashley*, 51 Hun, 483; 4 N. Y. Supp. 255, affirmed; see 121 N. Y. 700; 24 N. E. Rep. 1100. We are not holding that in all cases, or generally, the common-law lien will override and be superior to the prior chattel mortgage lien, but that in cases where the mortgagor can be said to have expressed or implied authority from the mortgagee to procure repairs to be made on the mortgaged property, it will be so. The carriage company was entitled to its lien, and it was superior to the lien of the chattel mortgage; hence the judgment of the district court was wrong and must be reversed.

Ragan, C., dissents.

APPEAL BONDS—JUDGMENT AGAINST SURETY.—Where a statute so provides, a summary judgment may be rendered against

obligors in an appeal bond, when the judgment is affirmed by the appellate court: See the note to *Howell v. Alma Milling Co.*, 38 Am. St. Rep. 714.

BAILMENTS—LIEN OF BAILEE—COMMON LAW AND STATUTORY LIENS.—At common law, the principle was recognized at an early day that the artisan or tradesman who had contributed to enhance the value of goods delivered to his custody by bestowing his labor thereupon was entitled to a lien upon them for his reasonable charges: *Scott v. Mercer*, 98 Iowa, 258; 60 Am. St. Rep. 188, and note; *McIntyre v. Carver*, 2 Watts & S. 392; 37 Am. Dec. 519, and note; *Cox v. Martin*, 75 Miss. 229; 65 Am. St. Rep. 604. Possession is essential to the existence of a common-law lien: *Fitzgerald v. Elliott*, 162 Pa. St. 118; 42 Am. St. Rep. 812, and note. Distinction between common law and statutory liens: *Sullivan v. Clifton*, 55 N. J. L. 324; 39 Am. St. Rep. 652.

CHATTEL MORTGAGES—TITLE.—The mortgagee of chattels is not the owner of the legal title thereto. It is in the mortgagor until divested by foreclosure proceedings and sale in pursuance of the statute. Until then the mortgagee has merely a lien upon the property: *Musser v. King*, 40 Neb. 892; 42 Am. St. Rep. 700, and note.

CHATTEL MORTGAGES—LIEN FOR REPAIRS—PRIORITY.—If the mortgagee of a railway and the rolling stock thereon permits a locomotive and tender to remain in the possession and use of the mortgagor, and through such use it becomes in need of alterations and repairs, whereupon it is intrusted to a mechanic to alter and repair, he has a lien thereon for the amount due him, which has precedence over such mortgage: *Watts v. Sweeney*, 127 Ind. 116; 22 Am. St. Rep. 615, and note. See, also, *Wilson v. Donaldson*, 121 Cal. 8; 66 Am. St. Rep. 17.

LINTON v. COOPER.

[54 NEBRASKA, 433.]

PROCESS—EXEMPTION FROM SERVICE OF.—A nonresident witness or suitor, who comes within the jurisdiction of the court for the sole purpose of attending the trial of a case therein as a party or witness, is privileged from service of civil process not only while coming to, returning from, and attending upon, the court, for the purposes of the trial, but also for a reasonable time after the hearing to prepare for departure. What constitutes such reasonable time must depend upon, and be determined by, the evidence and circumstances of each particular case.

J. T. Cathers and W. A. Redick, for the plaintiff in error.

C. A. Goss, for the defendant in error.

433 **NORVAL, J.** This action was brought in the district court of Douglas county to recover the sum of seventy-five thousand dollars. The defendant was personally served with summons in that county. He made special appearance in the cause and objected to jurisdiction of the court over his person, and moved to quash the service of the summons, on the ground that

he was a nonresident and had been in attendance before the court in another cause as a witness, and a reasonable time had not elapsed after the trial thereof to enable him to return to his home. The service of process was set aside and the action dismissed.

The record discloses that the defendant is a British subject and a citizen and a resident of England; that on September 19, 1894, he came to Omaha solely as a party and witness to be present at the trial of a cause then pending in the district court of Douglas county, wherein Phoebe R. E. E. Linton and Adolphus Frederick Linton were plaintiffs, and John Whitaker Cooper and others were defendants, with the intent to depart from Omaha at the earliest possible moment after the conclusion of the trial, which was commenced on Monday, October 1, 1894, continued from day to day until Thursday, October 11th, at about 5 o'clock P. M. of that day, when the cause was submitted to the court, by it taken under advisement, and the decision therein announced on October 20th; that the defendant herein was present during the entire trial of that cause in the capacity of defendant and witness; that on October 11th, and within fifteen minutes of the close of the trial, defendant was served with a summons in a suit brought against him before a justice of the peace of Douglas county by the said Phoebe R. E. E. Linton, and within an hour thereafter he was served with another summons in an action brought by the said Phoebe in said district court, and that summons in the present action was served upon defendant on Saturday, October 13, 1894, between 3 and 4 o'clock P. M. in the courthouse of Douglas county.

Public policy, the due administration of justice, and the protection of parties and witnesses demand that nonresident suitors and witnesses alike be protected from the service of civil process while necessarily in attendance upon court. This privilege or immunity extends to parties and witnesses not only while coming to, returning from, and in actual attendance upon, the court for the purpose of trial, but for a reasonable time after the hearing to prepare for departure. This is the settled doctrine of this and other courts: *Palmer v. Rowan*, 21 Neb. 452; 59 Am. Rep. 844; *Mayer v. Nelson*, 54 Neb. 434; *Fisk v. Westover*, 4 S. Dak. 233; 46 Am. St. Rep. 780; *Wilson v. Donaldson*, 117 Ind. 356; 10 Am. St. Rep. 48; *First Nat. Bank of St. Paul v. Ames*, 39 Minn. 179; *Mulhearn v. Press Pub. Co.*, 53 N. J. L. 150; *Parker v. Marco*, 136 N. Y. 585; 32 Am. St.

Rep. 770; *Andrews v. Lembeck*, 46 Ohio St. 38; 15 Am. St. Rep. 547; *Jacobson v. Wayne Circuit Judge*, 76 Mich. 234; *Gregg v. Sumner*, 21 Ill. App. 110; *Christian v. Williams*, 35 Mo. App. 297; *Partridge v. Powell*, 180 Pa. St. 22; *Kinne v. Lant*, 68 Fed. Rep. 436; *Smythe v. Banks*, 4 Dall. *329. Judge Thompson, in *Christian v. Williams*, 35 Mo. App. 297, uses this language: "The reason which extends the immunity to a nonresident witness is, that he cannot be brought within the ⁴⁴¹ jurisdiction to testify by compulsory process; and as his testimony may be needed in order to the due administration of justice, he ought not to be deterred from coming by the possibility of being entangled in other litigation by reason of coming. The same reason extends in a measure to the presence of a litigating party. The due administration of justice is presumptively promoted by his being present at the trial of a cause to which he is a party, in order to instruct his counsel, and it is therefore prejudicial to the administration of justice that a rule should exist which may deter him from coming." There is some conflict among the decided cases, but, in weight and reason, the decisions range themselves in strong array in support of the principle announced in the foregoing excerpt.

The testimony adduced in support of the motion to set aside the service of process herein tends to show that after the conclusion of the hearing on October 11, 1894, defendant had a large amount of business to transact with his counsel in connection with said cause as a party litigant; that important features were to be discussed and contingencies to be provided for in relation thereto, since the decision had not been announced; that his personal effects and baggage were to be packed; that hundreds of documents which he had brought with him from England to be used in the trial of said cause had become disarranged and scattered during the trial, and it was necessary to gather these up, sort, and arrange them so a portion could be left with his counsel and the remainder packed for reshipment for England; that affidavits were required to be prepared for the purpose of supporting the motion to quash the service of the writs in the two other cases already mentioned which had been sued out against Cooper; that defendant and his counsel, immediately after the close of the hearing on October 11th, began to make all necessary preparations to enable defendant to leave Omaha and the state at the earliest practicable moment consistent with the business which brought him ⁴⁴² to the city, and both continued their efforts in that behalf incessantly, and

with all due haste, up to the time the summons herein was served upon the defendant. The question is whether the service of process was had while Cooper was in attendance upon the district court of Douglas county as a suitor and witness, and before sufficient time had elapsed for him to depart from the county. No definite rule can be laid down as to the length of time a party or witness may have to return to his home other than that the law gives him a reasonable time to depart from the court. What is, and what is not, a reasonable time for such purpose is a question of fact to be ascertained from the evidence adduced and the circumstances surrounding each particular case. What would be reasonable for one person might be wholly unreasonable for another. We think, under the facts disclosed by this record, Cooper was privileged from service of summons in this action, especially since the cause in which he had appeared as a party and testified as a witness was undetermined when this service was had, and because a reasonable time after the hearing therein for him to take his departure from the state had not yet elapsed. The facts bring this case within the letter and spirit of the rule, and the reason upon which it is based, which protects parties and witnesses from the service of process in civil cases while attending court in a jurisdiction other than the one where they reside: See *Jacobson v. Wayne Circuit Judge*, 76 Mich. 234; *Kinne v. Lant*, 68 Fed. Rep. 436; *Hatch v. Blisset*, Gilb. Cas. 308; *Sidgier v. Birch*, 9 Ves. 69; *Ricketts v. Gurney*, 7 Price, 699; *Lightfoot v. Cameron*, 2 W. Black. 1113.

The motion to set aside service of process in this cause was properly sustained, and the judgment, therefore, must be affirmed.

PROCESS—EXEMPTION FROM SERVICE OF.—All suitors and witnesses who are nonresidents of a state or county in which a case is being tried are exempt from service of civil process during their attendance in good faith before any judicial tribunal therein, and for a reasonable time in going to and returning therefrom: *Hicks v. Besuchet*, 7 N. Dak. 429; 66 Am. St. Rep. 665; *Powers v. Arkadelphia Lumber Co.*, 61 Ark. 504; 54 Am. St. Rep. 276; *Flisk v. Westover*, 4 S. Dak. 233; 46 Am. St. Rep. 780. The same rule applies to attorneys: *Hoffman v. Bay Circuit Judge*, 113 Mich. 109; 67 Am. St. Rep. 458. Service, however, upon a nonresident suitor or witness while attending the courts of the state as such suitor or witness is not void, but voidable. His remedy is not by motion to dismiss the action, but by motion on special appearance to set aside the return of the service: *Cooper v. Wyman*, 122 N. C. 784; 65 Am. St. Rep. 731. In some states the courts hold that while a nonresident witness is exempt from the service of process in another suit, a nonresident suitor is not entitled to such an exemption: *Capwell v. Sipe*, 17 R. L. 475; 33 Am. St. Rep. 890, and note.

MERRIAM v. MILES.

[54 NEBRASKA, 566.]

SURETYSHIP—ASSUMPTION OF MORTGAGE BY CO-TENANT.—If one of several cotenants of land encumbered with a mortgage buys the interest of his cotenants, and covenants to pay the mortgage debt, or as part of the consideration assumes the payment, he becomes, as among the parties to such agreement, the principal debtor, and the vendors become his sureties.

SURETYSHIP—ASSUMPTION OF MORTGAGE BY CO-TENANT—EXTENSION OF TIME OF PAYMENT.—A purchaser of notes secured by a mortgage executed by several cotenants, with knowledge that one cotenant has purchased the interest of the others, and assumed and agreed to pay the mortgage debt as part of the consideration, releases the cotenants who have sold their interest, by entering into an agreement with the purchasing cotenant, upon a valid consideration, and without the consent of the other cotenants, to definitely extend the time of payment of the notes and mortgage.

SURETYSHIP—RELEASE OF SURETY.—When the relationship between debtors has become that of principal and surety, to the knowledge of the creditor, the duty of the latter to regard the rights of the surety exists, although the creditor may sustain such a relationship that in enforcing his own rights he may treat both as principals; and if, with knowledge of the changed relationship between his debtors, he disregards the rights of the surety, he may thereby release him from all liability.

Wharton & Baird, for the plaintiff in error.

F. B. Tiffany and W. T. Nelson, for the defendant in error.

⁵⁶⁷ **IRVINE, C.** Andrew Miles and James W. Vinton, executors of the will of John L. Miles, deceased, and James Thompson brought this action against Nathan Merriam, Charles T. Brown, Patrick Egan, and H. J. Cosgrove to recover on eight promissory notes for one thousand dollars each, executed by the defendants to William M. Clark and transferred to John L. Miles and James Thompson. Of the defendants, Merriam alone was served with process. As a defense, he pleaded that the notes were made to Clark in part payment for a tract of land purchased jointly by the makers, and were secured by mortgage on the land purchased, which was afterward platted into lots as an addition to Lincoln; that before the notes were sold to Miles and Thompson, Merriam, Egan, and Cosgrove sold their respective ⁵⁶⁸ interests in the land to Brown, their cotenant, and comaker of the notes, who, in the deed of conveyance and as a part of the consideration assumed and agreed to pay these notes; that afterward, for a valuable consideration, Miles and Thompson entered into a written agreement with Brown,

whereby they extended the time of payment for four years, and agreed to accept partial payments on certain designated terms, and also agreed to and did release from the lien of said mortgage twenty-eight of the lots included therein; that Merriam was not a party to such agreement, and that, "as between said Brown and this defendant, this defendant was and remained only a surety upon said notes, which was well and fully understood by the said Miles and Thompson at the date of the execution and delivery of said agreement." The reply contains a peculiar negative pregnant in meeting the last averment quoted from the answer. It is as follows: "Plaintiffs deny that as to the payment of the notes set out in plaintiffs' petition Charles T. Brown became the principal and the defendant Merriam surety thereon, with the full understanding of the said John L. Miles and James Thompson at the date of the purchase of said notes." This is followed by averments that at the time of the purchase of the notes five of them were overdue and the time of payment had been extended by the then holder, and that the written agreement made by Miles and Thompson was merely a ratification of the agreement for an extension theretofore in force. The court, the case having been tried without a jury, found specially the facts almost as the defendant asserted them, but on the issue of notice to Miles and Thompson of the changed relationship between Brown and the other makers found that they had no notice thereof and did not consent thereto. On these findings it was held that Merriam was not discharged, but that he was entitled to a deduction from the amount of the notes of the value of the twenty-eight lots released by Miles and Thompson from the lien of the mortgage. Judgment was entered against ⁵⁶⁹ Merriam for the amount thus ascertained, and Merriam has brought the case here for review. There can be no doubt of the correctness of the findings of fact, except with regard to notice. Indeed, defendant in error concedes that the facts are not open to dispute except as to the change in relationship between Brown and his comakers, and with regard to notice; and on the former issue the ultimate facts are not open to controversy. It is shown beyond peradventure that Brown bought the property, and as a part of the consideration agreed to pay the debt. It is not shown that the holder of the note was a party to that contract. The only question here is as to the legal effect of those facts on the duties of the holder.

It is asserted on behalf of the plaintiffs that, unless the holder

was a party to the agreement, or afterward ratified it and accepted the new liabilities thereby created, he was not bound in any respect thereby, and could for all purposes continue to treat all the parties to the instruments as principals and deal with them on that basis. We do not think that so broad a statement of the law is warranted by reason or the authorities, although some cases are found which go to that extent. The doctrine has been frequently recognized by this court that where one buys land encumbered by a mortgage, and covenants to pay the mortgage debt, or as part of the consideration assumes the payment thereof, his promise creates a principal obligation which the mortgagee may enforce against him: *Cooper v. Foss*, 15 Neb. 515; *Keedle v. Flack*, 27 Neb. 836; *Rockwell v. Blair Sav. Bank*, 31 Neb. 128; *Reynolds v. Dietz*, 39 Neb. 180; *Grand Island etc. Assn. v. Moore*, 40 Neb. 686; *Meehan v. First Nat. Bank of Fairfield*, 44 Neb. 213; *Green v. Hall*, 45 Neb. 89. It follows, as a logical consequence, that thereupon the vendor becomes in effect a surety, and the vendee the principal debtor—that is, between themselves: *Paine v. Jones*, 76 N. Y. 274; *Huyler v. Atwood*, 26 N. J. Eq. 504; *Flagg v. Geltmacher*, 98 Ill. 293. Of course there can be no change without the knowledge and consent of the mortgagee which can affect ³⁷⁰ his rights. He need not look at all to the vendee unless he so elects. He need surrender no rights against the vendor unless he so elects; but it by no means follows that because he is not contractually bound by the contract between them, he may, after learning thereof, enter into new relations with one of the parties, in disregard of the rights of the other. He may enforce his rights as they before existed, but if he undertakes, after notice of the changed relationship between the other parties, to deal with one of them by changing his own contractual obligations with him, he must regard the rights which he knows the third person has acquired. The rule which releases a surety, when the creditor, without the surety's consent, enters into a valid contract extending the time of payment, is founded on equitable considerations, and does not arise from an implied provision of the original contract. Where the relationship is, or has become, that of principal and surety, the duty to regard the surety's rights exists, although the creditor may himself sustain such a relationship that in enforcing his own rights he may treat both as principals. In practically all the cases on this subject the duty of the creditor in this behalf is made to arise from his knowledge of the relationship existing between

the debtors as between themselves, not upon the existence of the relationship of principal and surety as between them and the creditor. In *Paine v. Jones*, 76 N. Y. 274, a mortgagee, with knowledge that the land had been sold and that the vendee had assumed the debt, agreed with the vendee to abrogate a clause in the mortgage whereby the mortgagor, on partial payment, might require partial releases of the land mortgaged. It was held that the mortgagee "was under an equitable obligation to do nothing to affect or alter the rights of the surety," and that the vendor was therefore discharged. So in many cases similar in principle, the discharge of the surety is made to depend on the knowledge by the creditor of the existence of the relationship between principal and surety, and not on the form or nature of the contract ⁵⁷¹ as between the creditor and the debtors: *Bank of British Columbia v. Jeffs*, 15 Wash. 230; *Behrns v. Rogers* (Tex. Civ. App. Apr. 14, 1897), 40 S. W. Rep. 419; *Wilson v. Foot*, 11 Mct. 285; *Morgan v. Thompson*, 60 Iowa, 280; *Lamson v. First Nat. Bank*, 82 Ind. 21. It is not necessary, for reasons which will presently appear, to determine whether this knowledge must exist at the time one becomes a creditor, or whether it binds the creditor if possessed at the time the extension is given. We conclude on this branch of the case that while the holders of the note were not parties to the contract changing the mutual relationship of the makers, still Brown had, as between him and Merriam, become the principal debtor and Merriam the surety, and that the plaintiffs were bound to do nothing to injure Merriam, by way of extension or otherwise, if they knew of that relationship at the time they bought the notes—perhaps at the time they made the extension.

The case therefore turns on the fact of notice, and we shall treat the averment quoted from the reply as putting that fact in issue, and examine the evidence to ascertain whether the special finding thereon is sustained by the evidence. It appears that the notes sued on had passed from Clark, the payee, to the Clark & Leonard Investment Company, and that five of them were some months overdue. Brown desired an extension thereof and himself arranged with Miles and Thompson to buy them and grant the extension. He paid Miles and Thompson about one thousand dollars as a bonus to induce them to purchase the notes and grant the desired extension. After this was negotiated, a representative of the investment company took the notes to Omaha and there the transfer was completed, the written agreement for an extension being made the same day and

evidently as a part of the same transaction. Brown negotiated both the sale and the extension, and it was his desire for the extension that led him to bring about the sale. This contract for the extension recites the purchase by Miles and Thompson, "this day," of the notes in suit and one other, and that "Charles T. Brown is the present ⁵⁷² owner of said addition and agrees to pay the said notes as hereinafter agreed upon." Then follow the terms of the extension and the agreement pleaded to release twenty-eight lots from the mortgage lien. This was certainly evidence tending very strongly to show that Miles and Thompson had knowledge of Brown's and consequently of Merriam's position. It expressly recites the transfer of the property to Brown, or at least the present ownership in Brown, and it is not contended that the nature of the paper and the former condition of the title were unknown. Indeed Brown testifies that Miles visited the land with him and examined it to ascertain whether it afforded sufficient security, showing that Miles and Thompson were buying with reference to the mortgage and must have been on inquiry as to title. It does not appear that they had actual notice of the deed to Brown, which discloses his obligations to the former owners, and we need not decide whether they were charged with notice, because, in addition to the very strong evidence afforded from the recitals in the contract, and the circumstances leading to the sale of the notes, Brown testifies that John L. Miles actually knew of his purchase of the property. Against this we have only the testimony of Andrew Miles that he did not know of these facts. Andrew Miles was a book-keeper for Miles and Thompson, and seems to have taken an active part in the final transfer of the paper, but he does not say that he knew all that the purchasers themselves knew. He indeed says that he does not know what knowledge his brother, John L. Miles, possessed, and Brown testifies, without contradiction, that it was with John L. Miles that the negotiations took place, and he did know. Andrew's testimony as to his own ignorance is clearly insufficient, in view of the contract itself and the other evidence, to sustain the finding that Miles and Thompson had not notice.

It is asserted that the extension had been granted before the notes were sold; that the written contract was merely evidence of a ratification thereof by the purchasers. ⁵⁷³ This assertion is founded upon a memorandum appearing on the back of each note, "payment of within note extended to March 17, 1893." Andrew Miles testifies that this was on the notes when they

came into his charge on the day of purchase. There is no evidence as to who made the memorandum or why it was made or when, except that when Andrew Miles got the notes it was there. Brown, however, testifies that there had been no extension by the former holders so far as he knew, and the irresistible inference from all the proof is that the very purpose of the sale was to procure the extension. The indorsement may have been made, and probably was made, contemporaneously with the sale to plaintiffs. Certainly the unexplained memorandum cannot be taken to prove an extension for a valid consideration by the former holders. We are compelled to hold that the finding that plaintiffs were without notice of the rights of Merriam is not sustained by the evidence in the case.

Reversed and remanded.

SURETYSHIP—EXTENSION OF TIME OF PAYMENT—RELEASE OF SURETY.—After the payee of a promissory note signed by two persons as makers has knowledge that one of them is merely surety for the others, the law does not permit him to enter into a new agreement with the principal debtor to extend the time of payment, or to do any other act to continue the liability of the surety, without his consent; and, if he does so, the surety is discharged: *Gillett v. Taylor*, 14 Utah, 190; 60 Am. St. Rep. 890. A holder of a promissory note extending the time of payment to a maker by a contract, upon sufficient consideration, discharges an apparent maker that he knows to be a surety, and whose consent to the extension has not been given: *Lime Rock Bank v. Mallett*, 34 Me. 547; 56 Am. Dec. 673; *Stillwell v. Aaron*, 69 Mo. 539; 33 Am. Rep. 517.

SURETYSHIP—ONE PRINCIPAL DEBTOR BECOMING SURETY.—One of two or more principal debtors cannot, by agreement among themselves, without the consent of their creditor, be changed in character from a principal to a surety, so that he will be released by those acts or omissions which release a surety: *Shapleigh Hardware Co. v. Wells*, 90 Tex. 110; 59 Am. St. Rep. 783.

LINCOLN STREET RAILWAY COMPANY v. McCLELLAN.

[54 NEBRASKA, 672.]

RAILROAD COMPANIES — CONTRIBUTORY NEGLIGENCE OF PASSENGER.—A passenger on a street railway cannot recover if the accident from which he received an injury resulted in part from his own want of ordinary care. In such case, the carrier, to escape liability, need not prove that the passenger was guilty of gross contributory negligence.

RAILROAD COMPANIES—NEGLIGENCE.—STREET RAILWAY COMPANIES are common carriers of passengers, and as such are bound to exercise the utmost skill, diligence, and foresight consistent with the business in which they are engaged, and are liable for the slightest negligence.

COMMON CARRIERS — NEGLIGENCE — BURDEN OF PROOF.—It is presumed that one injured while being transported by a common carrier is injured in consequence of the latter's negligence. To escape liability it must show that it has discharged the full measure of its legal duty, and is in no way to blame for the accident; but, to acquit itself, it need not prove in addition that the plaintiff was guilty of gross contributory negligence.

RAILROAD COMPANIES—STATUTES.—A statute imposing upon railroad companies the duty to erect and maintain fences along their lines for the protection of domestic animals, and providing that "every railroad company as aforesaid shall be liable for all damages inflicted upon the person of passengers while being transported over its road, except in cases where the injury done arises from the criminal negligence of the person injured," has no application to street railway companies.

RAILROAD COMPANIES.—STREET RAILWAY companies are common carriers of passengers and answerable only for failure to exercise the highest degree of care, while other railroad companies are insurers, and absolutely liable for injuries to a passenger resulting from the operation or management of trains, unless gross negligence on the part of the passenger is shown, or a violation by him of some known rule or regulation of the company, causing the injury.

Ames & Pettis and W. S. Clark, for the plaintiff in error.

Clark & Allen for the defendant in error.

¶73 SULLIVAN J. The plaintiff, Mary J. McClellan, was injured while a passenger on one of the cars of the defendant, the Lincoln Street Railway Company, on June 21, 1892. Claiming her injury was caused by the negligence of defendant's servants, she brought this action in the district court of Lancaster county and recovered a verdict and judgment for eleven hundred and twenty-five dollars. The answer of the defendant was a general denial, coupled with an allegation of contributory negligence. The court instructed the jury as follows:

"3. When it once appears from the evidence that the plaintiff was injured while a passenger upon defendant's street-car, then the burden is upon the defendant to show by a preponderance of the evidence that such injury was not caused by any negligence upon its part, and that plaintiff herself contributed to the injury by her own gross negligence, unless it should appear in establishing ¶74 plaintiff's own case that the injury was caused by causes beyond the control of defendant or contributed to by plaintiff's own gross negligence."

"6. It was the duty of the plaintiff when entering the car of the defendant to exercise reasonable and ordinary care in discovering the opening in the floor of the car and avoiding the same; and if you find from the evidence that plaintiff failed to

do so, then it is a proper matter for you to consider in determining whether or not the plaintiff was guilty of gross negligence that contributed to the accident complained of. And if you find from the evidence that plaintiff, by her own gross, careless, and negligent acts, contributed to the injury complained of, then she cannot recover even though you should conclude from the evidence that the plaintiff was negligent as charged."

By these instructions the jury were told that if the accident was proven the defendant would be liable, unless it established by a preponderance of the evidence that it was not itself at fault, and that the plaintiff's own gross negligence contributed to her injury. It is settled by the decisions of this court that street railway companies are common carriers of passengers: *Spellman v. Lincoln Rapid Transit Co.*, 36 Neb. 890; 38 Am. St. Rep. 753; *Pray v. Omaha Street Ry. Co.*, 44 Neb. 167; 48 Am. St. Rep. 717; *East Omaha Street Ry. Co. v. Godola*, 50 Neb. 906. As such they are bound to exercise for the safety of their patrons more than ordinary care. They are required to exercise the utmost skill, diligence, and foresight consistent with the business in which they are engaged, and are liable for the slightest negligence. This is the liability imposed by the common law on all carriers of passengers for hire: *Spellman v. Lincoln Rapid Transit Co.*, 36 Neb. 890; 38 Am. St. Rep. 753; *Topeka City Ry. Co. v. Higgs*, 38 Kan. 375; 5 Am. St. Rep. 754; *Meier v. Pennsylvania R. R. Co.*, 64 Pa. St. 225; 3 Am. Rep. 581; *Indianapolis etc. R. R. Co. v. Horst*, 93 U. S. 291. The law presumes that one injured while being transported by a common carrier was injured in consequence of the latter's negligence; and to escape liability it must show that it has ⁶⁷⁵ discharged the full measure of its legal duty and was in nowise to blame for the accident. It need not, however, under the rules of the common law, acquit itself of all blame and in addition thereto convict the plaintiff of gross contributory negligence. This counsel for plaintiff seem to concede, but they contend that the provisions of section 3, article 1, chapter 72 of the Compiled Statutes of 1897, are applicable to street railway companies, and, therefore, the rule stated in the foregoing instructions is correct. The section referred to is as follows: "Every railroad company, as aforesaid, shall be liable for all damages inflicted upon the person of passengers while being transported over its road, except in cases where the injury done arises from the criminal negligence of the person injured, or when the injury complained of shall be the violation of some express rule

or regulation of said road actually brought to his or her notice." The act of which this section is a part was passed in 1867 and contained five sections. The first imposes on railroad corporations a duty to erect and maintain fences along their lines for the protection of domestic animals. The second relates to the liability resulting from a failure to comply with the first. The fourth provides the manner in which summons may be served on railroad companies, and the fifth forbids them from limiting their liability as common carriers without express notice. There is nothing whatever in the title or body of the act which indicates a legislative intent to make its provisions, or any of them, applicable to street railways. When this law was enacted there was neither occasion nor demand for legislation of this character in the interests of tramway passengers. The means then employed for their transportation was the old-fashioned lagging horse-car, in which the transit was not only safe, but peculiarly free from every suggestion of peril. Cable traction had not yet come into use, and electricity as a propulsive power was not even within the dreams of legislative philosophy, and had no existence anywhere save, perhaps, as a dim ⁶⁷⁰ possibility in the minds of some ardent theorists. In the common understanding, a railroad and a street railway have always been separate and distinct things. One is a graded road over which heavy cars, running on iron or steel tracks and usually propelled by steam, carry passengers, freight, and baggage, while the other is exclusively employed for the transportation of passengers in cities, and is so constructed as to interfere but little with ordinary traffic: Elliott on Roads and Streets, 557; Funk v. St. Paul City Ry. Co., 61 Minn. 435; 52 Am. St. Rep. 608; Louisville etc. R. R. Co. v. Louisville City Ry. Co., 2 Duvall, 175. In the case last mentioned it is said: "A 'railroad' and a 'street railroad,' or way, are, in both their technical and popular import, as distinct and different as 'a road' and 'a street,' or as 'a bridge' and 'a railroad bridge.'" And in Bloxham v. Consumers' Electric etc. Ry. Co., 36 Fla. 519, 51 Am. St. Rep. 44, the court say: "The word 'railroad,' as generally used, applies to commercial railways engaged in the transportation of freight and passengers for long distances, and, as a general rule, having steam engines for motive power, and making stops at regular stations for the receipt and discharge of freight and passengers. The term 'street railroad' applies only to such roads, the rails of which are laid to conform to the grade and surface of the street, and which is otherwise constructed so that the

public are not excluded from the street as a public highway, which runs at a moderate rate of speed compared with commercial railroads, which carries no freight, but only passengers from one part of a thickly populated district to another in a town or city and its suburbs, and for that purpose runs its cars at short intervals, stopping at street crossings or other places irregularly, as the convenience of its patrons may require, for the receipt and discharge of its passengers." In the decisions of this court above cited the duty of street railway companies to their patrons is declared to be only commensurate with that imposed by the common law on common carriers of passengers. But railroad ⁶⁷⁷ companies, it has been held, are absolutely liable for injuries to a passenger resulting from the operation or management of their trains, unless they can show that the gross negligence of such passenger or the violation by him of some known rule or regulation of the company was the cause of the injury: *Union Pac. Ry. Co. v. Porter*, 38 Neb. 226; *Missouri Pac. Ry. Co. v. Baier*, 37 Neb. 235; *Chicago etc. R. R. Co. v. Landauer*, 39 Neb. 803; *Fremont etc. R. R. Co. v. French*, 48 Neb. 638. In other words, it has been distinctly settled by our own decisions that the liability of one is that of an insurer, while the other is only answerable for the failure to exercise the highest degree of care. The difference in the liability of the two kinds of carriers results from the fact that one is affected by the statute in question and the other is not. It follows from these considerations that the instruction requiring the defendant to prove gross negligence on the part of the plaintiff as an essential element of its defense to the action was erroneous. It is argued, however, that if this was error, it was error without prejudice, because the sixth instruction defines gross negligence to be a want of ordinary care. We do not so understand it. The meaning of the instruction plainly is that if the plaintiff did not exercise reasonable and ordinary care in discovering the opening in the floor of the car and avoiding it, the jury should take that fact into account in determining whether she was guilty of gross negligence; in other words, the doctrine of the instruction is that want of ordinary care is evidence tending to prove gross negligence. For the error committed in submitting to the jury the instructions quoted the judgment must be reversed and the cause remanded for further proceedings.

RAILROAD COMPANIES—CONTRIBUTORY NEGLIGENCE.—
A party cannot recover damages for a negligent injury which, by

the exercise of reasonable care, he might have avoided: Delaware etc. R. R. Co. v. Cadow, 120 Pa. St. 559; 6 Am. St. Rep. 730. Slight contributory negligence of a person who is injured defeats his right to recovery, though the defendant or his agents were guilty of gross negligence, provided the injury would not have been suffered except for the negligence of the plaintiff: McDonald v. International etc. Ry. Co., 86 Tex. 1; 40 Am. St. Rep. 803.

RAILROAD COMPANIES—NEGLIGENCE—STREET RAILWAYS.—A street railway company is bound to exercise the utmost skill, diligence, and human foresight in conveying its passengers, and is liable for slight negligence: Spellman v. Lincoln Rapid Transit Co., 36 Neb. 890; 38 Am. St. Rep. 753, and note.

COMMON CARRIERS—PRESUMPTION OF NEGLIGENCE—BURDEN OF PROOF.—The occurrence of an accident to a passenger is prima facie evidence of negligence on the part of the carrier, throwing upon it the onus of rebutting the presumption by proof that there was no negligence: Philadelphia etc. R. R. Co. v. Anderson, 72 Md. 519; 20 Am. St. Rep. 483, and extended note thereto. See the note to Long v. Pennsylvania R. R. Co., 30 Am. St. Rep. 736. See Stearns v. Ontario etc. Co., 184 Pa. St. 519; 63 Am. St. Rep. 807. In some jurisdictions, however, the rule is well established that the mere happening of an accident, together with the exercise of ordinary care by the plaintiff, does not alone raise a presumption of negligence on the part of a common carrier: Chicago Street Ry. Co. v. Rood, 163 Ill. 477; 54 Am. St. Rep. 478; Hawkins v. Front Street Cable Ry. Co., 3 Wash. 592; 28 Am. St. Rep. 72.

RAILROAD COMPANIES—STATUTES.—A "street railway" is not a "railroad," and the term "railroad" does not include "street railway"; Funk v. Paul City Ry. Co., 61 Minn. 435; 52 Am. St. Rep. 608, and note thereto.

RAILROAD COMPANIES—INSURERS OF PASSENGERS' SAFETY.—Carriers of passengers, not being insurers of their safety, are not responsible for injury to them, if all reasonable care, skill, diligence, prudence, and foresight for their safety have been employed: Hite v. Metropolitan Street Ry. Co., 130 Mo. 132; 51 Am. St. Rep. 555; International etc. Ry. Co. v. Welch, 86 Tex. 203; 40 Am. St. Rep. 829; Wormsdorf v. Detroit City Ry. Co., 75 Mich. 472; 18 Am. St. Rep. 453.

OMAHA AND REPUBLICAN VALLEY RAILROAD COMPANY v. CROW.

[54 NEBRASKA, 747.]

NEGLIGENCE—DEATH BY WRONGFUL ACT—PLEADING.—If in an action to recover for a death caused by a wrongful act, the complaint discloses that the deceased left a widow, or next of kin as minor children, in whose favor the law devolved upon him a legal obligation for their support, it is sufficient to raise a legal presumption of pecuniary loss, caused by his death, and it is not necessary to plead facts showing special damage.

RAILROAD COMPANIES—LIABILITY FOR NEGLIGENCE OF CONNECTING CARRIER.—If a railroad company issues a through ticket contracting to carry a passenger beyond its own terminus, it is liable for the negligence of the connecting carrier, through whose agency the contract for through transportation is being performed.

RAILROAD COMPANIES—DUTY TO SHIPPER WITH PASS.—A shipper of livestock who receives from the railroad company transporting such stock a shipper's ticket or pass, to enable him to care for his stock while in transit, assumes only such risks as necessarily attend upon such care, and does not assume the risk of the negligence of the carrier. As thus modified, the liability of the railroad company to the shipper for injury received through its negligence is that of a common carrier for hire.

RAILROAD COMPANIES—SHIPPER OF LIVESTOCK—FELLOW-SERVANTS.—A shipper of livestock by railroad who accepts a shipper's ticket or pass from the company to enable him to care for his stock while in transit does not thereby become a servant of the railroad company, nor a fellow-servant with the railroad employes on the train.

NEGLIGENCE—PLEADING AND PROOF.—A general averment of negligence is sufficient unless attacked by motion, and plaintiff is entitled to prove every act of negligence falling within such averment.

TRIAL—SPECIAL FINDINGS—DISCRETION OF COURT. Whether special interrogatories shall be submitted to the jury is a matter within the discretion of the trial court.

W. R. Kelly and E. P. Smith, for the plaintiff in error.

Reese & Gilkeson and C. A. Munn, for the defendant in error.

748 IRVINE, C. This was an action by Marilla L. Crow, administratrix of the estate of Jonathan S. Crow, deceased, against the **749** Omaha & Republican Valley Railway Company, to recover damages arising from the death of plaintiff's intestate, alleged to have been caused by the negligence of the defendant. From an adverse judgment the defendant once before prosecuted error proceedings to this court, and the judgment was reversed for error in the instructions: Omaha etc. Ry. Co. v. Crow, 47 Neb. 84. Another trial resulted in another verdict for the plaintiff, and from a judgment thereon the defendant again prosecutes error. In the former opinion will be found a statement of facts, substantially in accordance with the facts elicited on the last trial. This time, however, the defendant introduced evidence in some respects contradicting or modifying the effect of plaintiff's evidence. Thus the evidence now makes it quite certain that a headlight was burning at the rear of the locomotive which ran over Crow, but the fact remains that the light therefrom emitted does not seem to have been sufficient to attract the attention of any of the witnesses. Moreover, the admissions of facts with reference to the capacity of the plaintiff and the measure of damages were not made at the last trial, and these were issues contested by proof and submitted to the jury. There are one hundred and eleven assignments of error, most of which are separately

discussed in the very voluminous briefs. In several instances a group of these assignments really presents a single question of law. In a few instances the assignment receives no support from the record; in others the question presented is a subordinate question of fact, of no general interest or importance, or the ruling complained of, if erroneous, was clearly not prejudicial. In order to avoid an unjustifiable expansion of the opinion, it is necessary to pass over many of these assignments without special reference thereto. They have all, nevertheless, been considered.

At the beginning of the trial the defendant objected to the introduction of any evidence, on the ground that the petition did not state a cause of action. The overruling ⁷⁵⁰ of this objection is assigned as error. The specific objection made to the petition is, that it does not show that the next of kin sustained any pecuniary injury from Crow's death. The petition alleges that Crow left a widow and several children, naming them and stating their ages. Six of them are minors. Since the filing of the briefs in this case the court has had occasion to investigate the question thus presented and to review the former decisions on the subject; and it has been held that when the petition discloses that the deceased left a widow, or next of kin, as minor children, in whose favor the law devolved upon him a legal obligation for their support, such facts are sufficient to raise a presumption of pecuniary loss because of his death, and it is not, in such case, necessary to plead any facts showing special damage: *Friend v. Burleigh*, 53 Neb. 674. It is true that it is not alleged in this petition, as it was in the case cited, that the deceased was of ability to perform that duty, but it will be presumed that a man will, to the extent of his ability, perform a duty of that character; it will be presumed that he has some ability to work; and the extent to which he does or can perform the duty is not a matter going to the sufficiency of the petition, but to the proof of damages.

For several reasons it is urged that the evidence does not sustain the verdict, and the arguments under this head are of such a character that their discussion disposes of most of the assignments of error relating to the instructions and to rulings on the admission of evidence. We shall, therefore, ask counsel to accept what is said under this head, so far as applicable, as deciding these more special assignments, without always referring to them specifically.

It is said that the evidence conclusively shows that the injury occurred on the line of a connecting carrier, after the deceased had reached the terminus of defendant's road, and, if it was caused by the negligence of any one, it was that of the servants of the connecting carrier. ⁷⁵¹ The evidence discloses on this subject that the defendant company was operating a line of railroad from Ord, where the deceased began his journey, to Grand Island, where it connected with the lines of the Union Pacific Railway Company. The two roads were owned by different companies, and, according to witnesses for the defendant, they were operated separately, with no relationship closer than an arrangement for the interchange of business. The ticket issued to Crow was headed "Union Pacific System and branches," and in no other way indicated by what corporation it was issued. The same were true of the written contract for the transportation of the livestock which Crow was accompanying. The ticket was for a continuous passage from Ord to South Omaha, and the contract was for the transportation of the stock to South Omaha. In no way was the contract restricted to the transportation of either passenger or cattle to the end of defendant's line. It was a through contract. Under the facts the case was essentially like that of *Chollette v. Omaha etc. R. R. Co.*, 26 Neb. 169, and *Omaha etc. Ry. Co. v. Cholette*, 41 Neb. 578, holding the initial carrier liable for the negligence of a connecting carrier through whose agency the contract for through transportation is being performed. In *Fremont etc. Ry. Co. v. Waters*, 50 Neb. 592, cited by the defendant, the carrier had carefully restricted itself to agreeing to carry the goods to the end of its own line and there deliver to a connecting carrier named in the contract. There was no contract to carry the goods to their destination and no through consignment. That case is, therefore, in no sense applicable. The instruction on this point, bitterly assailed in the brief, is in accordance with the law as just stated, but includes the additional statement to the jury that if the deceased procured the ticket at the station of the defendant company, and if the contract was for carriage over the defendant's road and connecting lines, then the contract would be as binding on the defendant as if made in its ⁷⁵² name. As the ticket was not issued in the name of the defendant company, and especially as there was evidence to show that "Union Pacific System" was merely a sort of trademark,

to indicate a congeries of roads having joint traffic arrangements, this part of the instruction was eminently proper.

It is next argued that there was no evidence of negligence on the part either of the defendant or the connecting carrier, and that the evidence of contributory negligence was conclusive. This presents also a question argued more specifically with reference to certain instructions—that is, the measure of the defendant's duty. On the former hearing it was held that one who is being transported over a line of railroad on what has been called a "shipper's ticket" is not a passenger in such sense as to render applicable to him all the rules governing the transportation of passengers on passenger trains. Such a person is charged with the care of his livestock while in transit. He must ride on the train with the animals. He must care for them en route, and in various ways subject himself to perils not incident to ordinary travel. To the extent that such requirements interfere with the operation of ordinary rules of liability, the duty of the carrier is accordingly modified, and no further: *Omaha etc. Ry. Co. v. Crow*, 47 Neb. 84; *Missouri Pac. R. R. Co. v. Tietken*, 49 Neb. 130; 59 Am. St. Rep. 526. The statute fixing the liability of carriers to ordinary passengers is, from the nature of the case, not applicable; but, subject to the different conditions reasonably arising from the special arrangements and duties created by such a contract, the common law as to carriers of passengers applies. The carrier, subject to such modifications, is still bound to the exercise of the highest degree of care of which human foresight is capable; and contributory negligence is a defense. The difference between such a case and the ordinary one of a passenger affects also the latter question. The duties imposed on the passenger, of riding on a freight train and caring for his stock, excuse conduct ⁷⁵³ which would be grossly negligent on the part of a passenger on a passenger train. The evidence tends to show that no arrangements were made by the railroad company for notifying shippers when the trains were about to start. It was necessary, therefore, for the shippers to remain close to the trains while they were at rest; and this train was standing in a large railroad yard with many tracks therein, lying close together. The deceased, with three other shippers, was standing beside the rear car of their train, where the caboose was about to be attached, and which caboose they expected to board as soon as it should be attached. No other place was provided for them, and no other place was available without their incurring the danger of having the train leave

before they could board it. The employes in the yard knew that such was the condition of affairs when stock trains were being made up, and they knew this particular train was being made up. The engineer testified that there were from four to fifteen stockmen alongside the trains every night. The yard-master was aboard the switch engine which ran over Crow, and actually saw these four men standing beside the track before the accident happened. The tracks were only eight feet apart. The stock cars extended at least twenty inches beyond the rail, and the foot-board on the tender which struck Crow extended still farther. This left very little space where men could stand with safety. The night was wet and dark. The engine, after pushing a way-car upon a side track east of where the men were standing, ran toward the west and a short distance beyond them. It then stopped and immediately backed to the eastward again, neither sounding the whistle nor ringing the bell before or while so doing. Negligence was pleaded generally, and that is sufficient, unless the petition be attacked on that ground by motion: *Omaha etc. Ry. Co. v. Wright*, 49 Neb. 457. Therefore, instead of plaintiff's not being permitted to prove any negligence, as defendant argues, she was, on the contrary, entitled to ⁷⁵⁴ prove every act of negligence which would fall within the general averment. We think that in the manner of handling these trains and compelling the shippers to stand in the open yards, and in the backing of the engine without any warning, with knowledge that shippers customarily stood at that point, and with actual knowledge by the man in charge of the movements that these men were there, there is found ample to sustain the finding. It is said that there was no street crossing near and that there was, therefore, no duty imposed upon the railroad of ringing a bell or sounding a whistle; but the statute on that subject is not the only law. The bell and whistle are not designed solely for use at road crossings. It was a question of fact whether one or both of them should have been used as a warning under the circumstances of this case. It is also said that the engineer, in quickly reversing his engine, could not sound the whistle, and that the fireman was engaged in shoveling coal and could not ring the bell. But if such a signal was demanded by prudence, time should have been taken to give the signal. Again, it is said that it is not customary to give a signal under such circumstances; but a custom to be negligent is no defense. An effort was made to show whether or not the engineer knew of an ordi-

nance of the city of Grand Island forbidding the sounding of whistles in the railroad yards. Error is assigned on the exclusion of that evidence, but no offer of proof was made, and in any event the engineer's knowledge of such an ordinance would be immaterial. No effort was made to prove such an ordinance, and if one existed and was valid, it would not excuse the failure to give some other warning, as by ringing the bell. It is also argued that the proof shows that an engine in stopping and in starting, as did this one, makes several varieties of noise of its own accord, and that such noise was a sufficient warning. But it must be remembered that there is no question here of ignorance by the deceased of the presence of the engine. ⁷⁵⁵ He knew it had just passed him. What it seems that he did not know was that immediately thereafter it had been reversed and was again approaching. It is not shown that he was sufficiently familiar with locomotives to learn that fact from the noises it emitted. No such technical knowledge can be presumed.

What has been said in a manner answers the arguments as to the conclusive character of the evidence of contributory negligence. Crow was where he had a right to be and where duty compelled him to be. The night was dark, and the headlight on the tender attracted the attention of no living witness. It evidently did not attract his. The space was narrow. He did not step upon the track, but only so near it that he was struck by the projecting foot-board. He had no warning of the engine's approach. It was for the jury to say whether or not his conduct was negligent. A finding either way might be sustained.

The defendant contends that the danger Crow incurred was a risk assumed by the special circumstances of his journey. But that risk extended only to those dangers incident to the requirements of his duties while being transported in such a manner, and while the railroad was being operated with due care. He did not assume the dangers arising from the negligence of defendant's employes. The argument on this point, that by the requirement that he should care for his own stock in transit he became a quasi servant of the defendant and subject to the fellow-servant rule, is obviously unsound. The special contract, by its terms, exempted the railroad from liability for the negligence of its servants. It was held on the former hearing that the contract was, in that respect, contrary to public policy, and we are entirely satisfied with that conclusion.

Complaint is made of some of the instructions as to negligence and contributory negligence on the ground that they group certain facts and omit others essential to a proper consideration of the issues. This method ⁷⁵⁶ of charging the jury has been frequently criticised, and in the former opinion herein it was said that the utmost to be permitted in that line is to state what facts may be considered in determining the issue. Even then there is danger of omitting some essential consideration. Here, however, the danger was avoided by adding to the specified facts that all other facts in evidence throwing light on the issue should be regarded. There was nothing in the instructions on this point that can be deemed prejudicial to the defendant.

It was charged that the deceased was bound to the exercise of ordinary care, and that was defined as such care as "an ordinarily prudent and cautious person would have exercised under like circumstances." Complaint is made of this because of the use of an adverb instead of an adjective. It is said that the rule should have been stated with reference to the conduct of a "person of ordinary prudence"; that an "ordinarily prudent" man may at times be very negligent, and that the jury might have thought that this was such an occasion. We hardly think that the jury was composed of such purists. To the "ordinary mind," acting "ordinarily," the two phrases convey the same meaning.

The court refused to give forty instructions asked by the defendant. These stated many correct principles of law, but these were given in substance by the court of its own motion. They also stated other rules inconsistent with the doctrines we have just announced in dealing with the evidence. These were properly refused for that reason. Some stating correct principles were properly refused because of their exceedingly argumentative character and their infringing upon the jury's right to determine the facts.

The defendant requested the court to submit to the jury fifty-five special interrogatories. It has often been held that the submitting of such interrogatories for a special verdict is in the discretion of the trial court. There was certainly no abuse of discretion in refusing this request.

⁷⁵⁷ For reasons stated at the commencement it is not practicable to discuss every assignment of error. The foregoing covers the more salient points of the argument. We find no prejudicial error in the record.

Affirmed.

Harrison, C. J., not sitting.

NEGLIGENCE—DEATH BY WRONGFUL ACT—PLEADING.—In an action by a father to recover damages for the death of his minor son, caused by negligence, a general allegation of damage is sufficient to authorize the recovery of such damages as naturally and usually flow from the death: *Orman v. Mannix*, 17 Colo. 564; 31 Am. St. Rep. 340.

RAILROAD COMPANIES—LIABILITY FOR NEGLIGENCE OF CONNECTING CARRIER.—No distinction exists between the carriage of goods and passengers as to the liability of a railroad selling a through ticket beyond its terminus, and over connecting lines, and as to the liability of the receiving company for freight shipped beyond its own terminus over connecting lines. A common carrier of goods or passengers may, by express contract, bind himself to carry any distance or to any destination, either by means of its own line or beyond its own line: *Harris v. Howe*, 74 Tex. 534; 15 Am. St. Rep. 862.

RAILROAD COMPANIES—DUTY TO SHIPPER WITH A PASS.—One riding on a drover's pass in the charge of livestock shipped by him is a passenger for hire, and as such entitled to recover if injured through the negligence of a railway corporation or its employes: *Illinois etc. R. R. Co. v. Beebe*, 174 Ill. 13; 66 Am. St. Rep. 253. See monographic note to *Illinois etc. R. R. Co. v. O'Keefe*, 61 Am. St. Rep. 89.

NEGLIGENCE—PLEADING AND PROOF.—Under a complaint averring simple negligence, the plaintiff should not be permitted to prove willful injury or wanton negligence: *Louisville etc. R. R. Co. v. Markee*, 103 Ala. 160; 49 Am. St. Rep. 21. A complaint charging negligence in general terms is good upon demurrer: *Mississinewa Min. Co. v. Patton*, 129 Ind. 472; 28 Am. St. Rep. 203.

TRIAL—SPECIAL FINDINGS.—A court may properly refuse to submit to a jury interrogatories which, however answered, could not have controlled or changed the verdict, or have resulted in a finding necessarily determinative of the cause: *German Sav. Bank v. Citizens' Nat. Bank*, 101 Iowa, 530; 63 Am. St. Rep. 899. See *Taylor v. Wootan*, 1 Ind. App. 188; 50 Am. St. Rep. 200.

SIMS v. JONES.

[54 NEBRASKA, 769.]

EXECUTION.—GROWING ANNUAL CROPS ARE PERSONAL PROPERTY and subject to levy and sale as such, for the satisfaction of the indebtedness of the owner.

LANDLORD AND TENANT—GROWING CROPS—LEVY OF EXECUTION.—A landlord and tenant are tenants in common of growing crops when rent is reserved in a share thereof, and the interest of either is subject to levy and sale for the payment of the debts of the respective parties.

J. S. Kirkpatrick and L. E. Kirkpatrick, for the plaintiff in error.

Sullivan & Gutterson, for the defendant in error.

⁷⁶⁹ HARRISON, C. J. The plaintiff herein alleged for cause of action that in a suit instituted in the county court of Custer county ⁷⁷⁰ against his debtor, Thompson Sims, the plaintiff procured to be issued a writ of attachment, which was delivered to the defendant in this cause, the sheriff of Custer county, who levied the writ on certain property of the said debtor of plaintiff of sufficient value to satisfy the claim of plaintiff as stated in the writ, and that through the subsequent abandonment of the levy by the officer the plaintiff was damaged in the amount sought to be recovered in the attachment suit. It appeared that the defendant in the last-mentioned case was the owner of land in Custer county, which had been leased, the owner to receive as rent the one-third of the crops raised during the year, and that on about twenty-five acres of the land oats were sown and on ninety acres corn was planted and grown. The levy of the writ of attachment was alleged to have been on any interest the landlord possessed at the time in the crops. The oat crop had been cut and almost, if not all, stacked, but none threshed. The corn was standing in the field ungathered, whether matured or not does not appear, but the time of the levy would raise the presumption that the corn had not then ripened. The one-third of the oats were to be delivered to the owner of the land after threshing, and the one-third of the corn in the crib. In the district court a jury was waived, and of the issues there was a trial to the court, which resulted in a determination that the defendant in the attachment suit had no attachable interest in the crops at the time the levy was made, and judgment was rendered in favor of defendant in the case at bar.

Many cases hold that under such a contract as we have hereinbefore outlined the tenant is the owner of the crops until the division is made, and the owner of the land acquires and has no interest therein until his stipulated portion is set apart to him: *Rees v. Baker*, 4 G. Greene, 461; *Alwood v. Ruckman*, 21 Ill. 200; *Woodruff v. Adams*, 5 Blackf. 318; 35 Am. Dec. 122. See, also, portion of note to *Putnam v. Wise*, 37 Am. Dec. 319. And it has been held that the landlord of such a lease has no leviable ⁷⁷¹ interest in the crops: *Walston v. Bryan*, 64 N. C. 764; *Shinn on Attachment and Garnishment*, sec. 32; *Howard County v. Kyte*, 69 Iowa, 307. On the other hand, it has been concluded that a landlord and tenant of a letting of land as

herein involved are tenants in common of the crops: See Putnam v. Wise, 1 Hill, 234; 37 Am. Dec. 309, and note thereto, 317, 318. The interest of a tenant in common may be levied on and sold: Bernal v. Hovious, 17 Cal. 541; 79 Am. Dec. 147; Veach v. Adams, 51 Cal. 611; Branch v. Wiseman, 51 Ind. 3. That growing annual crops are personal property and subject to levy and sale as such for the satisfaction of the indebtedness of an owner has been recognized in this state, see Johnson v. Walker, 23 Neb. 736. See, also, generally, 1 Freeman on Executions, sec. 113, and citations in support of the text. It also seems to be indicated by the section 530 of the Code of Civil Procedure, in relation to exemptions, wherein it states: "No property hereinafter mentioned shall be liable to attachment, execution, or sale, or any final process issued from any court in this state, against any person being a resident of this state and the head of a family. . . . The provisions for the debtor and his family necessary for six months' support, either provided or growing, or both, and fuel necessary for six months." In the chapter of the Code of Civil Procedure relative to executions for the enforcement of judgments rendered by a justice of the peace is the following: "In all cases where any lands may have been let, reserving rent in kind, and when the crops or emblements growing or grown thereon shall be levied on or attached, by virtue of any execution, attachment, or other process against the landlord or tenant, the interest of such landlord or tenant, against whom such process did not issue, shall not be affected thereby": Code Civ. Proc., sec. 1073. This seems to be a direct recognition by the legislature of the doctrine that a landlord and tenant are tenants in common of growing crops where rent is reserved in a share of the crops and the ⁷⁷² interest of either subject to levy and sale for the payment of debts of the respective parties.

The supreme court of Kansas, in an opinion in the case of Polley v. Johnston, 52 Kan. 478, quote paragraph 5008 of the code of that state (part of procedure applicable in actions before justices of the peace), as follows: "In all cases where any lands may have been let, reserving rent in kind, and when the crops or emblements growing or grown thereon shall be levied on or attached by virtue of any execution, attachment, or other process against the landlord or tenant, the interest of such landlord or tenant, against whom such process was not issued, shall not be affected thereby; but the same may be sold, subject to the claim or interest of the landlord or tenant against whom

such process did not issue"; and observe in relation to this and some other paragraphs considered in the same connection that: "While these sections do not reach the case we have under consideration, we think they show a recognition of what we regard as the settled doctrine of the common law—that such growing crops are personal property, subject to sale on execution for the debts of the owner; and were we to hold a different rule to apply in this case, the only class of debtors benefited thereby would be those owning both the soil and the crop, for the section of the justice's act just quoted renders the shares of landlord and tenant, where that relation exists, both subject to levy and sale." The question of a levy on the interest of a landlord or tenant in growing crops where rent is reserved in kind was not directly in issue, but the foregoing statement furnishes a very strong indication of what might be the conclusion of the court on the subject should it be presented. We feel bound to follow the very evident intention of the legislators, and must conclude that the landlord's interest in the crops was a leviable one; and it results that the judgment of the trial court must be reversed and the cause remanded.

EXECUTION.—GROWING CROPS, when *fructus industriales*, are personal property, and as such subject to levy and sale under execution: *Edwards v. Thompson*, 85 Tenn. 720; 4 Am. St. Rep. 807, and note. But see note to *Barrett v. Choen*, 12 Am. St. Rep. 366. Blackberries growing on bushes are not subject to execution as personal property, though a statute of the state authorizes the levy of the writ upon unharvested crops: *Sparrow v. Pond*, 49 Minn. 412; 32 Am. St. Rep. 571, and note thereto. See the extended note to *Norris v. Watson*, 55 Am. Dec. 161, on what growths or crops are subject to execution as personalty.

LANDLORD AND TENANT—GROWING CROPS—COTENANCY.—Upon the question as to what are the rights of a landlord and tenant, and as to whether such parties are tenants in common, in crops raised by the tenant, where some right in them is reserved by the landlord, the cases are in hopeless conflict: See the monographic note to *Putnam v. Wise*, 37 Am. Dec. 317-323. As supporting the rule laid down in the principal case, see *Baughman v. Reed*, 75 Cal. 319; 7 Am. St. Rep. 170; *Daniels v. Brown*, 84 N. H. 454; 69 Am. Dec. 505. Contra, *Dixon v. Niccolls*, 39 Ill. 372; 89 Am. Dec. 312.

CASES
IN THE
SUPREME COURT
OF
OHIO.

PHILLIPS v. McCONICA.

[59 OHIO STATE, 1.]

AN EXECUTOR MAY MAINTAIN AN ACTION IN HIS OFFICIAL CAPACITY, to recover moneys paid out by him by mistake to a supposed legatee. Other existing remedies to recover moneys wrongfully paid out do not exclude the remedy by an action in the name of the executor.

ADOPTED CHILDREN — LAPSE OF LEGACY BEQUEATHED TO THE ADOPTING PARENT.—An adopted child is not entitled, on the death of his adopting parent, to a legacy bequeathed to him, under a statute providing that when a devise of real or personal property is made to any child or other relative of the testator, and such child or other relative shall die leaving issue surviving the testator, such issue shall take the estate.

ADOPTED CHILDREN ARE NOT ISSUE OF THEIR ADOPTING PARENTS within the meaning of a statute providing that, upon the death of a legatee before the testator, the issue of the legatee shall take the legacy, although the statute declares that such adopted child shall be to all intents and purposes the child and lawful heir of the person adopting him, entitled to all the rights and privileges, and subject to all the obligations of a child of such person begotten in lawful wedlock.

AN ADOPTED CHILD MAY INHERIT FROM ITS ADOPTER, but not through him. It is not an heir of the ancestor of its adopter.

PAYMENT MADE UNDER MISTAKE OF LAW, BUT WITH FULL KNOWLEDGE OF THE FACTS AND WITHOUT ANY DURESS, cannot be recovered back. Hence if an executor pays moneys to an adopted child through his mistaken belief that the law entitles such child to the moneys so paid, they cannot be recovered from him.

Action by the plaintiff in his official capacity as executor of the estate of Thomas H. Madden, deceased, to recover moneys paid by the plaintiff to the defendant. The testator devised

and bequeathed one-half of his estate to his grandchildren, Wilbert, Thomas, and Charles McConica, and Minnie McConica Fulton. Wilbert died prior to the testator, leaving no heirs of his body, but having in his lifetime legally adopted Mary McConica, an infant. The defendant was appointed her guardian, and received of the plaintiff certain moneys as such, which were paid on the assumption that the infant had become entitled to the portion of the estate which had been bequeathed to her adopting father. The defendant demurred on the grounds that the plaintiff had no legal capacity to sue as executor, and that the complaint did not state facts sufficient to constitute a cause of action. The demurrer was overruled, and judgment entered against the defendant, from which she appealed to the circuit court, which reversed the judgment, and the plaintiff thereupon appealed to the supreme court.

McConica & Banker and S. C. Kingman, for the plaintiff in error.

L. K. Powell and J. A. Garver, for the defendant in error.

¶ BURKET, J. It is argued by defendant below, defendant in error here, that the plaintiff below had no legal capacity to maintain the action, because the executor is personally liable to the legal distributees for the money which came into his hands as such executor, and for the further reason that he can maintain an action in his own personal right for money of the estate wrongfully distributed, as held in *Rogers v. Weaver*, 5 Ohio, 536. These considerations are not sufficient to cut off his right to maintain the action as executor. The money paid to the guardian was the money of the estate, and an executor is always a proper party to maintain an action to recover money belonging to the estate. Other existing remedies to recover money wrongfully paid out do not exclude the remedy by action in the name of the executor.

¶ It may be that the executor and his sureties have become insolvent, and in such cases the only remedy that is effective and available to the proper distributees is by an action in the name of the executor. The action was, therefore, properly brought in his name as executor.

The demurrer further raises the question as to whether the petition states facts sufficient to constitute a cause of action in favor of the executor against the guardian.

Wilbert McConica, the legatee, having adopted Mary Mo-

Conica, an infant, by legal proceedings in the probate court, died without issue of his body, before the death of Thomas H. Madden, the testator. The legacy to Wilbert, therefore, lapsed unless Mary is to be regarded in law as the issue of Wilbert. Wilbert was the grandson of the testator, and section 5971 of the Revised Statutes provides that when a devise of real or personal estate is made to any child or other relative of the testator, and such child or other relative shall die, leaving issue surviving the testator, such issue shall take the estate. The word "issue" in this section means child of the body, or heir of the body, of the deceased relative of the testator, and does not include a child adopted by such decedent. The issue in such case must be of the blood of the testator and of the deceased child or other relative by birth. Adoption does not make the adopted child of the blood of its adopter, nor of the blood of his ancestors.

True, section 3140 of the Revised Statutes provides that such adopted child "shall be to all intents and purposes the child and legal heir of the person so adopting him, or her, entitled to all the rights and privileges, and subject to all the obligations of a ⁹ child of such person, begotten in lawful wedlock." But this is far from providing that such adopted child shall be the issue of the adopter, and of his blood and of the blood of his ancestors.

It was well said in *Upton v. Noble*, 35 Ohio St. 658, that in passing the adopting statute "the legislature was dealing with personal rights and duties growing out of the relation of parent and child, by transferring them from the natural to the adopted relation."

The statute enables the adopted child to inherit from its adopter, but not through him. The statute does not make the adopted child the heir of the ancestors of its adopter, and the right of the adopted child to inherit cannot be extended beyond where the statute has fixed it. The statute in this regard must be strictly construed, as held in *Upton v. Noble*, 35 Ohio St. 658.

Adoption does not change the law of descent and distribution as to the property of the ancestors of the adopter: *Quigley v. Mitchell*, 41 Ohio St. 375. The ancestors of the adopter are presumed to know their relatives by blood, and to have them in mind in the distribution of their estates, either by will or descent, but they cannot be expected to keep informed as to adoption proceedings in the probate courts of the counties of

this state; and to allow an adopted child to inherit from the ancestors of the adopter would often put property into the hands of unheard of adopted children, contrary to the wishes and expectations of such ancestors.

As Mary McConica, the adopted child, was not the issue of Wilbert, the legacy to him lapsed and the guardian of Mary was not entitled to receive the money that was paid to her as such guardian, ¹⁰ by the executor on distribution of the estate, and the money should be returned to him by the guardian, unless there is some rule of law to prevent it.

The petition sets out that he believed that Mary inherited the legacy of Wilbert, and that he paid the money to the guardian under a mistake of his rights and duties as executor, and which he was under no legal or moral obligation to pay.

This states no mistake of fact, but of law. So far as the petition discloses, he knew all the facts, but he was mistaken as to his rights and duties, that is, as to the law of the case. In *Thompson v. Thompson*, 18 Ohio St. 73, it was held by this court that: "Mistake as to the law of descents, where the intention in making a deed was to vest the estate conveyed in the grantee, affords no ground for relief in equity."

In *Cincinnati v. Gas Light etc. Co.*, 53 Ohio St. 278, this court held that: "A payment made by reason of a wrong construction of the terms of a contract is not made under a mistake of fact, but under a mistake of law, and, if voluntary, cannot be recovered back." The payment, as disclosed in the petition, was voluntary and not under duress, and not under mistake of fact, and in such cases the holdings of this court have been that no recovery can be had: *Mays v. Cincinnati*, 1 Ohio St. 268; *Marietta v. Slocumb*, 6 Ohio St. 471; *Railway Co. v. Iron Co.*, 46 Ohio St. 44; *Cincinnati v. Gas Light etc. Co.*, 53 Ohio St. 278.

The executor had the right to obtain the judgment of the court as to the proper person to receive this money, as was done in *Upson v. Noble*, 35 Ohio St. 655; Rev. Stats., sec. 6202. But, knowing all the facts, he did not seek the direction of the court, but relying upon his own ¹¹ judgment, paid the money at his own peril. If he intended to litigate the matter, he should have litigated before payment. It is now too late, unless he can show that he paid it under a mistake of fact, and this his present petition fails to show.

Judgment affirmed.

PAYMENT UNDER MISTAKE OF LAW—ACTION BY EXECUTOR OR ADMINISTRATOR.—The general rule is, that one who voluntarily pays money with full knowledge or means of knowledge of the facts, without any fraud having been practiced upon him, cannot recover it by reason of the payment having been made in ignorance of the law: *Camden v. Green*, 54 N. J. L. 591; 33 Am. St. Rep. 686, and note. But an administrator who, under a mistaken view of the law, but with a full knowledge of all the facts, pays to a portion of the distributees of an intestate a greater portion of the estate than they are entitled to, may recover back the same in an action for money had and received: *Culbreath v. Culbreath*, 7 Ga. 64; 50 Am. Dec. 375. And one who, under the mistaken belief that he was entitled to a tract of land, pays a legacy charged upon it, may recover the sum paid, from the true owner; *McC Campbell v. McC Campbell*, 5 Litt. 92; 15 Am. Dec. 48.

ADOPTED CHILDREN—RIGHT TO INHERIT.—An adopted child is, in a legal sense, the child both of its natural and of its adopting parents, and its entitled to inherit from each as their child. But an adopted child is not a bodily heir, and a conveyance to A B and his bodily heirs cannot, upon the death of A B, vest any estate in his adopted child: *Charkson v. Hatton*, 148 Mo. 47; 65 Am. St. Rep. 635. See monographic note to *Van Matre v. Sanky*, 39 Am. St. Rep. 223. See, also extended note to *In re Ingram*, 12 Am. St. Rep. 100. In Maine, it is held that an adopted child takes a legacy given to one of its adopted parents, who dies before the testator, where the statute authorizing the adoption declares that the child becomes, to all intents and purposes, the child of its adopters, the same as if born to them in lawful wedlock: *Warren v. Prescott*, 84 Me. 483; 30 Am. St. Rep. 870.

CARTER v. DAY.

[59 OHIO STATE, 96.]

PARTITION—EFFECT OF UPON TITLE.—A partition of land, whether by act of the parties or by a suit, creates no new title to the shares set off to the parties to be held in severalty. The title by which each holds his divided share, after the partition, is the same as that by which his undivided interest was held, and if the lands constituted an ancestral estate before partition, no change in this respect results therefrom.

PARTITION—EVIDENCE TO SHOW THAT A DEED WAS MADE TO ACCOMPLISH.—Though a conveyance purports to be made for a pecuniary consideration, parol evidence is admissible to prove that no money was paid therefor, and that it was one of several conveyances executed by cotenants for the purpose of effecting a voluntary partition of property devised to them by their common ancestor, and, in this connection and for this purpose, the other conveyances executed by the cotenants may be admitted in evidence.

Suit by the plaintiffs to partition real property of which they claimed to be the owners in fee of an undivided eight-ninths as grantees of Marcus Day, surviving husband of Martha Day, whose maiden name was Martha Carter. The defendants de-

nied the title of the plaintiffs. Judgment in favor of the plaintiffs, and the defendants appealed.

W. L. Sewell, H. P. Sewell, and Cummings & McBride, for the plaintiffs in error.

Bradford & Morehouse and Donnell & Marriott, for the defendants in error.

¹⁰⁰ WILLIAMS, J. The cause was submitted to the trial court upon admitted facts and unconflicting evidence which show that Robert Carter, Sr., died in 1865, seised of a tract of land situated in Richland county, containing nearly six hundred acres, which he devised by will to his nine children, all of whom were then living, "to be divided equally between them." These children, on the second day of April, 1869, made amicable partition of the land by the interchange of deeds of release, by which the sixty acres in controversy in this case were set off in severalty to the testator's daughter, Martha Carter, as her equal share, and she relinquished her interest in like shares to each of the other children. Martha was married to Marcus Day in 1866, and died in 1887, intestate and without issue, seised of her tract of sixty acres. Her husband survived her, and in 1890, conveyed the land to his children by a former marriage, and died in 1892. His grantees are the plaintiffs in the action below; and their claim is that, on the death of his wife, Martha, he took by inheritance from her an estate in fee simple to the eight-ninths of the land so held by her under the partition, which estate, by his conveyance, became vested in them. The defendants in the action are the surviving brothers and sisters of Martha, and the representatives of those now deceased; and it ¹⁰¹ is their claim that the whole of the land of which she died seised descended to them, subject only to a life estate of her husband therein. Which one of these conflicting claims must prevail depends upon the nature of the title by which Martha held the land at the time of her decease, and that depends upon the effect of the partition. If she thereby acquired a new title to eight-ninths of the land, that interest passed to the surviving husband in fee simple under section 4159 of the Revised Statutes, and was conveyed by his deed to the plaintiffs below. On the other hand, if, notwithstanding the partition, she continued seised of her title as devisee, then its descent is controlled by section 4158, under which the husband took an estate for life only, and, on his

death, it went to her brothers and sisters and their representatives, and the plaintiffs in error.

A partition of land by action, the authorities maintain, creates no new title to the shares set off to the parceners in severalty. While its effect is to locate the share of each in his allotted parcel of the land, and extinguish his interest in all the others, the title by which he holds his divided share is the same as that by which his undivided interest in the estate in common was held: *Tabler v. Wiseman*, 2 Ohio St. 208; *McBain v. McBain*, 15 Ohio St. 337; 86 Am. Dec. 478. The effect upon the title is different where, in such proceeding, it is found impracticable to divide the land among the tenants in common and there is an election by one or more of them to take the land or some parcel of it at the valuation returned by the appraisers. The grounds of the distinction are satisfactorily stated in *Freeman v. Allen*, 17 Ohio St. 527, and need not be repeated here. But no satisfactory reason can be assigned why ¹⁰² partition by metes and bounds among tenants in common, by the interchange of mutual releases, where each one receives no more than his proper share of the land, should have any different effect upon the title from that of a like partition under the statute. The former is a convenient and less expensive mode of attaining the same result, and the difference is in the method only, and not in the legal consequences. The latter is not less effectual than the former in extinguishing the interest of each parcener in the parcel allotted to the others, and in transferring to each the interest of the others in his parcel. The controlling fact common to both is, that each parcener receives in severalty no greater estate than he before held in common.

With regard to the effect of partition in either mode upon the title, it is said in the case of *Freeman v. Allen*, 17 Ohio St. 527, that a tenant in common has the right to have his share "located in a distinct part of the premises by proceedings in partition, or the same thing might be effected by mutual releases. No new title would be acquired in either case, and the estate in the land would remain the same as before. The tenancy in common only would be dissolved and the estate of each thereby become separate." True, the question we have before us was not involved in that case; but it was directly presented and decided in the case there cited: *Crosthwait v. Dixon*, 5 Ad. & E. 834. In that case one of two parceners aliened his moiety in fee, whereby the alienee and the remaining parcener

became tenants in common. Afterward, by deed of partition between the alienee and the remaining parcener, the land was divided by metes and bounds, and each took a moiety in ¹⁰³severalty. The question was, whether by that deed the parcener took anything as purchaser so as to break the line of descent. It was held that he did not. Lord Denman, C. J., said: "It is admitted that, if the deed of partition had been made between the parceners themselves, the descent would not have been broken: Comyn's Digest, tit. Parcener, c. 15. But it is said that, inasmuch as one of the parties to the deed was a stranger in blood, whatever was taken from him by the parcener must be taken by purchase. And doubtless this would be so if anything was taken from him, but we are of opinion nothing was taken by the parcener from the alienee under the deed. The effect of it was only that the parcener had it by a divided moiety in severalty discharged of any right of the alienee, instead of an undivided moiety in common; but he had the same estate in the land as before." In Comyn's Digest, volume 5, chapter 15, pages 240-241, under the title of Parceners, the rules on this subject are stated to be that: "Upon partition made, the occupation and descent, which before were in common, shall be several and distinct. But a coparcener, after partition, continues in the same privity of estate as before, for it does not convey or make any alteration in the estate. So parceners shall be in from the common ancestor as before, for the partition does not make any degree."

The precise question we have here was decided by this court in the unreported case of *Smith v. Carver*. In that case Clara Bell Carver, an adopted daughter of Henry Carver, took by descent from him as tenant in common with his children. Partition was made by mutual releases of land so inherited, and afterward Clara Bell died intestate, without issue, and unmarried. The children of ¹⁰⁴the ancestor survived her, and she left brothers and sisters of the half blood—children of her father, who brought partition, claiming that she took by purchase the land set off to her in severalty by the partition deeds, and that it descended to them. This claim was contested by the children of Henry Carver, who contended the land descended to them as ancestral property. The courts below held that the estate was not changed by the partition from one by descent to an estate by purchase, and therefore its course of descent was controlled by section 4158 of the Revised Statutes;

and that holding was affirmed by this court: See *Smith v. Carver*, 55 Ohio St. 642.

If the testator in this case had divided his land into nine parts and by his will given one part to each of his children, the parcel given to Martha would have descended to the plaintiffs in error. Instead of doing that, he gave each of his children an equal undivided share in the whole body of his land, leaving the division to be so made among themselves. This they did by the execution of deeds of release to each other; and we are of opinion that by the partition thus made no new title was acquired, and consequently the course of descent was not changed.

We have examined the cases of *Brower v. Hunt*, 18 Ohio St. 312, *Hershizer v. Florence*, 39 Ohio St. 516, *Bank v. Wallace*, 45 Ohio St. 168, and other cases cited by counsel for the defendants in error, and find they do not raise the question here under consideration, nor conflict with the conclusion arrived at in this case.

It is urged, however, that the judgment below should nevertheless be affirmed, because, if certain ¹⁰⁵ incompetent evidence were excluded, the deed to Martha Carter would appear to have been made for a money consideration actually paid, and her estate in the land one acquired by purchase. That deed was introduced and relied on by the plaintiffs below; and, against their objection, the defendants put in evidence all of the deeds made to accomplish the partition. Each one recites a pecuniary consideration of the same amount. The defendants also proved that in fact no money was paid, but that the only purpose of the conveyances was to make amicable partition of the land, and each was the sole consideration for the others. As sustaining their contention that the evidence was incompetent, counsel for the defendants in error cite and seem to rely largely on the case of *Burrage v. Beardsley*, 16 Ohio, 438, 47 Am. Dec. 382, and other cases of like import. That case holds that, "where a deed purports to be executed for a valuable consideration, and is impeached by proving that no consideration passed, it cannot be sustained by proving that it was executed for natural love and affection." But this rule, it is said in *Steele v. Worthington*, 2 Ohio, 182, 187, is applicable only where the deed is impeached for fraud. And it was held in *Mitchell v. Ryan*, 3 Ohio St. 377, that a deed not impeached for fraud may be shown to be a gift, notwithstanding the consideration expressed in the deed is a pecuniary one. Where

the deed is not impeached or attacked, the recital of the consideration has no other effect than as an admission, and like other admissions is open to explanation: *Harrison v. Castner*, 11 Ohio St. 339; *White v. Brocaw*, 14 Ohio St. 339. Here the validity of the partition deeds was not attacked by either party; nor was the evidence to which the objection ¹⁰⁶ was made designed or calculated to impeach them, nor yet to sustain them, but rather to prove that the real transaction was nothing more than an amicable partition, and that the recital of a uniform consideration in each case was adopted as a means of showing that each tenant in common actually received no more than his equal share of the estate. And all of the deeds having been made at the same time, as parts of a single transaction, for the accomplishment of a common purpose, the partition of the land among the parties, their admission in evidence was proper, so that they might be considered and construed together, in the light of the circumstances attending their execution, and according to the intention of all the parties.

Judgment reversed and judgment for the plaintiffs in error.

PARTITION—EFFECT OF UPON TITLE.—When partition between tenants in common is made by consent by means of deeds mutually executed, the deeds do not pass title to any real estate, but simply designate the share of each by metes and bounds, destroying the unity of possession, and allotting the land to be held in severalty: *Harrison v. Ray*, 108 N. C. 215; 23 Am. St. Rep. 57; *Dawson v. Lawrence*, 13 Ohio, 543; 42 Am. Dec. 210; *Finley v. Cathcart*, 149 Ind. 470; 63 Am. St. Rep. 292, and note.

CONSIDERATION IN DEEDS — PAROL EVIDENCE.—The clause in a deed acknowledging payment of the consideration is not conclusive, but prima facie evidence, except for the purpose of giving effect to the operative words in the deed, and parol evidence is admissible to show that such consideration, though expressed to have been paid in money, was paid in a different manner: *McOrea v. Purmort*, 16 Wend. 460; 30 Am. Dec. 103, and note thereto.

STATE v. MARTIN.

[59 OHIO STATE, 212.]

PARDON — EFFECT OF IN THE EVENT OF THE COMMISSION OF A SECOND OFFENSE.—If a second offense is by statute more heavily punishable than the first, the pardon of the first obliterates it. It cannot be considered in the determination of the punishment for the second, and if the statute provides that every person who has been twice convicted, sentenced, and imprisoned for a felony shall be deemed an habitual criminal and shall

be detained in the penitentiary for life, an offense which has been unconditionally pardoned cannot be considered in determining whether the offender is an habitual criminal within the meaning of this statute.

Prosecution against the defendant for grand larceny, the indictment in which charged him with being an habitual criminal. He pleaded, with respect to his former conviction, that he had been unconditionally pardoned. The plea was demurred to and the demurrer overruled.

F. S. Monnett, attorney general, and George C. Blankner, for the plaintiff in error.

J. E. Sater, for the defendant in error.

²¹⁷ THE COURT. It is provided in section 7388-11 of the Revised Statutes that: "Every person who, after having been twice convicted, sentenced, and imprisoned in some penal institution for felony, whether committed heretofore or hereafter, and whether committed in this state or elsewhere within the limits of the United States of America, shall be convicted, sentenced, and imprisoned in the Ohio penitentiary for felony hereafter committed, shall be deemed and taken to be an habitual criminal, and on the expiration of the term for which he shall be so sentenced, he shall not be discharged from imprisonment in the penitentiary, but shall be detained therein for and during his natural life," et cetera.

The question presented by the exception is, whether a former conviction and imprisonment for a felony on account of which the governor has granted an unconditional pardon may be regarded as one of the former convictions necessary to place the accused in the category of habitual criminals as defined by the act. It may be that the criminal habit is as certainly indicated by the commission of felonies for which unconditional pardons have been granted as by those whose penalties ²¹⁸ have been suffered to the end. But we must presume that the legislature enacted this section intending that the language should be construed according to the commonly received view as to the effect of a pardon. That view with reference to legislation of this character is that: "If a second offense is made by statute more heavily punishable than the first, then if the first is pardoned, it is obliterated. The consequence of which is that a like offense afterward committed is not a second, and is punishable only as a first": Bishop's New Criminal Law, sec. 919; *Edwards v. Commonwealth*, 78 Va. 39; 49 Am. Rep. 377. The

case of *Mount v. Commonwealth*, 2 Duvall, 93, has not been accepted as a correct statement of the law.

Exception overruled.

PARDON—EFFECT OF IN THE EVENT OF THE COMMISSION OF A SECOND OFFENSE.—When an additional punishment is prescribed for a second offense, a pardon of the first offense takes away the right to inflict it: *Edwards v. Commonwealth*, 78 Va. 39; 49 Am. Rep. 377. A pardon blots out the crime committed, and removes all disability resulting from the conviction: *Singleton v. State*, 38 Fla. 297; 56 Am. St. Rep. 177; *Diehl v. Rodgers*, 169 Pa. St. 316; 47 Am. St. Rep. 908; see the monographic note to *State v. McIntire*, 59 Am. Dec. 578-580.

COE v. ERB.

[59 OHIO STATE, 259.]

JUDGMENT LIEN—ENTRY OF JUDGMENT IS ESSENTIAL TO.—Under a statute declaring that lands within a county where a judgment is entered shall be bound for the satisfaction thereof from the first day of the term at which judgment is rendered, and that all judgments shall be entered in the journals of the court, a judgment must be regarded as incomplete until such entry, and cannot operate as a lien relating to the first day of the term at which it was pronounced if not entered on the journals during such term. Within the meaning of this statute a judgment is not rendered until it is entered.

JUDGMENT.—THE ENTRY OF A JUDGMENT NUNC PRO TUNC will not be allowed to work detriment to the rights of an innocent third person acquiring interests without notice of the rendition of any judgment. Hence it will not be effective for the purpose of creating a lien against a purchaser of real property from the judgment debtor before such entry and without notice of the judgment.

JUDGMENTS—IMPEACHMENT OF.—Persons who are not parties to an action, nor privies to the judgment therein, nor entitled to manage the cause or prosecute an appeal, are allowed to impeach it whenever it is attempted to be enforced against them.

JUDGMENT ENTRY—WHO MAY COLLATERALLY ATTACK.—A purchaser of real property from a judgment debtor may, for the purpose of avoiding the lien of the judgment, collaterally attack the entry by proving, notwithstanding the date which it bears, that it was not in fact entered at such date, but at a time long subsequent thereto and after he had received his conveyance from the judgment debtor.

JUDGMENT—ENTRY OF AFTER THE ADJOURNMENT OF THE TERM.—If a judgment has not been entered by the clerk before the adjournment of the court for the term, he cannot subsequently enter it so as to make it operative as a lien of a judgment of that term as against one who has purchased real property from the judgment debtor prior to such entry.

Suit for the sale of real property claimed to be subject to the lien of the plaintiff's judgment and alleged to have been re-

covered March 19, 1894, in the court of common pleas of Franklin county. The defendant Coe purchased the property in controversy March 17, 1894. He pleaded that he was not aware of the pendency of the action in which the judgment was recovered, that the term of the court ended on March 31, 1894, that during such term there was no entry of the judgment, that such entry was not made until April 4, 1894, but that, when made, it purported to have been made as of the twenty-ninth day of March preceding. The matters thus pleaded were by the trial court held insufficient, and judgment was given for the plaintiff, and the defendant prosecuted his writ of error.

J. S. Freisner and G. F. Castle, for the plaintiff in error.

Thomas E. Steele, for the defendant in error.

²⁶¹ SPEAR, C. J. The question argued by counsel for plaintiff in error, as arising upon the record, is whether or not, in an action commenced prior to the beginning of the term, upon a claim for money, a judgment announced though not placed upon the journal during the term, but entered nunc pro tunc after the term, creates a lien upon the real estate of the judgment debtor, as against a bona fide purchaser who buys during the term but before the judgment is announced, without knowledge of the pendency of the action.

²⁶² The question thus made involves a consideration of the statute which deals with the essentials of a judgment and with its effect upon the real property of the judgment debtor. Section 5374 of the Revised Statutes provides that lands and tenements, and goods and chattels not exempt, "shall be subject to the payment of debts and shall be liable to be taken on execution and sold." Section 5375 provides that: "Such lands and tenements, within the county where the judgment is entered, shall be bound for the satisfaction thereof from the first day of the term at which judgment is rendered; but judgments by confession and judgments rendered at the same term at which the action is commenced shall bind such lands only from the day on which such judgments are rendered." It has sometimes been contended, and the rationale of the judgments of the courts below in this case appear to imply, that the actual entry of the judgment upon the journal is not essential to the creation of a lien. This implication, it seems to us, is not warranted, when all the sections bearing upon the subject are regarded and their evident purpose considered. It is true that

the two words "rendered" and "entered," in their strict use, bear a clear difference in meaning and intent. Giving to these words such a signification, a judgment may be said to be "rendered" by a declaration from the bench; but to enter it requires the act of the clerk in writing it upon the journal. It is true, also, that for some purposes a judgment may be regarded as rendered so soon as it is pronounced. But, having in mind that we are dealing with the creation of liens upon real estate, the question is, In what sense is the word "rendered" used in the statute? Section 5331 provides that: "All judgments ²⁶³ . . . shall be entered on the journals of the court." Why this requirement if the judgment is to be regarded as in full force and effect for all purposes by the mere announcement of it from the bench? It would not be questioned, we suppose, that execution may not properly issue on a judgment until it has been duly entered. From this it would follow that goods and chattels even cannot be seized in execution upon the mere announcement of judgment by the court, and to assume that lands and tenements may be burdened by a lien, good for every purpose except sale, by judicial acts of less formality than are necessary to subject goods and chattels to the payment of the debt, would be an anomaly in the law, in view of the fact that when execution issues it must be first satisfied by levy and sale of goods and chattels, if any are found not exempt, and the money can be made out of lands and tenements only for want of goods and chattels. The requirement that all judgments must be entered on the journal carries the implication that until that is done the judgment is inchoate only; it is incomplete. Though possessing the character of potentiality it lacks the character of actuality, and hence is without probative force. Recurring again to section 5375, defining what lands may be bound and when, we find the expression, "within the county where the judgment is entered." Entered when? The words used are in the present tense. It is as to what must be done then—with the action which must be had at the term in order to effect a lien that the section is dealing. What more natural inference than that the phrase quoted means entered at the term? Giving, then, to section 5331 proper effect, and to the phrase respecting the entry of judgment, ²⁶⁴ in section 5375, its proper signification, and its employment in the statute its proper purpose, we conclude that that section requires that both conditions be satisfied, and that in order to an effective judgment, one on which execution may

issue as contemplated by section 5374, and which will create a lien upon real estate, as contemplated by section 5375, it must be entered on the journal as well as pronounced by the court; in other words, that the judgment isn't "rendered," within the meaning of the last-cited section until it is entered on the journal.

This conclusion is strengthened by a consideration of the purpose of our recording acts. These acts rest upon a recognition of the policy that there should somewhere be found a record which will disclose the state of the title of all lands within the county. For conveyances, mortgages, leases, et cetera, resort is had to the office of the county recorder; for tax liens to the tax duplicates; for judgment liens to the records of the courts. The entry of the judgment of the court of common pleas, in connection with the docket entries, constitutes, prior to the making up of the final record, a record which shall be notice to the world of the lien of the judgment upon the debtor's lands, and when so entered all men must take notice of the lien at their peril. The business public, therefore, has a high interest in the maintenance of such a system as will enable every person, by the ordinary inquiry—that is, an examination of the records—to ascertain the condition of titles. The statute in review was enacted for the benefit of the judgment creditor, but it is only reasonable to hold that the obligation rests on him, if he claims the advantage it gives, to comply strictly with its terms in order that due notice of ²⁶⁵ such claim to be given to the world, and that innocent persons shall not suffer. He controls the proceedings; he can take advantage of the statute or not at his pleasure. If he does comply he has given the notice and effected the lien; if for any cause he falls short, the consequences should be upon him. In the present case, one tracing the title would have found it in Hendrickson. He would have then found only an action for money pending against the owner, but no judgment entered at the adjournment of the term. The abstractor would then have been justified in concluding that the land was not affected by the pending action. Upon every consideration of justice, and in order to make section 5375 consistent with other laws on the subject of liens upon real estate, we are required to give such construction to the section as will require that in order to effect a lien upon lands as of the first day of the term, as contemplated by section 5375, the entry of judgment as well as the announcement thereof, must be made during the term.

If we are to treat this entry of judgment as one ordered *nunc pro tunc*, the law applicable to the case would seem to involve little difficulty. It is entirely settled law that an entry of judgment *nunc pro tunc* will not be ordered where it will prejudice intervening rights of innocent persons. As expressed by Professor Black in his work on Judgments, section 137: "When a judgment is entered *nunc pro tunc*, its effect, so far as it operates by relation back to the earlier date, must be confined to the rights and interests of the original parties; at least it will not be allowed to work detriment to the rights of innocent third persons acquiring interests without notice of the rendition of any ²⁸⁶ judgment. Thus a purchaser of real estate takes it charged with the lien of only such judgments as are actually existing at the time of the purchase, and it is not competent for a court to bind by a lien the lands of a third person by the rendition of a *nunc pro tunc* judgment against his grantor." And as held in *Miller v. Wolf*, 63 Iowa, 233: "A purchaser of real estate takes it charged with the lien of only such judgments as are actually existing at the time he purchases": See, also, *Borer v. Chapman*, 119 U. S. 587; *Smith v. Hood*, 25 Pa. St. 218; 64 Am. Dec. 692; *Newburgh Bank v. Seymour*, 14 Johns. 219; *Galpin v. Fishburne*, 3 McCord, 22; 15 Am. Dec. 614; *McClannahan v. Smith*, 76 Mo. 428; *Koch v. Atlantic etc. R. R. Co.*, 77 Mo. 354; *Ninde v. Clark*, 62 Mich. 124; 4 Am. St. Rep. 823; *Graham v. Lynn*, 4 B. Mon. 17; 39 Am. Dec. 493; *Acklen v. Acklen*, 45 Ala. 609; *Hays v. Miller*, 1 Wash. Ter. 143; *Shirley v. Phillips*, 17 Ill. 471; *Church v. English*, 81 Ill. 442; *Wells v. Gieseke*, 27 Minn. 478. It would seem to follow necessarily that where the innocent purchaser has had no notice of the application for the order *nunc pro tunc*, the judgment so ordered entered should not be held to preclude him.

It is important, however, to a clear understanding of the case, to note that the averment in the answer is not, in words at least, that the judgment was entered *nunc pro tunc*. The averment in that respect is, that at no time during the January term was there spread upon the journals any judgment or finding in respect to the case, nor was any entry then filed in said court, but that on the fourth day of April (four days after final adjournment of the term), a journal entry was prepared by counsel for plaintiff setting forth a finding and judgment in the suit, and then placed upon the journal as of the 29th of March preceding, which was ²⁸⁷ during the term. It thus ap-

appears that the action of the clerk in putting the entry on the journal was by procurement of plaintiff's counsel rather than by order of the court. It is to be concluded, also, we suppose, that upon its face the judgment appears to have been rendered and entered on the twenty-ninth day of March, a day within the term; and if this is conclusive, and cannot be contradicted by proof of the alleged facts, then it binds the lands from the first day of the term by virtue of section 5375, and the demurrer to the answer was well taken and the judgments below are right.

This brings us to a question not argued by counsel, viz., Can Irvin T. Coe, plaintiff in error, be heard to question the conclusiveness of this judgment as it appears upon its face?

The subject of when a judgment is open to collateral attack is a vexed one. Upon the one side are found weighty considerations affecting the public convenience and welfare, especially in regard to the maintenance of the integrity of land titles; on the other the strong desire of courts to avoid results which work out positive injustice to individuals. Thus has arisen a conflict between principles of policy and principles of natural justice, and, as might be expected in cases of such conflict, the decisions of courts have differed. Indeed, the differences have been so frequent and so marked that any attempt to reconcile them would be futile, and a review of them would take more space than probable results would warrant. It is, and has been since the organization of our state, assumed that judgments of courts import absolute verity, and, as a broad proposition, that a judgment of a court of general jurisdiction having jurisdiction of the cause and the parties cannot be ²⁶⁸ impeached collaterally. In the great majority of the cases where the question has arisen, the interests involved have been those acquired under the judgments sought to be attacked, as titles to real estate, or the like, where the effect of allowing the judgment to be overthrown would be to destroy the title of innocent persons who have invested their means in reliance on the judgment. The case at bar is one where the opposite is true; and no case like it is found reported in the books.

The general rule, however, has not been without exceptions. While it is true that the parties must resort for relief from the judgment to a direct attack, as by appeal, motion to correct, or proceeding in error, yet strangers to the judgment, not being entitled to impeach it directly, and who if the judgment were given full faith and effect, would be prejudiced in some

pre-existing right, are placed upon a different footing. It is said by Professor Freeman, in his work on Judgments, section 335, that "being neither parties to the action, nor entitled to manage the cause nor appeal from the judgment, they are allowed to impeach it whenever it is attempted to be enforced against them." It is observed by Professor Greenleaf, in his work on Evidence, section 522, that "justice requires that every cause be once fairly and impartially tried; but the public tranquility demands that, having been once tried, all litigation of that question, and between those parties, should be closed forever. It is also a most obvious principle of justice that no man ought to be bound by proceedings to which he was a stranger." In note to Hargrave's Law Tracts, 456, it is said: "Fraud was a matter of fact, and, if used in obtaining judgment, was a deceit on the court and hurtful to ²⁰⁰ strangers, who, as they did not come in to reverse or set aside the judgment, must of necessity be admitted to aver it was fraudulent." And by Sutherland, J., in *Griswold v. Stewart*, 4 Cow. 458: "The rule that records cannot be impeached in pleading is founded on the consideration that the regular and orderly way of trying their validity is by writ of error; and that it might lead to great abuse to permit the solemn judgment of a court of record to be incidentally called in question in pleading, when a more direct and satisfactory mode of testing their validity exists. The reason of the rule shows its limitation. It is confined to parties or privies, who alone can bring error. It does not apply to strangers." In *Vose v. Morton*, 4 Cush. 27, 50 Am. Dec. 750, Shaw, C. J., says: "The demandant claims title under an attachment followed by a valid judgment in the circuit court of the United States, an execution on that judgment, and a levy of the execution on the premises, as the property of Moses Morton, 2d, the judgment debtor. If this title is well established, it must prevail, although the tenant had a valid deed of prior date which was good against everybody but creditors and purchasers without notice. But the demandant must make out his case strictly; he must prove that he was a creditor of Moses Morton, 2d; that he attached the premises prior to the registration of the tenant's deed; and that such attachment was followed by a good judgment, execution, and levy. The first point relied upon by the demandant is, that the judgment of the circuit court is conclusive, and that the tenant cannot aver against it. But we are of opinion that this position cannot be maintained. A judgment is conclusive only

against parties and privies. The ²⁷⁰ tenant is in no sense a party or privy to that judgment. He is indeed privy in estate with Moses Morton, 2d, under whom he claims the demanded premises; but no question respecting the title to such estate was embraced or determined in that suit. It was only after that judgment was rendered that, by a distinct and collateral act, the judgment creditor attempted to satisfy his execution upon it, by a levy on the premises claimed by the tenant. Being neither a party or privy to the judgment, he cannot have a writ of error to reverse it, although it may be erroneous and void; but when such judgment is set up collaterally to defeat the tenant's title, which is otherwise good, and the tenant can show that the judgment is erroneous, either in matter of law or fact, he may do so by proof. It is a general and established rule of law that when a party's right may be collaterally affected by a judgment, which for any cause is erroneous and void, but which he cannot bring a writ of error to reverse, he may, without reversing, prove it so erroneous and void in any suit in which its validity is drawn in question. The cases are numerous, and a few only will be cited, including the first and the last, which have been decided in Massachusetts: *Alexander v. Gould*, 1 Mass. 165; *Smith v. Saxton*, 6 Pick. 483; *Pond v. Makepeace*, 2 Met. 114; *Leonard v. Bryant*, 11 Met. 370. In *Leonard v. Bryant*, 11 Met. 370, the demandant's title was derived from Chester Denison and George G. Denison; and the tenants set up a judgment in their favor against George G. Denison and one McGinney, recovered before the deed from George G. to the demandant was recorded. To this judgment the tenants objected because the same was rendered contrary ²⁷¹ to the provisions of the statute. This objection was overruled, on the ground that the judgment was only voidable by a writ of error and that the demandant might maintain a writ of error, as a privy in estate, or because the judgment was prejudicial to him by intercepting his title. The court was unanimously of the opinion, after a careful examination of the authorities, that the ruling below could not be sustained, and held, in a writ of entry brought by L. against B., to recover possession of the land, that the said judgment was contrary to law and erroneous, but that there was no such privy of estate between L. and D. and E. as would authorize L. to maintain a writ of error to reverse the judgment, and therefore he might avoid it by plea and proof."

It has appeared by the authorities cited that two principal grounds on which collateral attack by strangers has been permitted are fraud and want of jurisdiction.

In the case at bar, one risk which the purchaser took in buying when he did, although unknown to him, was that during the term a valid judgment might be taken against his grantor. He incurred no other peril by reason of the pending action; and it is difficult to see that he is in any worse plight than he would have been had he examined the records of the court the day after the final adjournment of the January term, and found that no judgment had been taken against his grantor, provided the alleged facts can now be inquired into. As the record stood then, his deed conveyed to him a title clear of any lien. What, then, was the character of the act which sought to impose a burden on his land? It was without the purchaser's knowledge; it was presumably without ²⁷² the knowledge of the judge. Its effect, if sustained, will be to make that appear to be true which in fact is not true; to make the records of the court, in other words, speak an untruth. It is, as to this purchaser, the obtaining of a pecuniary advantage by unfair means. That actual fraud is not alleged nor shown to have been intended is not conclusive. The facts are pleaded. The act itself was intended. Its effect, as we believe, if carried out, would work a constructive fraud. The precise case has, perhaps, not been adjudicated, but analogous questions have arisen in the courts of sister states. In *Downs v. Fuller*, 2 Met. 135, 35 Am. Dec. 393, it is held that: "When a judgment, recovered contrary to law, is prejudicial to a third party, he may avoid it by plea and proof." And in the opinion it is observed by Wild, J.: "Although the judgment in favor of the plaintiff in the present case was not recovered by collusion with his debtor, or with any fraudulent intention, yet we think the defendant has a right to avoid it in the same manner, because he is neither party or privy to the plaintiff's judgment, and is not entitled by the rules of law to reverse it by a writ of error. This was so decided in *Warter v. Perry*, Cro. Eliz. 199, and in *Randal's case*, 2 Mod. 308; and the same principle is laid down in *Comyn's Digest*, tit. Error, D; and in 5 *Dane's Abridgment*, 225. This rule of law does not appear in any case to have been controverted, and it seems reasonable and just that where a judgment is recovered contrary to law, and prejudicial to a third party, he should have a right to avoid it." *Hunter v. Cleveland etc. Stove Co.*, 31 Minn. 505, is in point as in-

volving the precise principle. The syllabus is: "The plaintiff, as statutory assignee of certain land for the benefit of creditors, brings ²⁷³ this action to determine an adverse claim to the same made by the defendant. The adverse claim, as set up in defendant's answer, is based upon the alleged lien of a judgment confessed by plaintiff's assignor, and appearing upon the records of the district court to have been indorsed upon the 'statement' for confession, and docketed before the assignment to plaintiff, while in fact, and as the reply alleges, the judgment was not so indorsed nor entered in the judgment-book until more than six months after the making and filing of the assignment. Held, that in this action the false record may properly be attacked, and plaintiff's title as assignee adjudged paramount to the lien appearing to be thereby created."

The opinion by Berry, J., so well expresses our view that we take space to quote from it at length: "In the case at bar, the plaintiff is a stranger to the alleged judgment—just as much so as would be one of the creditors whom he represents—and hence he is not estopped or in any way bound by it: 1 Greenleaf on Evidence, sec. 532. Under the statute, as assignee he takes and holds the assigned property in trust for the benefit of creditors of the assignor. Hence it is his plain duty to protect and defend it, and, so far as lies in his power, to make it available to the payment of the creditors' claims. If, after he has taken the lands under the assignment, the records of a court are so manipulated as to show a judgment lien upon the assigned property at the time of the assignment, and such records are false, there being no such judgment lien at that time, it is the assignee's duty to protect the property by removing the cloud which the false records raise. He cannot move in the action or quasi action in ²⁷⁴ which the alleged judgment lien was obtained, for he is not a party to it; neither has he succeeded to the rights or liabilities of any party to it. As respects the judgment, there is no privity between him and either party to it: Mann v. Flower, 26 Minn. 479; and see Bennett v. Whitcomb, 25 Minn. 148; Vose v. Morton, 4 Cush. 27; 50 Am. Dec. 750; Freeman on Judgments, sec. 162. Nevertheless, there must be some way in which he can have it adjudicated that his title to the land is paramount to the lien of the defendant's judgment, notwithstanding the appearance of the record to the contrary, for otherwise his case would be the inadmissible one of a clear legal right without a remedy. He must, therefore, be able to attack the false record in some way.

. . . . His concern is, that his title be adjudged paramount to the lien apparently created by the false record. We see no reason why this may not be done in the present action. . . . It is an action to determine defendant's adverse claim. The answer sets up the judgment, and the reply the facts which go to show that the record is false. An issue as to the validity of the apparent lien is thus distinctly raised in the pleadings. The facts set up in the answer, and found by the court, also show that, as respects the plaintiff, the record is not only false, but in law fraudulently false, though, as the court finds, there may have been no moral fraud. That fraud vitiates everything is a rule without exception, and which applies to a judgment as well as to an ordinary contract: Stephens on Evidence, art. 46. Why may it not also apply to the false and fraudulent record of a judgment? And why, in an action like the present, may not a party injured by such record have it adjudged to be false and fraudulent as respects him, and thereby secure just and appropriate ²⁷⁵ relief, without disturbing a record with which he has no further concern, save as it clouds his title? We see no good reason to the contrary. It is true that the record of a judgment is stated by high authority to be conclusive evidence of the fact of the rendition of the judgment, and of all the legal consequences resulting from that fact, whoever may be the parties to the suit in which it is offered in evidence: 1 Greenleaf on Evidence, sec. 538. But, in our opinion, this statement is too broad when sought to be applied to an attack upon the record by a stranger, upon the ground that it is as to him false and fraudulent. Such an attack may, in a case like this at bar, be made in a collateral action: See *McIndoe v. Hazelton*, 19 Wis. 567; 88 Am. Dec. 701; *Edson v. Cumings*, 52 Mich. 52, and cases cited."

As to jurisdiction, the court of common pleas acquired jurisdiction of the parties and of the subject matter. It pronounced a judgment during the term, but did not then enter it. One requisite of a judgment is that it must be given at the right time. As said by Bouvier's Law Dictionary, volume 2, page 15: "To be valid, a judicial judgment must be given by competent judge or court, at a time and place appointed by law, and in the form it requires. A judgment would be null if the judge had not jurisdiction of the matter, or, having such jurisdiction, he exercised it when there was no court held." Under our practice, the court retains control of its journals during the term; it may then add to, strike out, or alter that

which is on the journals, or incorporate new matter. On the final adjournment, however, that control is lost. This we take to be elementary. Confessedly, the judge cannot, in vacation after the term, render a judgment. How ²⁷⁶ can he make an order affecting a judgment which he had in fact pronounced in term—an order necessary to complete the judgment and make it effective? While it cannot be said that jurisdiction of the case had been lost, nevertheless an attempt to exercise jurisdiction at the time this entry is alleged to have been made, would, according to the authorities, have been as futile, at least as regards the rights of persons not parties nor privies, as though jurisdiction had in fact been lost because there was no court then to exercise it. That the court at a subsequent term has power to then order the entry of a judgment actually pronounced during a preceding term is well understood, but that does not cover the case. We have found that such an order will not avail as against the intervening rights of an innocent purchaser. But even such an order cannot be made by the judge in vacation; it can be made only by a court in session, and the court, between terms, is not in session. How, then, can the counsel and the clerk, by an entry made after the term is over, give to such entry the effect of a judgment of a court, as against strangers, at a time when the judge himself would be powerless to act? We think they cannot. If there was power in the clerk and counsel to cure the omission four days after the term, then they might do it forty days after, or four hundred. We have not overlooked the practice of making entries on the journal after the term. It is common and is acquiesced in by counsel and parties. One reason for such acquiescence is, that where judgment has in fact been pronounced, it would be within the power of the court, at a subsequent term, to order the entry made, and so no substantial advantage would result from objection; and ²⁷⁷ there are other considerations of convenience involved. But it does not follow that because the practice is acquiesced in by litigants and their counsel that it must be held to conclude strangers.

Our conclusions are that section 5375 requires that in order to create a lien as of the first day of the term, there must be an entry of judgment on the journal during the term; that the entry made in this case after the term was unauthorized and worked a fraud upon the plaintiff in error; that the judgment, as it appears of record, does not conclude his rights, and that, not being a privy as respects the action then pending, he could

not maintain a direct action to review the judgment, and, therefore, has the right to challenge its effect on his property in the case at bar.

The judgments below will be reversed and the cause remanded with direction to overrule the demurrer to the answer, and for further proceedings according to law.

JUDGMENT LIEN—ENTRY OF JUDGMENT ESSENTIAL TO.—A judgment is not rendered, so as to be a lien from the time of its "rendition," until it is entered on the records, as prescribed by the statute, although an entry or direction therefor has been signed by the judge and indorsed by the clerk as "filed": *Callanan v. Votruba*, 104 Iowa, 672; 65 Am. St. Rep. 538; *Bernhardt v. Brown*, 122 N. C. 587; 65 Am. St. Rep. 725. But in *Johnson v. Schloesser*, 146 Ind. 509, 58 Am. St. Rep. 367, it was held that the lien of a judgment on land is not lost by the failure of the clerk of a court to enter the judgment on the judgment docket, although such real estate has passed into the hands of a bona fide purchaser without notice of such judgment.

JUDGMENT LIEN—EFFECT OF JUDGMENT NUNC PRO TUNC.—The entry of a judgment nunc pro tunc will not be allowed to injuriously affect the rights of innocent third parties, who acquired rights without notice of the rendition of any judgment: See the note to *Ninde v. Clark*, 4 Am. St. Rep. 833; *Leonard v. Broughton*, 120 Ind. 536; 16 Am. St. Rep. 347. See, however, the broad statement of the rule in *Doughty v. Meek*, 105 Iowa, 16; 67 Am. St. Rep. 282. And in *Skipwith v. Cunningham*, 8 Leigh, 271, 31 Am. Dec. 642, it was held that the lien of a judgment upon lands relates to the first day of the term at which it was rendered, and overreaches intermediate deeds of trust or other encumbrances: *Contra*, *Pope v. Brandon*, 2 Stew. 401; 20 Am. Dec. 49. On the question of the adjudication of the rights of third parties in nunc pro tunc proceedings, see *Hyde v. Michelson*, 52 Neb. 680; 66 Am. St. Rep. 533.

JUDGMENT—COLLATERAL IMPEACHMENT.—A judgment may be collaterally impeached by one not a party or privy: 1. Where the court rendering it had no jurisdiction of the case; 2. Where it was obtained by fraud or collusion; 3. Where it was erroneously or unlawfully entered up to the prejudice of the rights of third parties. Beyond this, the law does not authorize parties to proceed in the collateral impeachment of judgments: *Sidensparker v. Sidensparker*, 52 Me. 481; 83 Am. Dec. 527. See, also, *McCoy v. Morrow*, 18 Ill. 519; 68 Am. Dec. 578.

CIRCLEVILLE v. SOHN.

[59 OHIO STATE, 285.]

A MUNICIPAL CORPORATION IS ANSWERABLE for injuries caused by the unsafe condition of a public way under its control, which it has suffered to remain, after notice, when the defect arose in the execution of a plan adopted by the corporation for local improvement.

Chris. A. Weldon, city solicitor, for the plaintiff in error.

Clarence Curtain, for the plaintiff in error.

302 WILLIAMS, J. The instructions given and refused by the court of common pleas for which its judgment was reversed by the circuit court, raise the question whether a municipal corporation is exonerated from liability for injuries caused by an unsafe condition of a public way under its control which it has suffered to remain after notice, when the defect arose in the execution of a plan adopted by the corporation for a local improvement. Its immunity from liability is defended here on the ground that, in the adoption of plans for local improvements, municipal bodies are in the exercise either of a legislative power, which is discretionary and not subject to judicial control, or of a judicial power, and not responsible for errors of judgment. Cases are cited in support of the proposition, some of 303 which place the exemption from liability on one of these grounds and some on the other; but none on both. It is said in *Detroit v. Beckman*, 34 Mich. 125, 22 Am. Rep. 507, that "when complaint is made that the original plan of a public work is so defective as to render the work dangerous when completed, it is apparent that the fault is with legislative action." And in *Urquhart v. Ogdensburg*, 91 N. Y. 67, 43 Am. Rep. 655, it is declared that the exercise of the power to make local improvements is quasi judicial. The courts of these states, in numerous decisions, maintain respectively these divergent views of the grounds on which municipal corporations are not liable in such cases, but concur in holding their nonliability; and on that question they are at variance with a large number of reported cases, especially of those decided by the courts of the middle and western states. In *Blyhl v. Waterville*, 57 Minn. 115, 47 Am. St. Rep. 596, it is held that: "A municipal corporation is liable for an injury caused by having an unsafe sidewalk, the condition of which is due to the plan adopted for its

construction, when the city could have remedied the defect, but did not do so." And in *Gould v. Topeka*, 32 Kan. 485, 49 Am. Rep. 496, the court hold that a "city has no more right to plan or create an unsafe and dangerous condition of one of its streets than it has to plan or create a public or common nuisance." The same doctrine is maintained in Indiana, Iowa, and other states. We will not attempt a review or discussion of the cases on this subject. In their briefs, which show diligent research, counsel have collected the cases on both sides, and ably presented their different views.

Text-writers on the subject lean to the side of municipal liability in such cases. In *Dillon on Municipal Corporations*, volume 2, page 1294, under ³⁰⁴ section 1024, it is said: "Does the principle that actionable negligence cannot be predicated of the plan itself (*Dillon on Municipal Corporations*, sec. 1046) go so far as to exempt from liability if that plan leaves the streets in an unsafe and dangerous condition for public use? In the author's opinion this question ought to be answered in the negative." And in *Harris on Damages by Corporations*, volume 1, page 165, that author says: "As to the liability of a city for damages for an injury resulting from a defective plan, the decisions are not all harmonious, but the weight of authority is now, perhaps, in favor of holding the city liable for defects in the plan as well as in the execution of the work": And see *Elliott on Roads and Streets*, c. 20; and *Jones on Negligence of Municipal Corporations*, c. 4, p. 67.

It has been held in this state, in a number of reported cases, that municipal corporations are liable for injuries caused to property abutting on streets, by changes in their grades, notwithstanding the establishment of the grade was a lawful exercise of municipal authority, and the work was done in conformity with the plan so adopted. The court recognizes that in this class of cases it has taken ground in advance of some adjudications elsewhere, and its position is maintained on principle. The doctrine established by them has since been adopted and followed in several other states. In *Dayton v. Pease*, 4 Ohio St. 80, the city of Dayton was held liable in damages for injuries to property resulting from the fall of a bridge forming part of one of its streets over a canal, where the fall was owing entirely to defects in the plan of the bridge which had been approved by the council, and the bridge was constructed under its direction and in accordance with the plan. While ³⁰⁵ the question here is not precisely the same as in

that case, it is nearly so, and involves an application of the same principle. And, in view of the irreconcilable conflict of decisions elsewhere on this question, we are at liberty to adopt such rule as will best harmonize with those of this court, and our legislation on the subject, and as to us seem most reasonable and practicable. Our statute, in express terms, places the public ways of each municipality, in its control, coupled with a positive command to keep them open, in repair, and free from nuisances. In the performance of that duty, the municipal authorities are required to remove, and keep removed from its streets, all dangerous defects, obstructions, and nuisances of every kind, as they may arise, from time to time, from any cause. There is no exception from the requirement in favor of defects, obstructions, or nuisances which are placed, or caused to be placed, in a street by the corporation or by its officers or agents; nor is there any the less reason for holding the corporation liable for a disregard of its duty to remove such obstacles from its streets when placed there by its own act or the act of its officers, than there is for making it answerable for its negligence in permitting similar obstacles to remain when placed in the street by other persons. The statutory duty is ministerial in its nature, and mandatory in terms, and was imposed for the benefit of those having occasion to use the streets, so that they might use them with safety, and not for the benefit of the corporation; and ample means for its prompt and efficient performance are placed in the control of the corporation. While municipal legislation may be necessary in providing means and measures for the performance of the duty, as ³⁰⁶ it is with respect to many strictly ministerial duties, its performance, or the omission to perform it, is not the exercise of legislative or judicial power, nor is it discretionary.

We are of opinion, therefore, that a municipal corporation should be held liable for injuries caused by a dangerous defect or obstruction in a street or sidewalk which it suffers to remain after reasonable notice of its existence, though it arose in the construction or alteration of the street or sidewalk in accordance with a plan adopted by the municipal authorities.

We express no opinion in regard to the weight of the evidence. There was not a total lack of evidence tending to support the issues for the plaintiff, and its sufficiency is for the jury under proper instructions, and for the lower courts.

Judgment affirmed.

Shauck, J., dissents.

MUNICIPAL CORPORATIONS—LIABILITY FOR UNSAFE HIGHWAY WHILE IMPROVEMENTS ARE BEING MADE—NECESSITY OF NOTICE.—The temporary obstruction of the public streets for the purposes of improvement, if a reasonable necessity exists therefor, is not unlawful, and the municipal authorities are not answerable in damages for permitting it: *Frazier v. Butler*, 172 Pa. St. 407; 51 Am. St. Rep. 739, and note. Municipal corporations, when private or public improvements are being made in their streets, must guard them so as to protect travelers from resulting injuries therefrom: *Pettengill v. Yonkers*, 116 N. Y. 558; 15 Am. St. Rep. 442; *Kimball v. Bath*, 38 Me. 219; 61 Am. Dec. 243. See *James v. San Francisco*, 6 Cal. 528; 65 Am. Dec. 526. Actual notice on the part of a city of a defect in a street or sidewalk is not necessary, if the defect has existed for such a time that, with reasonable diligence, it might have been known: *Frankfort v. Coleman*, 19 Ind. App. 368; 65 Am. St. Rep. 412, and note; *Cunningham v. Denver*, 28 Colo. 18; 58 Am. St. Rep. 212.

IVES v. McNICOLL.

[59 OHIO STATE, 402.]

STATUTES ADOPTED FROM ANOTHER STATE—CONSTRUCTION OF.—In adopting a statute from another state there is always adopted the construction already placed upon it by the courts of that state, and each subsequent re-enactment of the statute acquiesces in the construction put upon it up to the date of such re-enactment by the courts of the state wherein it was originally enacted.

BASTARDS — ADULTERINE — LEGITIMATION OF.—A statute declaring that when a man has by a woman one or more children, and afterward intermarries with her, such issue, if acknowledged by him as his child or children, shall be deemed legitimate, and the issue of persons whose marriage is null in law shall nevertheless be legitimate, authorizes the legitimation of a child by its father, though when it was begotten and born the mother was the wife of another, and therefore incapable of contracting marriage with the father, if subsequently she was divorced from her husband and then married the father of the child, who, on his part, acknowledged it as his child.

Suit for the partition of real property brought by Margaret C. McNicoll, claiming to have an interest therein as the heir of her father, Henry McNicoll, to whom the property was devised by his father, Peter McNicoll. The plaintiff was born in September, 1876. At that time, and for nine years prior thereto, her mother was the wife of Samuel P. Reasoner, with whom she had not lived after 1869. In April, 1889, a divorce was procured by Mrs. Reasoner, who soon afterward married Henry McNicoll, who, both after and before the marriage, recognized plaintiff as his daughter. The plaintiff was born, and the marriage of her parents took place in Kentucky, but her

father at all times was a resident of the state of Ohio. The statute of Kentucky was substantially in the same language as that of Ohio, but in *Sams v. Sams*, 85 Ky. 396, such statute was decided not to warrant the legitimation of adulterine bastards. The defendant Ives was the daughter of Henry McNicoll by a prior marriage, which had been terminated by divorce before his acquaintance with the plaintiff's mother began. The trial courts decided in favor of the plaintiff, and the defendant Ives sought to reverse the judgment.

Kittredge & Wilby, for the plaintiff in error.

Robert Ramsey, Joseph W. O'Hara, and John Nichols, for the defendant in error.

⁴¹² BURKET, J. While the court finds that Mr. Reasoner and Mrs. Reasoner were married at a certain time, and that she obtained a divorce from him at a certain time thereafter, there is no finding that he obtained a divorce from her; and as in reviewing a judgment based upon a finding of facts, facts not found are regarded as not existing, this record must be construed as showing that Mrs. Reasoner was the wife of Mr. Reasoner at the time her daughter Margaret C. was begotten.

⁴¹³ The court finds in effect that the child, Margaret C., is the offspring of Henry McNicoll, an unmarried man, and Mrs. Reasoner, a married woman. The child is, therefore, what is known as an adulterine bastard, begotten of an adulterous connection between a man and woman who at that time could not make a valid contract of marriage. The legal obstacle to their marriage was afterward removed by divorce obtained by her, and they were shortly thereafter legally married, and the child at once became a member of his family, and was recognized and acknowledged by him as his child up to the time of his death, and was so treated in his last will and testament. The child now claims that she was and is thereby legitimated under our statute, and entitled to one-half of the property devised by Peter McNicoll to Henry McNicoll for the term of his natural life, and at his decease to go to the heirs of his body; while Claribel Ives, the only child of Henry McNicoll begotten in lawful wedlock, claims that an adulterine bastard cannot become legitimated under our statute by the subsequent marriage of the parents, and that therefore Margaret C. McNicoll has no interest in the property, and is not entitled to have partition thereof.

By the civil law, the law of Scotland and the Code Napoleon, an adulterine bastard could not become legitimated by the subsequent legal marriage of the parents. All bastards who were the offspring of parents who might legally marry at the time of begetting such bastards might become legitimated by the subsequent marriage of the parents, followed by an acknowledgment of a child by the father as being his child. Under the common law of England, there could be no legitimating ⁴¹⁴ of bastards, whether adulterine or otherwise.

This was the state of the law in Europe as to legitimating bastards when our first statute on the subject was passed, February 22, 1805: 3 Ohio Laws, 281. Our statute of that date is a transcript of the statute of Virginia on the same subject, passed in 1785, and entitled, "An act concerning the course of descents": 12 Henning's Stats. at Large, 139. The bill was drafted and reported by a committee, of which Thomas Jefferson was one, after some years of deliberation, and was adopted by the Virginia legislature, omitting the exception of the civil law and the law of Scotland as to adulterine bastards, and disregarding the common law of England, which prevented all bastards from being legitimated.

The statute of Virginia did not follow nor adopt any of the European laws as to bastards, but enacted a new statute on the subject, to be construed and enforced by reference to the words used in the statute itself, untrammelled by the rules of the civil law. The courts of Virginia, both before and after the adoption of our statute, construed the statute of that state as having abrogated the exception of the civil law as to adulterine bastards: *Stones v. Keeling*, 5 Call, 143; *Browne v. Turberville*, 2 Call, 390; *Templeman v. Steptoe*, 1 Munf. 339; *Davis v. Rowe*, 6 Rand. 355; *Garland v. Harrison*, 8 Leigh, 368. When we adopted in this state the Virginia statute as to bastards, we adopted with the statute the construction placed upon it by the courts of Virginia, and at each re-enactment of the statute we acquiesced in the constructions up to that time placed upon the statute by the courts of Virginia, ⁴¹⁵ no construction having in the mean time been placed upon the statute by our own courts: *Favorite v. Booher*, 17 Ohio St. 548.

As the exception as to adulterine bastards existed in the civil law and in the law of Scotland and was omitted from the Virginia statute, it must be presumed and held that such omission was intended, and that it was the purpose of the Virginia legislature to wipe out the exception as to adulterine bastards.

and to permit them to be legitimated the same as other bastards. When the legislature of this state adopted the Virginia statute in 1805 it was familiar not only with the Virginia statute, but also with the civil law, the law of Scotland, the common law of England, and the Code Napoleon, and the omission of the exception as to adulterine bastards was not in ignorance of those laws, but was with the purpose of wiping out the exception, and doing justice to the innocent offspring.

It is urged by counsel for plaintiff in error that while the words of our statute are broad enough to include adulterine bastards, the general assembly could not have intended to include them, because to do so would be against public policy, would disturb the general law protecting the marriage relation, and lead to absurd consequences, and that married people should not be encouraged to forsake their marriage vows and cohabit with others in anticipation of a future marriage with a view of making their offspring legitimate. And these considerations induced the decision in the case of *Sams v. Sams*, 85 Ky. 396.

There can be no public policy in this state in conflict with a valid statute of the state. Public policy must always yield to a valid statute. The 41st general assembly has the power to enact a law legitimating adulterine bastards, and there would be no absurdity in so doing. Neither would such a statute disturb the general law protecting the marriage relation nor the law of crimes and misdemeanors, nor the law as to public morals. The subject of marriage and divorce, and the subject of adultery and fornication, and the subject of public morals are all carefully provided for and protected by separate chapters and sections of our statutes, and if the general assembly desired to prevent adulterine bastards from becoming legitimated, some provision to that effect would be found in some of the statutes. No such provision is found, but, on the contrary, section 4175 of the Revised Statutes has been enacted as follows: "When a man has by a woman one or more children, and afterward intermarries with her, such issue, if acknowledged by him as his child or children, shall be deemed legitimate; and the issue of parents whose marriage is deemed null in law, shall nevertheless be legitimate."

The force and effect of this section begin after the sections as to marriage, divorce, adultery, fornication, and public morals have expended their force. After marriage and divorce, and after prosecutions for adultery and fornication, and to protect

public morale, there are often adulterine bastards existing whose parents have thereafter become legally married, and have recognized and acknowledged them as their children, and the purpose of our statute is to legitimate such children, and to permit them to inherit from the father as well as the mother. Thereby justice is done to the innocent offspring without in any manner impinging upon the laws as to the marriage relation or as to ⁴¹⁷ public morals. Those laws are allowed to have their full force and effect, and this statute as to bastards provides for a state of things existing after the other statutes have been fully executed.

Neither would such a statute encourage married persons to forsake their marriage vows and cohabit with others in anticipation of a future marriage with a view of thereby making their offspring legitimate. The adulterous connection is not had with a view to subsequent marriage and legitimating children, but with a view to present pleasure; and the ardent hope and desire usually exists that no offspring should result therefrom; and this section was enacted to enable parents, when all impediments to a legal marriage should be removed, to intermarry and recognize and acknowledge their offspring, and thereby in a measure atone for the sins of the past, and do justice to their innocent and unfortunate children. Viewed in this light the statute is a righteous enactment. While to visit the sins of the parents upon the innocent and helpless offspring would shock every sense of right and justice.

Again, it is clear that after the birth of an adulterine bastard, all obstacles being removed, parents may legally marry and enjoy all the rights and privileges of marriage. They may inherit from each other under our statute, and to allow them to marry and enjoy all the fruits thereof and deprive their offspring from inheriting from them would seem rank injustice; and it cannot be presumed, without clear words to that effect, that the legislature intended such an unjust result. To so hold would be to reward the guilty parents, and punish the innocent offspring.

⁴¹⁸ That our statute was intended for the benefit and protection of the innocent offspring, and not for their punishment on account of sins committed by their parents, is shown by the cases of *Wright v. Lore*, 12 Ohio St. 619; *Morris v. Williams*, 39 Ohio St. 554.

If the purpose of our law is to punish the bastard children for the errors of the parents, to be consistent, the children

should be prevented from inheriting from the mother, as well as the father, after the marriage of the parents. It is said that the mother is always known, but the father is not. But when the father marries the mother and recognizes and acknowledges the children as his own, he thereby makes himself known, and thereafter there is no more reason for denying inheritance to them from him than from the mother.

Again, the weight of authority in this country is in favor of the defendant in error: *Carroll v. Carroll*, 20 Tex. 731; *Hawbecker v. Hawbecker*, 43 Md. 516; *Blythe v. Ayres*, 96 Cal. 532; *Schouler on Domestic Relations*, 226; *Sutphin v. Cox*, 1 Western Law Monthly, 346; 2 Dec. Re. 90.

Opposed to these authorities is the case of *Sams v. Sams*, 85 Ky. 396. That case is cited by Pingrey on the Law of Real Property, section 1143, by Ballard on the Law of Real Property, section 344, *Cope v. Cope*, 137 U. S. 682-685, *Latin Maxims and Phrases*, by John Trainer, 450, *Rapalje and Lawrence's Law Dictionary*, 118, and the *Law of Persons and Property* by Dwight, 257. The only adjudged case is *Sams v. Sams*, 85 Ky. 396, and all the citations and references are to that case, and most of them refer to the case in language indicating a doubt as to its soundness.

⁴¹⁹ Again the language of the statute is too clear to require construction: "When a man has by a woman one or more children, and afterward intermarries with her," et cetera. A "man" means any man, and a "woman" means any woman. There are no exceptions. If he is a man and she is a woman, no matter what their previous lives may have been, they come within the language of the statute, and when legally married and the former issue acknowledged by him as his child, such issue becomes thereby legitimated, even though it is an adulterine bastard. Take the case at bar. Mr. McNicoll was a man, Mrs. Reasoner was a woman. He had a child by her and afterward intermarried with her and acknowledged the child as his child. The statute says that in such case the child shall be deemed legitimate. Nothing is said in the statute as to whether the parents could or could not legally marry at the time the child was begotten. The general assembly having attached no such condition, the courts can attach none, and to do so would be judicial legislation.

Judgment affirmed.

STATUTES ADOPTED FROM ANOTHER STATE, CONSTRUCTION OF.—In adopting a statute of a sister state, it is taken with the construction theretofore put upon it by the courts of that state, but this rule does not apply to a construction put upon the statute by the courts of that state since its adoption in this state: *Germania Life Ins. Co. v. Lewin*, 24 Colo. 43; 65 Am. St. Rep. 215, and note; *Cowhick v. Shingle*, 5 Wyo. 87; 63 Am. St. Rep. 17. Although the construction put upon statutes by the courts of the state from which they are borrowed is entitled to respectful consideration, yet such construction is not permitted to prevail when not in harmony with the spirit and policy of the legislation and decisions of the borrowing state: *Oleson v. Wilson*, 20 Mont. 544; 63 Am. St. Rep. 639, and note.

BASTARDS — ADULTERINE — LEGITIMATION OF.—Though children are born to a married woman while living with her husband, still, if they are the fruits of her intercourse with another man, whom she subsequently marries, and who afterward acknowledges them, they are thereby, by virtue of the statutes of Maryland, legitimated and made capable of inheriting his property as if born to him in lawful wedlock: *Scanlon v. Walshe*, 81 Md. 118; 48 Am. St. Rep. 488. See *Miller v. Miller*, 91 N. Y. 315; 43 Am. Rep. 669, on the effect of legitimation in other states.

JASHENOSKY v. VOLRATH.

[59 OHIO STATE, 540.]

JUDICIAL SALES—TITLE TO RENTS.—A deed executed pursuant to an order confirming a judicial sale takes effect by relation as of the date of the sale, and vests in the purchaser the title to the intermediate rents.

Action by Mrs. Volrath, assignee of William Volrath, to recover the rents of certain real property for the months of March, April, and May, 1894. The defendants pleaded that the property was sold on March 10, 1894, at a judicial sale, and that they had paid all rents to the purchaser. The sale was confirmed May 30, 1894, and a deed was then executed pursuant to the order of confirmation. The circuit court gave judgment for the plaintiff, and the defendants prosecuted their writ of error.

F. F. D. Alberty, for the plaintiffs in error.

Samuel Hambleton, for the defendant in error.

545 THE COURT. The parol evidence submitted upon the trial is not before us, and we must presume that the circuit court correctly held that it afforded no support to the verdict. It follows that the circuit court rightly held that since all ma-

terial facts were agreed upon, and nothing remained to be done but to apply the law to those facts, such final judgments as those facts required should be rendered by it. The general doctrine relating to the effect of the confirmation of a judicial sale is that it relates back to the day of sale and passes a title as of that day. The deed executed pursuant to the order of confirmation by relation takes effect as of the day of sale. This is the established doctrine in Ohio: *Boyd v. Longworth*, 11 Ohio, 236; *Oviatt v. Brown*, 14 Ohio, 286; 45 Am. Dec. 539. It was not applied in *Black v. George*, 26 Ohio St. 629, because by the terms of the sale there considered the purchaser's right to possession was deferred until the expiration of a current lease. The equity of the rule is manifest, because the purchaser cannot escape from the sale because he may think it ⁵⁴⁶ disadvantageous to him, and he is required to pay interest from the day of sale on so much of the purchase price as he has not actually paid. That the right to the intermediate rents passes to the purchaser as one of the results of confirmation has been held in numerous cases: *Winfrey v. Work*, 75 Mo. 55; *Stevenson v. Hancock*, 72 Mo. 612; *Taylor v. Cooper*, 10 Leigh, 317; 34 Am. Dec. 737; *Wagner v. Cohen*, 6 Gill, 97; 46 Am. Dec. 660; *Lathrop v. Nelson*, 4 Dill. 194.

Judgments of the circuit court reversed and those of the common pleas affirmed.

JUDICIAL SALES—TITLE TO RENTS.—After a judicial sale is confirmed, the confirmation relates back to the date of the sale, and the purchaser is entitled to everything he would have been entitled to had the confirmation and conveyance been contemporaneous with the sale: See note to *Watson v. Tromble*, 29 Am. St. Rep. 497; *Taylor v. Cooper*, 10 Leigh, 317; 34 Am. Dec. 737. A doctrine in conflict with that of the principal case was laid down in *Pearson v. Gillenwaters*, 99 Tenn. 446, 63 Am. St. Rep. 844, where it was held that a purchaser of land at a judicial sale is not entitled to the rents and profits for a period between the sale and its confirmation, since the title of the purchaser at such a sale does not, upon confirmation, relate back to the date of the sale.

CASES
IN THE
SUPREME COURT
OF
PENNSYLVANIA.

LEHIGH COAL & NAVIGATION COMPANY v. BLAKESLEE.

[189 PENNSYLVANIA STATE, 12.]

GUARANTY—GENUINENESS OF SIGNATURE—STATUTE OF LIMITATIONS—FORGERY.—If a person, acting in good faith, guarantees that the signature to an irrevocable power of attorney to transfer shares of stock in a company is genuine, such guaranty raises an implied promise upon the part of the guarantor to be answerable to any party who purchases the certificate and power, or makes a transfer of it; but if the signature is, in fact, a forgery, the implied promise of the guarantor is broken when it is made, the right of action accrues immediately, and the statute of limitations begins to run from the date of the guaranty.

Assumpsit upon a guaranty. On September 10, 1890, the defendant guaranteed, at the request of John R. Baker, Jr., that the signature of Baker's grandmother, Elizabeth Baker, to an irrevocable power of attorney to transfer fifty shares of the stock of the Lehigh Coal and Navigation Company, was genuine. On November 6, 1890, a transfer of the shares was made to John R. Baker, Jr., who shortly afterward fled from the country, when it was discovered that the signature to the power of attorney was forged. Verbal notice of the forgery was given in February, 1891, to the plaintiff and the defendant in this suit, and, on June 27, 1892, a demand in writing for a new certificate was made upon the plaintiff. Nothing further was done until July 6, 1896, when Mrs. Baker's administrator commenced an action against the company named to recover damages for the transfer of the stock, and the company, not being able to make a defense, paid the administrator, in settlement of the claim against the company, the sum of eighteen hundred

and eighty-seven dollars and thirty-five cents. The transfer of stock was made on November 6, 1890, and on November 9, 1897, this suit was brought. The defendant interposed the statute of limitations, and the question was whether it was a good defense. The company appealed from an order discharging a rule for judgment for want of a sufficient affidavit of defense.

R. C. Dale and Samuel Dickson, for the appellant.

A. B. Shearer, for the appellee.

¹⁷ McCOLLUM, J. That the question presented by the appeal was carefully considered ¹⁸ by the learned president of the common pleas clearly appears in his opinion. It is admitted therein that a diligent effort was made by court and counsel to find a case plainly corresponding in its facts with the case at bar, and that they were unable to do so. The counsel, however, cited cases in which they claimed that questions analogous to the question under consideration were discussed and determined. But these cases were not all alike in their facts, nor were the questions decided in them the same. The plaintiff relied upon one class of them as authority for its contention, and the defendant upon another class as furnishing a sufficient warrant for the judgment he obtained. Many cases relating to actions on warranties of title to real estate were cited by the former as establishing the familiar and well-settled rule that "to sustain an action upon a covenant of general warranty an actual eviction must be averred and proved." But it seems to us that these and other cases cited as authority for the plaintiff's contention that the cause of action did not accrue until November 5, 1897, are inapplicable to the case at bar. They are certainly unlike it in their facts, and the conclusions drawn from them and contended for by the plaintiff are seemingly not adapted to it.

The cases cited by the defendant are not in their facts exactly like the case in hand, but there is a noticeable analogy between them and the latter. A brief reference to a few of them will show their relation to and bearing upon the present issue. It was held in *Meade v. McDowell*, 5 Binn. 195, that if A guarantees to B the performance of any contract he may make with C, and six years elapse after the contract between B and C and before the bringing of any suit against A upon his guaranty, no acknowledgment of C subsequent to the contract can take the

case out of the statute of limitations as to A. The statute runs from the making of the contract, and as no suit was brought upon the guaranty within six years from that time, it was a bar to a subsequent suit. In *Owen v. Western Sav. Fund*, 97 Pa. St. 47, 39 Am. Rep. 794, it was held: 1. That in an action upon the case against a recorder of deeds for damages suffered by reason of a false certificate of search given by the recorder to the plaintiff, in the absence of fraud, the statute of limitations begins to run from the time when the search was given and not from the development of the damage. 2. It is immaterial that the party who ¹⁰ received and paid for the search had no knowledge of its falsity or cause for inquiry until more than six years after it was given. The cause of action, within the meaning of the statute of limitations, was the issuing of the false certificate. The right of action accrued to the plaintiff as soon as it parted with its money on the faith of it, and from that period the statute began to run. 3. With reference to the statute of limitations there is no distinction between trusts arising from contracts and those which arise from official misfeasance. In *Binney v. Brown*, 116 Pa. St. 169, a party satisfied a mortgage by mistake, in which there was no element of fraud. More than six years after the commission of the mistake the party injured by it brought suit to which the statute of limitations was held to be a bar, although he had no knowledge of the mistake until the statute had run against it. In *Moore v. Juvenal*, 92 Pa. St. 484, it was held: 1. That in an action against an attorney at law for neglecting to prosecute a claim until it was barred by the statute of limitations, where there was no fraud or concealment on the part of the attorney, the plea of the bar of the statute is a good defense; 2. Where the declaration in such a case alleges a breach of duty and special consequential damages, the breach of the duty and not the consequential damage is the cause of the action, and the statute runs from the time of the former, and not from the time the special damage is revealed or becomes definite. These cases, together with the cases cited in them and in the opinion of the learned president of the court below, are believed to be applicable to the contention of the defendant in this case. It is conceded that there was no element of fraud in his guaranty of the signature, and that he made it on the representation of a party then in good repute and in whom he had entire confidence. The signature guaranteed purported to be the signature of Elizabeth Baker to an irrevocable power of attorney to

transfer fifty shares of the stock of the Lehigh Coal and Navigation Company. It was, however, a forged signature. It was guaranteed by the defendant on September 10, 1890, and the stock was transferred by the company on November 6, 1890, more than seven years before this suit was brought.

It was held by the learned court below that the implied promise of the guarantor was broken when it was made, and that the right of action accrued and the statute of limitations run from ²⁰ the date of the guaranty. It seems to us that this is a reasonable and just view of the case; that it is supported by the rulings in the cases to which particular reference has been made herein, and by the rulings in the cases cited as authority for them. We therefore overrule the assignments of error.

The order discharging the rule for want of a sufficient affidavit of defense is affirmed.

THE COMMENCEMENT OF THE STATUTE OF LIMITATIONS in a given case is contemporaneous with the origin of the cause of action: *Owen v. Western Sav. Bank*, 97 Pa. St. 47; 39 Am. Rep. 794.

MESSMORE v. WILLIAMSON.

[189 PENNSYLVANIA STATE, 78.]

SCIRE FACIAS AGAINST HEIRS—JUDGMENT AGAINST ADMINISTRATOR—CHARGING LANDS OF DECEDENT—ADMINISTRATOR AS A PARTY.—If a judgment has been entered against an administrator, an omission to make him, as such administrator, a defendant in a writ of scire facias, to charge the lands of the decedent with the payment of his debts, is not fatal to the proceeding, where he is also an heir, and, as such, has been made a party defendant; where he has full notice of the proceeding, and does not complain; and where the parties to the judgment, as well as its date, number, and term all fully appear in the body of the writ.

SCIRE FACIAS AGAINST HEIRS—JUDGMENT AGAINST ADMINISTRATOR—CHARGING LANDS OF DECEDENT—EFFECT OF NAMING INTERMEDIATE HEIRS.—It is not a fatal objection to a scire facias to revive a judgment against an administrator, so as to charge the real estate of the decedent with his debts, that a person is named in the writ as an intermediate heir through whom the interests of other heirs are derived.

SCIRE FACIAS—DEFINITIONS—OMISSION OF WORD "REAL" IN DESCRIPTION OF ESTATE TO BE CHARGED—EFFECT OF.—An "estate" is the degree, quantity, nature, and extent of interest which a person has in real property. The word, in its popular sense, includes both real and personal property, but, in a technical sense, it applies to realty only. Hence, the omission of the word "real," before "estate," in a writ of scire facias, in describing the estate to be charged, is unimportant, as realty is meant by the word "estate."

SCIRE FACIAS AGAINST HEIRS—JUDGMENT IS BINDING ONLY TO WHAT EXTENT.—If the heirs of a decedent are made parties defendant in a scire facias to revive a judgment against an administrator, for the purpose of charging the lands of the decedent with the payment of his debts, a judgment against them will bind only the land in their hands as heirs, and cannot be enforced against them personally.

Scire facias to revive a judgment. The judgment upon which the writ issued was entered in the court of common pleas in favor of Amanda Messmore, against John Morrison, administrator of the estate of Joseph Morrison, deceased, on May 13, 1895. The plaintiff in the scire facias proceeding was Amanda Messmore, for the use of Kate Messmore, and the defendant was Benjamin Williamson, heir and devisee of Archibald Morrison, deceased, who was an heir of Joseph Morrison, deceased. The original judgment was obtained against the estate or representative of Joseph Morrison. It was contended in the scire facias proceeding that the land or property of Joseph Morrison, passed to Archibald Morrison, and from Archibald Morrison to Benjamin Williamson, and was subject to the payment of the debts of Joseph Morrison, deceased. There seemed to be no dispute that this piece of land did pass to Benjamin Williamson from Joseph Morrison. The only question, therefore, was whether, under the evidence offered, the plaintiff was entitled to recover, or have judgment on the scire facias. The administrator, as such, was not made a party defendant in the scire facias proceeding though he was named therein as an heir; and Archibald Morrison, deceased, was named in the writ as an intermediate heir through whom the interests of other heirs were derived. And, in describing the estate to be charged, the word "real" was omitted from the writ, before the word "estate." The writ named the heirs and devisees of Archibald Morrison, deceased, as parties defendant. The court practically instructed the jury to return a verdict for the plaintiff, which it did, and the defendant appealed.

F. W. Downey and R. F. Downey, for the appellant.

James E. Sayers, for the appellee.

77 FELL, J. The exceptions upon which the assignments of error are based rest on purely technical grounds, and were taken at the close of the trial when the opportunity for amendment had passed. The omission to make the administrator a party defendant in the scire facias to charge the lands of the decedent with the payment of his debts was not, under the facts

of the case, fatal to the proceeding. The administrator was also an heir, and as such was made a defendant, and had full notice of the proceeding, and he is not here complaining. In the body of the writ the parties to the judgment, its date, number, and term all fully appear. In his representative capacity the administrator ⁷⁸ could have made no defense, for while the judgment is *prima facie* evidence only in a proceeding to charge the land, it is conclusive as to the personal estate: *Sergeant v. Ewing*, 36 Pa. St. 156; *Paul v. Grimm*, 183 Pa. St. 330. If summoned he could not have defended in the interest of creditors or of the estate generally, and the omission to name him deprived the other defendants of no right. Nor is there any merit in the objection that Archibald Morrison is named in the writ as an intermediate heir through whom the interests of other heirs were derived. The clear purpose of the proceeding was to charge with his debts the real estate of Joseph Morrison, which was in the possession of his heirs or their devisees, and of this purpose the record throughout gave the fullest notice. It would have been better practice to have followed the words of the act of assembly in describing the estate to be charged, but the omission of the word "real" could have led no one to suppose that goods and chattels, and not lands and tenements, were meant. While in its popular use the word "estate" includes both real and personal property, when used in a strictly technical sense it applies to realty only. In *Bouvier's Law Dictionary* (1897) it is defined to be "the degree, quantity, nature, and extent of interest which a person has in real property," and this is said to be the proper and technical meaning of the word.

The verdict was for the amount of the judgment "to be levied of the lands and tenements which are in possession of, and held by, the defendant and owned in remainder, and which were of the lands and tenements of Joseph Morrison, deceased, subject to the payment of his debts at the time of his death." This settled every possible doubt as to the nature and extent of the plaintiff's demand. There was no attempt to obtain a judgment which would bind the defendants personally, and no such attempt if made would have been successful. The defendants were brought into court that they might contest the debt, and any judgment rendered against them would bind only the land in their hands as heirs or devisees, and could not be enforced against them personally: *Coyle v. Reynolds*, 7 Serg. & R.

328; Sample v. Barr, 25 Pa. St. 457; Coulter v. Selby, 39 Pa. St. 358.

The judgment is affirmed.

SCIRE FACIAS—HEIRS—CHARGING LANDS OF DECEDENT. A scire facias is an appropriate remedy to revive a judgment against the heir-at-law of a deceased judgment debtor, to compel its satisfaction out of lands descended to them. Under the Pennsylvania statute, a scire facias may issue to revive a judgment against an executor, and a judgment be rendered thereon against the devisees. But the revival of a judgment against a decedent's administrator by a scire facias against his heirs is erroneous; though a sale of the decedent's lands, under such a judgment of revival, is not void, and the heirs cannot recover from the vendee under the sheriff: See monographic note to Frierson v. Harris, 94 Am. Dec. 226, 227, on scire facias to revive a judgment.

DEFINITIONS—"ESTATE."—In its popular sense, the word "estate" includes both realty and personalty: Note to Tolar v. Tolar, 14 Am. Dec. 576; Thornton v. Mulquinne, 12 Iowa, 549; 79 Am. Dec. 548; but the word may be interpreted according to the context of the instrument in which it is used, with a view of accomplishing the intent of the parties as therein expressed: Note to Higgins v. Higgins, 66 Am. St. Rep. 61.

PYLES v. BROWN.

[189 PENNSYLVANIA STATE, 164.]

DEEDS—RECORD OF CONVEYANCES AND MORTGAGES AS NOTICE—DUTY AS TO SEARCH—INDEXES.—A grantee or mortgagee must search for conveyances and mortgages made by anyone who has held the title; with conveyances and mortgages to them he has nothing to do; and this rule is not changed by a statute which requires recorders of deeds to prepare and keep in their offices direct and adsectum indexes of deeds and mortgages, and makes the entry of recorded deeds and mortgages in such indexes, respectively, notice to all persons of the recording of the same.

MORTGAGES—RECORD OF, AS NOTICE—RECITALS IN SATISFIED MORTGAGE AS NOTICE.—A mortgagee is not bound to go back over the records of satisfied mortgages to look for recitals therein; and, as they do not affect him, it is unnecessary to consider what is their effect, if any, where the mortgagee has had a clear search against every one who appears, at any time, to have held the title.

DEEDS—FAILURE TO RECORD TITLE—RECITALS AS NOTICE.—If an owner of property neglects to record his title, every presumption is in favor of a subsequent purchaser, and vague and indefinite recitals are not sufficient notice to put him on inquiry outside the record.

Ejectment for a lot of ground in the city of Pittsburg. The court gave binding instructions for the defendant, for whom there was a judgment, and the plaintiff appealed.

George M. Hosack and John A. Murphy, for the appellant.

T. S. Brown and W. G. Stewart, for the appellee.

¹⁰⁶ FELL, J. The appellant acquired title to the lot for which ejectment was brought by sheriff's sale under proceedings on a purchase money mortgage given by Holland to Kaufman, dated May 19, 1892, assigned by Kaufman to Thomas Brown, and recorded May 24, 1892. No deed from Kaufman to Holland was ever recorded, and there was no direct evidence that a deed had ever been executed and delivered. June 1, 1892, Kaufman executed and delivered a deed for the same lot to Hughes, who conveyed to C. E. Williams, who conveyed to B. M. Williams, who, on October 14, 1895, executed a mortgage to the appellee, S. H. Brown. Judgment was obtained on this mortgage and the lot was sold by the sheriff and purchased by the appellee March 1, 1897.

As the appellant's title was founded on an unrecorded deed from Kaufman, and the appellee had a clear record title back to Kaufman, it was incumbent upon the appellant to prove the execution and delivery of the deed upon which his title was based, and as it was not recorded to show actual or constructive notice to the appellee. At the trial no proof was offered of the execution and delivery of a deed from Kaufman to Holland, or of actual notice to anyone, but the attempt was made to show constructive notice from the records of the recorder's office.

Kaufman purchased of Dick by deed dated May 2d, and recorded May 24, 1892, and gave Dick a purchase money mortgage for three thousand dollars, which covered this and an adjoining lot of the same size and value. This mortgage was assigned to Thomas Brown, who on May 24, 1892, released the lot in dispute from ¹⁰⁷ its lien by a writing on the margin of the record, by which he acknowledged the receipt of fifteen hundred dollars on account of the mortgage and released from the lien thereof "that portion of the within mortgaged premises as conveyed by within mortgagor to John S. Holland, by deed of May 19, 1892, and to be recorded." The deeds from Kaufman to Hughes and from Hughes to C. E. Williams contain recitals that the conveyances are made subject to a mortgage debt of fifteen hundred dollars. It was claimed that the recital in the release indorsed on the margin of the record of the mortgage of Kaufman to Dick was notice to the appellee of the conveyance by Kaufman to Holland, and of title in the latter, and that the

recitals in the deeds mentioned were notice of the mortgage of Holland to Kaufman, and put the appellee on inquiry.

It should be noted that the recitals in the deeds do not give the names of the parties or the date and place of record of the mortgage referred to, and that the deed from C. E. to B. M. Williams, the last in the chain of title, does not contain the recital of a mortgage, and that the mortgage given by Kaufman to Dick was satisfied September 22, 1892, more than three years before B. M. Williams took title to the lot and created the mortgage in which is the foundation of the appellee's title.

The first proposition of the appellant is that the entry of a mortgage in either the direct or adsectum index is notice to all persons of the recording of the same, and that it is the duty of the mortgagee to search both indexes against every name in the chain of title. The second proposition, which is a corollary of the first, and should be considered with it, is that the holder of a purchase money mortgage, which has been recorded within sixty days of its date, need not concern himself about further dealings with the property by others, and need not see that his mortgagor's deed is recorded. These propositions are based upon a construction claimed for the act of March 18, 1875: Pub. Laws, 32. This act requires recorders of deeds to prepare and keep in their offices direct and absectum indexes of deeds and mortgages, and the third section provides "the entry of recorded deeds and mortgages in said indexes, respectively, shall be notice to all persons of the recording of the same." The construction claimed would require the examination of all conveyances and mortgages to as well as by anyone whose name appears in the chain of title. It would make unnecessary the recording of a ¹⁰⁸ deed if a purchase money mortgage given with it were recorded, as a title derived under proceedings on the mortgage would be superior to the title of a subsequent grantee of the mortgagor.

The rule has always been that the grantee or mortgagee must search for conveyances and mortgages made by anyone who has held the title; with conveyances and mortgages to them he has nothing to do. The act of 1875 was certainly not intended to change this rule and to impose a burden for which there is no sound reason and which would extend and multiply the risks of conveyancing indefinitely. As suggested in the argument of the appellee's counsel, the act was probably passed to remedy the defects in the recording acts pointed out by Chief Justice Agnew in the opinion in *Schell v. Stein*, 76 Pa. St. 398, 18

Am. Rep. 416, decided in 1874. The act did not change the practice in many counties in which grantee and mortgagee indexes had been kept, but made the practice uniform by requiring general indexes to be kept in all counties. The purpose of the act was to require the keeping of general indexes, which before its passage had not been obligatory; and the provision that the entry of deeds and mortgages in the general indexes shall be notice of the recording of the same means that it shall be notice to all persons who in the examination of titles have occasion to search for conveyances and mortgages. It was not intended to create a new duty in this regard, nor to enlarge or extend the rule as to constructive notice.

The only ground for the inference of a conveyance from Kaufman to Holland was the recital in the purchase money mortgage given by Holland to Kaufman, and the recital in the marginal release of the mortgage given by Kaufman to Dick. The latter mortgage had been satisfied of record more than two years before the appellee took the mortgage on which her title was founded. It is unnecessary to consider what effect, if any, such a recital would have, as the appellee had a clear search against every one who appeared at any time to have held the title; and the recital did not affect her, as she was not bound to go back over the records of satisfied mortgages to look for recitals. As before stated the deed from C. E. to B. M. Williams, the last one in the chain of title, contained no recital of a mortgage, and the recitals in the two former deeds did not give names, dates, or places of record. A search would have disclosed no ¹⁶⁹ mortgage given by anyone in the chain of title, except the satisfied mortgage of Kaufman to Dick, and it substantially answered the call of the recital. There was no proof that the recitals referred to the Holland mortgage, and if this mortgage has been found it was a mortgage given by one who as far as the record and evidence show never held the title. Where an owner neglects to record his title, every presumption is in favor of a subsequent purchaser, and vague and indefinite recitals are not sufficient notice to put him on inquiry outside the record. The appellant failed to show title in Holland, and a verdict was properly directed against him.

The judgment is affirmed.

DEEDS—RECORD OF CONVEYANCES AND MORTGAGES AS NOTICE—INDEXES.—Registration is necessary to perfect the title of real property intended to be conveyed by a deed; and recording the instrument is constructive notice of its existence and contents

to all subsequent purchasers: Note to Hockenhull v. Oliver, 12 Am. St. Rep. 238; but such notice affects only subsequent purchasers and encumbrances: Note to Shirk v. Thomas, 16 Am. St. Rep. 387. Parties are bound to take notice of facts exhibited in a public record: Backer v. Pyne, 130 Ind. 288; 30 Am. St. Rep. 231. One who takes a mortgage upon real estate has constructive notice of every fact which could have been ascertained by an inspection of the deeds and mortgages on record in the chain of title: Note to Roby v. Bismarck Nat. Bank, 50 Am. St. Rep. 638; McPherson v. Rollins, 107 N. Y. 316; 1 Am. St. Rep. 826. An index is no part of the record. It is only intended to furnish facilities for tracing titles: Note to Curtis v. Lyman, 58 Am. Dec. 178; but a purchaser of land is charged with constructive notice of such entries in the reception-book or index in the registrar's office as are by law required to be made: Note to Backer v. Pyne, 30 Am. St. Rep. 236.

RECITALS IN INSTRUMENTS AS NOTICE—DEEDS AND SATISFIED MORTGAGES.—A vendee is chargeable with notice of the recitals contained in the instruments forming his chain of title. Not only is he bound by recitals in the conveyance under which he immediately holds, but he must give heed to the recitals in prior instruments which are necessary to complete his chain of title, and will be affected with notice of those facts to which such recitals refer. This principle applies not only to recitals in deeds and mortgages, but includes those in wills and records, without which the title could not be deduced: Notes to Lodge v. Simonton, 23 Am. Dec. 48; Graff v. Castleman, 16 Am. Dec. 754; Parker v. Conner, 45 Am. Rep. 188. The rule that a grantee always takes with constructive notice of whatever appears in the conveyances constituting his chain of title applies to a prior unrecorded mortgage referred to in the second mortgage: Note to Parker v. Conner, 45 Am. Rep. 188. So, though one of the mortgages on record in the chain of title is apparently satisfied of record, yet an intending mortgagee must take notice of all the facts appearing therefrom, and from the entry of satisfaction thereof: Kirsch v. Tozier, 143 N. Y. 390; 42 Am. St. Rep. 729. But a party is not charged with notice of recitals of matters not necessary to his title: Note to Graff v. Castleman, 16 Am. Dec. 754; and one not chargeable with notice of the registration of a deed cannot be affected by any facts set forth in the recitals found in such deed: Note to Shirk v. Thomas, 16 Am. St. Rep. 387.

PRESUMPTION IN FAVOR OF SUBSEQUENT PURCHASERS. One claiming title to land by a deed to him, purporting to be made for a valuable consideration, is presumed to be a purchaser in good faith without notice of prior unrecorded deeds, until the contrary is shown; and the burden of proof to show notice and want of good faith is on the party attacking the deed: Note to Block etc. Co. v. Holcomb-Brown Co., 67 Am. St. Rep. 321.

BELFIELD v. NATIONAL SUPPLY COMPANY.

[189 PENNSYLVANIA STATE, 189.]

AGENCY—RIGHTS OF UNDISCLOSED PRINCIPAL—LIMITATION UPON.—One who gives an order for goods to A cannot have it transferred by A to B without the buyer's knowledge and consent. And even if it turns out that A was all the time only agent for B, as an undisclosed principal, yet B's rights under the contract will be limited by the rights which the buyer has in good faith acquired against A while dealing with him as principal.

SALES—ORDER FOR GOODS TURNED OVER TO ANOTHER—RIGHTS OF PARTIES—HOW FIXED.—If a purchaser sends a firm an order for goods, which order is turned over to another, the rights of the parties are fixed by the original contract growing out of the order, whether the firm is regarded as a dealer on its own account, or is the agent of an undisclosed principal, and cannot be changed without the introduction of new facts and circumstances.

AGENCY—UNDISCLOSED PRINCIPAL—RISK OF SET-OFF.—Every undisclosed principal, as against those who deal with his agent as the real owner, runs the risk of having his claim met by the setoff of a demand due from the agent to a purchaser, and the only way of obviating this is by giving notice of his title.

AGENCY—UNDISCLOSED PRINCIPAL—PURCHASER'S LIABILITY BEFORE AND AFTER NOTICE OF TITLE—SET-OFF.—If an order for goods is given to a firm, which it turns over to another, with instructions to ship and charge directly to the purchaser, and, before the consummation of the transaction, the purchaser is notified of the shipper's title, the buyer is bound to refuse all goods delivered after such notice, or account for them to the shipper; but as to goods delivered to the buyer before such notice he may, in an action against him by the shipper, set off a claim of his against the firm, for the purchaser is not answerable to an undisclosed principal before knowledge of any other title than that of the firm.

AGENCY—UNDISCLOSED PRINCIPAL—NOTICE OF TITLE—QUESTIONS FOR THE JURY.—If an order for goods is given to a firm, which it turns over to another, with instructions to ship and charge directly to the purchaser, and before the consummation of the transaction, the purchaser is notified of the shipper's title, the question, in an action by the shipper against the purchaser, as to what goods were delivered before notice, and what ones after notice, as well as whether there was any ratification of the order as coming directly from the purchaser to the shipper, should be submitted to the jury.

Assumpsit to recover for goods alleged to have been sold and delivered by the plaintiff to the defendant. The goods were iron cocks alleged to have been sold and delivered to the defendant by, or through, the firm of Dickson & Kerr. It was admitted that the goods were those of the plaintiff, and that they were shipped to the defendant by the plaintiff and received by the defendant. It was also admitted that the price charged was correct. The defendant company, however, contended that

the goods were purchased under such circumstances that it was entitled to set off against their price a balance due it by Dickson & Kerr. About the close of the year 1896, the defendant gave Dickson & Kerr four orders for iron cocks. That firm ordered the goods from the plaintiff, directing that they be charged to the defendant, and the plaintiff shipped the goods directly to the defendant. Previous to that time the defendant had dealt with Dickson & Kerr as principals, and, at that time, this firm was indebted to the defendant on such previous dealings between them, but the plaintiff was unaware of this fact and acted in good faith. The plaintiff gave notice to the defendant of his title to the goods, but it did not clearly appear whether the goods were all delivered before or after notice of the plaintiff's title; and it did not appear whether there was any ratification of the orders as coming directly from the defendant. Neither did the evidence show the precise status of the account between Dickson & Kerr and the defendant at the time such notice was given. The plaintiff contended that the order had been given to him by Dickson & Kerr, as brokers, and that the defendant must pay for the goods without reference to its dealings with Dickson & Kerr. The defendant contended that the plaintiff was the undisclosed principal of Dickson & Kerr, and that, therefore, the indebtedness of that firm to the defendant could be set off. There was a verdict for the plaintiff, and the defendant appealed, the error assigned being the giving of binding instructions for the plaintiff.

A. Leo Weil and Charles M. Thorp, for the appellant.

George B. Gordon, John Dalzell, and William Scott, for the appellee.

194 MITCHELL, J. That defendant dealt with Dickson & Kerr as principals is clear from the whole course of their previous transactions. The fact that Dickson & Kerr also did business as brokers was immaterial, unless defendant gave orders to them as such. One who gives an order for goods to A cannot have it transferred by A to B without the buyer's knowledge and consent. And even if it turns out that A was all the time only agent for B as an undisclosed principal, yet B's rights under the contract will be limited by the rights which the buyer has in good faith acquired against A while dealing with him as principal: *Frame v. William Penn Coal Co.*, 97 Pa. St. 309. Whether, therefore, Dickson & Kerr be regarded as dealers on

their own account who turned over defendant's order to plaintiff or as agents of plaintiff, an undisclosed principal, the rights of the parties were fixed by the ¹⁹⁵ original contract growing out of the order, and could not be changed without the introduction of new facts and circumstances. Dickson & Kerr being in debt to defendant on the previous dealings, defendant had the right, as against them, to get its debt paid and the accounts balanced by ordering goods from them in the regular course of their prior business, and if the goods were sent, received, and charged by defendant before knowledge of any other title than that of Dickson & Kerr, the transaction was closed, and defendant was not liable to plaintiff. That is a risk which every undisclosed principal runs as against those who deal with his agent as the real owner.

But if, before the goods were received, the defendant had notice of plaintiff's ownership, then defendant was bound to elect either to refuse the goods or to take them as the property of plaintiff, and keeping them would be an assumption of the liability to pay plaintiff for them, whether it be regarded as a ratification of the transfer of the order from Dickson & Kerr or an acknowledgment of the plaintiff as the true principal now disclosed.

The exact date of such notice to defendant and the precise status of the goods and accounts at that time are not clear on the evidence as it now stands. Each party asked a direction for a verdict as matter of law; plaintiff on the ground that the order had been given to him by Dickson & Kerr as brokers, and the goods shipped to and received by defendant, and, being plaintiff's property in fact, must be paid for by defendant without reference to its dealings with Dickson & Kerr; defendant, on the other hand, standing on the state of the case at the time it ordered the goods from Dickson & Kerr without reference to the time of delivery. Both claims were too broad. Defendant was right as to its original status on its order to Dickson & Kerr, and as to all goods received, receipted for, or credited to Dickson & Kerr before notice of plaintiff's title. But such notice terminated its rights in that aspect, and, as already said, it was bound to refuse all goods subsequently delivered or account for them to plaintiff. The time of notice being received, and the deliveries of the goods before and after, were the crucial points of the case. Some of the goods appear to have been received before notice, some admittedly after it,

some of the acts and correspondence of defendant look like ¹⁸⁷ratification of the order as coming directly from defendant to plaintiff, some of them tend to the contrary. These questions therefore should have been sent to the jury.

Judgment reversed and venire de novo awarded.

AGENCY—ACTION BY UNDISCLOSED PRINCIPAL—SET-OFF—RIGHT OF, BEFORE KNOWLEDGE.—An undisclosed principal may maintain an action on a written contract made by his agent in the name of the latter alone, upon proof that, in making the contract, the agent was acting for such principal; but the burden of proof is upon the principal to show the agency, and that, in making the contract, the agent was acting for him: *Powell v. Wade*, 109 Ala. 95; 55 Am. St. Rep. 915, and monographic note thereto, on suits by undisclosed principals upon contracts made by their agents. If a person sells goods to a purchaser, without disclosing his agency, and the purchaser has no knowledge that the former is not the owner of the goods, the purchaser may, in an action by the principal for the purchase money, set off a demand due him from such agent: See notes to *Gardner v. Allen*, 41 Am. Dec. 46; *Powell v. Wade*, 55 Am. St. Rep. 921.

KUNKEL v. WHERRY.

[180 PENNSYLVANIA STATE, 193.]

DAMAGES—PENALTY—HOW REGARDED IN EQUITY.—The rule that in actions *ex contractu*, where the breach of an agreement admits of compensation, the recovery may be limited to the loss actually sustained, notwithstanding a stipulation for a penalty, is founded upon the principle that one party should not be allowed to profit by the default of the other, and that compensation, and not forfeiture, is the equitable rule. Equity will regard a penalty or forfeiture as intended to secure the fulfillment of a contract, and it may preclude the injured party from recovering more than a just compensation, or from obtaining a collateral advantage.

DAMAGES—PENALTY OR LIQUIDATED DAMAGES—HOW DETERMINED—NO GENERAL RULE.—Whether a sum named as compensation for the breach of a contract is to be considered as a penalty to secure its fulfillment, from which equity will relieve, or as damages liquidated by the parties themselves, is a question which cannot be answered by the application of any general rule, but is always one of intent and construction. Uncertainty as to the extent of the injuries which may ensue is, however, a criterion by which to determine whether it is a case of liquidated damages or a penalty.

DAMAGES—PENALTY OR LIQUIDATED DAMAGES—PRESUMPTION—INQUIRY BY THE COURT.—The general principle upon which the law awards damages is compensation for the loss suffered. The amount may be fixed by the parties in advance, but where a lump sum is named by them, the court will always look into the question whether this is really liquidated damages, or only a penalty, the presumption being that it is the latter. The name by

which it is called is of but slight weight, the controlling elements being the intent of the parties and the special circumstances of the case.

DAMAGES — WHEN LIQUIDATED—ILLUSTRATION.—If a contractor binds himself to complete the construction of a building within eleven months, agreeing to receive one hundred dollars for each day less than the time limit, and to pay one thousand dollars for each day that he shall exceed it in completing the work, and he contracts with third persons, who agree to furnish the materials and to finish the work to the top of the second story ready for the bricklayers in six weeks' time after three stories of iron work have been erected, and bind themselves, by stipulation in their contract, "to pay the sum of one hundred and fifty dollars per day as a penalty for each and every day thereafter that the said work remains unfinished, as and for liquidated damages," such stipulation in the latter contract must be regarded as liquidated damages, and not as a penalty, for the damages named are not disproportionate to the loss which may probably result from a failure to carry out the contract respecting the stone and granite work.

Assumpsit on a contract. There was a verdict for the plaintiffs, and the defendant appealed. The trial court regarded the stipulation in question as penalty, and it was against this holding that the fifth and seventh assignments of error were directed.

R. A. Balph and James Balph, for the appellant.

E. G. Ferguson and J. S. Ferguson, for the appellees.

²⁰⁰ FELL, J. The defendant was the contractor for the construction of a large ten-story building which he was required to complete in eleven months. By the terms of his contract with the owner he was to receive one hundred dollars for each day less than the time limit, and to pay one thousand dollars for each day that he should exceed it in the completion of the work. He entered into a contract with ²⁰¹ the plaintiffs for the stone and granite work. They agreed to furnish the materials and to finish the work to the top of the second story ready for the bricklayers in six weeks' time after three stories of iron work had been erected, and bound themselves "to pay the sum of one hundred and fifty dollars per day as a penalty for each and every day thereafter that the said work remains unfinished, as and for liquidated damages."

The learned judge held that this stipulation should be regarded as a penalty, and not as liquidated damages, and that the defendant could set off against the plaintiff's claim such damages only as he proved to have been actually sustained by him because of the delay of the plaintiffs in completing the work.

The rule that in actions *ex contractu*, where the breach of an agreement admits of compensation, the recovery may be limited to the loss actually sustained, notwithstanding a stipulation for a penalty, is founded upon the principle that one party should not be allowed to profit by the default of the other, and that compensation and not forfeiture is the equitable rule. Equity will regard a penalty or forfeiture as intended to secure the fulfillment of a contract, and it may preclude the injured party from recovering more than a just compensation, or from obtaining a collateral advantage: *Notes to Peachy v. Duke of Somerset*, 2 Lead. Cas. Eq. 2044; *Bispham's Equity*, 178. Whether a sum named as compensation for the breach of a contract is to be considered as a penalty to secure its fulfillment, from which equity will relieve, or as damages liquidated by the parties themselves, is a question which cannot be answered by the application of any general rule. The question is always one of construction, and any rule upon the subject is a mere guide to the intention of the parties. The grounds on which each case is to be considered and determined are clearly stated by our brother Mitchell in *Keck v. Biber*, 148 Pa. St. 645, 33 Am. St. Rep. 846: "The general principle upon which the law awards damages is compensation for the loss suffered. The amount may be fixed by the parties in advance, but where a lump sum is named by them, the court will always look into the question whether this is really liquidated damages or only a penalty, the presumption being that it is the latter. The name by which it is called is but slight weight, the controlling elements being ²⁰² the intent of the parties and the special circumstances of the case." And he quotes with approval *March v. Allabough*, 103 Pa. St. 335: "The question . . . is to be determined by the intention of the parties drawn from the words of the whole contract, examined in the light of its subject matter and its surroundings; and in this examination we must consider the relation which the sum stipulated bears to the injury which may be caused by the several breaches provided against, the ease or difficulty of measuring a breach in damages and such other matters as are legally or necessarily inherent in the transaction."

From the nature of this case the actual damages which would result from a breach of the contract would not readily be susceptible of ascertainment, and it seems to us that it was the manifest intention of the parties not to leave them to the uncertain estimate of a jury, but to fix them by express agreement. "Uncertainty as to the extent of the injuries which

may ensue," was said in *Powell v. Borroughs*, 54 Pa. St. 329, and *Wolf Creek etc. Co. v. Schultz*, 71 Pa. St. 180, "to be a criterion by which to determine whether it is a case of liquidated damages or a penalty." The damages named were for the breach of a single stipulation, and were not disproportionate to the loss which would probably result to the defendant from the failure of the plaintiffs to complete their work in time.

The fifth and seventh assignments of error are sustained, and the judgment is reversed with a *venire facias de novo*.

DAMAGES—PENALTY OR LIQUIDATED DAMAGES—BUILDING CONTRACTS.—PRESUMPTION.—When, from the nature of a contract, the damages for its breach cannot be calculated with any degree of certainty, a stipulated sum will usually be held to be liquidated damages when so designated in the contract; but, if it is doubtful from the whole agreement whether a sum named therein is intended as a penalty or as liquidated damages, it should be construed as a penalty: *Note to Willson v. Mayor*, 83 Md. 203; 55 Am. St. Rep. 349. If the damages resulting from the breach can be definitely computed, the stipulated sum must be construed as a penalty: *Note to Kelso v. Reid*, 27 Am. St. Rep. 716. When a lump sum is named by the parties to a contract as compensation for loss suffered, the presumption is that the sum named is intended as a penalty and not as liquidated damages, no matter what it is called in the contract, the controlling elements being the intent of the parties and the circumstances of the case: *Keck v. Bleber*, 148 Pa. St. 645; 33 Am. St. Rep. 846. The fact that the parties used the words "liquidated damages" in their agreement does not always determine the question. The courts generally lean toward that construction which excludes the idea of liquidated damages, and permits the party to recover only the damages which he has actually sustained: *Hennessy v. Metzger*, 152 Ill. 505; 43 Am. St. Rep. 267. But stipulations for specified or liquidated damages for the breach of a contract to build within a limited time are enforceable: *Monmouth Park Assn. v. Wallis Iron Works*, 55 N. J. L. 132; 39 Am. St. Rep. 626. When damages sustained by the breach of a single stipulation in a contract are uncertain in amount, and not readily susceptible of proof, then if the parties have expressly agreed upon a sum as the measure of compensation for the breach, and that sum is not disproportionate to the presumable loss, it may be recovered as liquidated damages: *Monmouth Park Assn. v. Wallis Iron Works*, 55 N. J. L. 132; 39 Am. St. Rep. 626. Compare monographic note to *Graham v. Bickham*, 1 Am. Dec. 331-340, on whether a sum agreed upon is liquidated damages or a penalty.

MEYRAN v. ABEL.

[189 PENNSYLVANIA STATE, 215.]

PARTNERSHIP—DISSOLUTION—LIQUIDATING PARTNER—IMPLIED AUTHORITY OF.—It requires no express authority to act as a liquidating partner after active operations of the firm have ceased, or after its dissolution, and if a partner so acts with the knowledge of his copartners, their permission may be presumed.

PARTNERSHIP—DISSOLUTION—LIQUIDATING PARTNER—POWER TO GIVE AND RENEW NOTES.—A liquidating partner may give and renew notes to liquidate the partnership indebtedness after active operations of the firm have ceased, or after its dissolution.

PARTNERSHIP—DISSOLUTION—RENEWED NOTES—ACTION BY ACCOMMODATION INDORSER—DEFENSE.—If partnership notes are made before a dissolution of the firm, and after the dissolution one of the partners gives notes in renewal thereof, which are indorsed in good faith for the firm's accommodation, no member of the partnership can, in an action by the indorser, who has paid the notes after maturity and protest, defend on the ground that another partner fraudulently used the notes for his individual purpose.

Assumpsit by an indorser against a partnership on a partnership note. The defendants appealed from an order making absolute a rule for judgment for want of a sufficient affidavit of defense.

F. C. McGirr and John Marron, for the appellants.

J. M. Shields and George W. Guthrie, for the appellee.

217 **FELL, J.** The plaintiff's statement sets out a complete cause of action, the making and delivery of partnership notes in renewal of prior notes; the indorsement of them by the plaintiff at the instance and request and for the benefit of the defendants, and their payment by the plaintiff after maturity and protest. By reference to the dates of the notes renewed the original debt is carried back as to both series of notes to a time when the firm was in existence and in possession of its assets, although it had ceased active operations. The making and delivery of the prior notes by one of the partners before the dissolution of the partnership, and of the last renewals by him after its dissolution, is in effect admitted by the affidavit. The grounds of defense then open were: 1. Fraud on the part of the partner who made the notes, to which fraud the accommodation indorser was a party; 2. Want of authority in the partner to renew the notes after the dissolution of the partnership.

A defense is established on neither ground. As the notes were in form partnership notes, the assertion that they were the individual notes of Joseph Abel must be considered as meaning that they were fraudulently used for his individual purpose. It is not denied that the plaintiff indorsed the notes in good faith for the accommodation of the partnership; and a fraudulent use of them by one of the partners, without participation by the plaintiff in the fraud or notice to him of the intended use, will not defeat the right to recover.

The averment that the firm did not make the notes; that neither the original notes nor the renewals thereof were authorized by the firm, and that after the sale of the assets in 1897, no former partner had authority to make notes, when read in their connection in the affidavit, are assertions of legal inferences by the affiants, and not of facts. It appears by the affidavit that the partnership was formed in 1882; that the business was managed by Joseph Abel and Charles O. Smith, the partners who are not defending; that active operations ceased in 1893, but that the assets were preserved until sold in 1897. After 1893 the partnership continued for the purpose at least of closing up its business, and during this period its ²¹⁸ liquidating partners had implied authority to make partnership notes. To act as liquidating partners required no express authority. If they so acted with the knowledge of their co-partners their permission may be presumed. After dissolution a liquidating partner may give and renew notes to liquidate the partnership indebtedness: *Fulton v. Central Bank*, 92 Pa. St. 112.

On the vital points of the case the affidavit of defense is evasive and insufficient and it does not meet the plaintiff's statement of claim.

The judgment is affirmed.

PARTNERSHIP—DISSOLUTION—RENEWAL OF OBLIGATIONS—LIQUIDATING PARTNER.—The dissolution of a partnership results in a limited partnership for closing purposes: See monographic note to *Gilmore v. Ham*, 40 Am. St. Rep. 562, on the powers, rights, liabilities, and remedies of partners after the dissolution of the firm. But promissory notes and other evidence of indebtedness given during the existence of a partnership cannot, after its dissolution, be renewed or extended by either party without express authority from the others: Note to *Gilmore v. Ham*, 40 Am. St. Rep. 565, 572. A new note or contract made by one partner in the name of the firm, and within the scope of the partnership business, and after dissolution, binds the firm until the payee of such note or contract has notice of the dissolution: Note to *Valz v. First Nat. Bank*, 49 Am. St. Rep. 309.

SHANO v. FIFTH AVENUE AND HIGH STREET BRIDGE COMPANY.

[189 PENNSYLVANIA STATE, 245.]

EMINENT DOMAIN—CONSTRUCTION OF PUBLIC WORKS—BRIDGE—MEASURE OF DAMAGES—MATTERS AFFECTING MARKET VALUE.—If property is injured by the construction of public works, the measure of damages is the difference in the market value of the property before and after the construction. The creation of noise and dust, the invasion of privacy, the deprivation of light and means of access, the burden of additional fencing, and like matters are to be taken into consideration as affecting the market value. They are not to be separately estimated, item by item, and a result to be reached by adding together the different estimates; nor is the effect upon the particular owner, because of anything peculiar to himself or his business to be taken into consideration. The owner's loss is measured by the difference in the market value of his property, which includes all the elements of depreciation and represents the whole loss; but the separate items are to be considered, not as distinct items of loss, but as they affect the market value.

EMINENT DOMAIN—CONSTRUCTION OF PUBLIC WORKS—BRIDGE—DAMAGE FROM NOISE, DUST, ET CETERA—ERRONEOUS INSTRUCTION.—In fixing damages caused by the construction of public works, such as a bridge, the jury have a right to consider evidence of noise, dust, invasion of privacy, obstruction of light, and interference with means of access, as showing how the market value of property has been affected by the building of the bridge. Hence, it is error for the court to charge that these matters are only circumstances to be considered by the jury in determining the credibility of witnesses, who have testified to market value as it was before and after the structure.

Trespass to recover damages for injuries to real estate caused by the construction of a bridge. The plaintiff appealed from a judgment for the defendant.

Johns McCleave, W. B. Rogers, and D. T. Watson, for the appellant.

E. P. Douglass, J. S. and E. G. Ferguson, and H. H. Swaney, for the appellee.

246 FELL, J. Where property is injured by the construction of public works, the measure of damages is the difference in the market value of the property before and after the construction. The creation of noise and dust, the invasion of privacy, the deprivation of light and means of access, the burden of additional fencing and like matters are to be taken into consideration as affecting the market value. They are not separately to be estimated item by item and a result to be reached by adding together the different estimates; nor is the effect upon the par-

ticular owner because of anything peculiar to himself or his business to be taken into consideration. The owner's loss is measured by the difference in the market value of his property; this includes all the elements of depreciation and represents the whole loss. But the separate items are to be considered, not as distinct items of loss, but as they affect the market value. This is the rule established by a long line of cases, among the more recent of which are *Dawson v. Pittsburgh*, 159 Pa. St. 317; *Reyenthaler v. Philadelphia*, 160 Pa. St. 195; *Comstock v. Clearfield etc. Ry. Co.*, 169 Pa. St. 582; *Struthers v. Philadelphia etc. R. R. Co.*, 174 Pa. St. 291.

247 In the first point the court was asked to instruct the jury: "That any evidence in the case in regard to noise, dust, invasion of privacy, or anything of this sort is not the basis for recovery by the plaintiff. It is only evidence to be considered by the jury in weighing the testimony of witnesses as to the value of the property as unaffected by the bridge in question compared with the value of the property in question affected by the construction and operation of the bridge." And in the fifth that: "The jury has no right to consider what its view of the damages would be by reason of noise, dirt, or invasion of privacy. Those circumstances are only circumstances to be considered in determining the credibility of the testimony of witnesses who testified to the market value before and after the property was affected by the bridge."

Evidence in regard to noise, dust, and invasion of privacy went directly to show the manner in which the construction of the bridge had affected the plaintiff's property. If it showed loss to him it established a basis for recovery. If it showed the extent of the loss due to depreciation in market value, it showed the legal measure of damages to which he was entitled. It was the right of the jury to consider this evidence, both to determine whether there was a loss and to what extent these matters affected the market value. It was not to be considered only in weighing the testimony of witnesses who had been examined or in determining their credibility. The question of credibility was not raised or involved. The noise, dust, invasion of privacy, obstruction of light, and interference with means of access were the matters shown as affecting the value of the property. The jurors had examined the property, and from what they saw and knew, as well as from the testimony of witnesses, they were to form their own judgment; the expert

testimony was an aid only in enabling them to reach a conclusion.

The rule for the measure of damages was clearly and correctly stated in the general charge, but the jury may well have understood from the answers to these points that in fixing the damages they were to exclude from their consideration the injury due to noise, dirt, and invasion of privacy.

The first and second assignments of error are sustained, and the judgment is reversed with a *venire facias de novo*.

EMINENT DOMAIN—DAMAGES—DUST AND NOISE.—A fair test of damages in eminent domain proceedings is the difference between the value of land before and after the taking: Note to *Johnston v. Old Colony R. R. Co.*, 49 Am. St. Rep. 807. Where a river is embanked, by act of parliament, to the injury of an owner on the shore thereof, he is entitled to compensation for being deprived of access to the river, for the loss of the use of the river frontage, and the consequent loss of privacy, and the increase of dust and noise by the creation of the embankment and road between it and the land where the river formerly flowed: Note to *Tomlin v. Dubuque etc. R. R. Co.*, 7 Am. Rep. 179. So, where land is taken for a railroad, the rattling of the trains, the ringing of bells, the blowing of whistles, the shaking of the ground, the filling of the air with smoke and soot, the throwing out of sparks, and the like, are matters to be considered in estimating the depreciation in value of the property as a whole: See monographic note to *Winona etc. R. R. Co. v. Waldron*, 88 Am. Dec. 114, on damages in eminent domain cases.

PENN PLATE GLASS COMPANY v. SPRING GARDEN INSURANCE COMPANY.

[189 PENNSYLVANIA STATE, 255.]

INSURANCE—RULES AS TO COMPUTATION OF TIME.—It is lawful for the parties to a contract of insurance to stipulate in the policy that the insurance shall begin at noon and expire at noon of the days named, and such an agreement becomes the special rule for the fixing of dates so referred to, for its object is to avoid possible dispute on the fundamental basis of any liability for loss; but such rule should not be applied to the five days' notice of cancellation, and other collateral questions of time, in the policy, as the better rule to apply to these computations is the general one of excluding the first day, and counting the days as legal days, beginning and ending at midnight.

INSURANCE—NOTICE OF CANCELLATION OF POLICY—WHEN INSUFFICIENT AS A DEFENSE.—In an action upon a policy of insurance, which contains a clause that the insurance shall begin at noon and expire at noon of certain days named, and a clause that the policy shall be canceled at any time at the request of the insured, or by the company by giving five days' notice of such cancellation, a notice of cancellation by the company is no defense when it appears that the property was destroyed on April 12th, by

a fire which started at 10:30 o'clock P. M., and the notice is averred to have been given to the plaintiff on April 7th, without any specification of the hour when it was given.

INSURANCE—APPRAISEMENT AS EVIDENCE OF LOSS. An appraisal provided for by a policy of fire insurance is never conclusive as to the fact or amount of loss, and is not even evidence unless made so by the parties uniting in it. It gets its entire force from the joint act of the parties through their agents, and where it is ex parte and, though averred by the plaintiff in his statement, is denied by the defendant, it goes for naught and is not evidence at all, either on a motion for judgment or at the trial.

INSURANCE COMPANY MAY REQUIRE AMOUNT OF LOSS TO BE PROVED BY COMPETENT EVIDENCE, THOUGH IT FAILED TO JOIN IN APPRAISEMENT AND DENIES LIABILITY—ESTOPPEL.—A condition as to appraisal, in a policy of fire insurance, is revocable by either party to the contract. Hence, the rights of the company are not prejudiced by its omission or refusal to join in an appraisal, notwithstanding a provision in the policy that no action shall be brought on it until after compliance with all its requirements, among which is that relating to appraisers, and a total denial of liability on its part does not estop it from requiring that, if its liability is established, the amount of it shall be proved by competent evidence.

Assumpsit upon a policy of fire insurance. The plaintiff's loss was covered by various policies of insurance and he contended that the defendant company was answerable for its proportionate share. The statement of claim averred that the property insured had been destroyed by fire about 10:30 o'clock P. M., on April 12, 1898; that on April 14, 1898, the defendant was notified of the fire, but refused or declined to participate in any ascertainment of the loss, or to appoint appraisers as provided in the policy; that appraisers appointed by the plaintiff and other insurance companies appraised the property destroyed; and that the defendant's liability was fixed by such appraisal at the sum of two thousand and ninety-nine dollars. The policy contained a clause that it should be canceled at any time at the request of the company, or by the company by giving five days' notice of such cancellation. The company, in defense, claimed to have canceled the policy on April 7, 1898, and to have notified the plaintiff, but the hour when the notice was given was not specified. The company made a total denial of its liability, and a rule for judgment for want of a sufficient affidavit of defense was made absolute. The company appealed.

Samuel S. Mehard, for the appellant.

S. Schoyer, Jr., S. B. Schoyer, and William Kaufman, for the appellee.

²⁵⁰ MITCHELL, J. The policy stipulates that the insurance under it shall begin at noon and expire at noon of the days named. Such an agreement is entirely lawful, and, of course, becomes the special rule for the fixing of dates so referred to. But it is by no means clear that it is intended to apply as the rule for all computations of time under the policy. The object of the clause is to fix with precision the term covered by the insurance and thereby to avoid possible dispute on the fundamental basis of any liability for loss. The same reason does not apply with equal force to the question of time on collateral matters, such as the stipulated protection for five days of property removed on account of danger of fire, the sixty days after adjustment of amount when the loss is to become payable, or the five days' notice of cancellation as involved here. The application of such a special rule for computation might be extremely inconvenient and doubtful, as, for example, if goods had been removed in this case to save them ²⁶⁰ from the fire, starting at 10:30 P. M. on April 12th, what period should the five days' special protection cover? From noon of the 12th to noon of the 17th would afford the insured less actual time than he was entitled to, while from noon of the 13th to noon of the 18th would give him more. The result would be no more accurate than by the application of the general rule of excluding the first day and counting the days as legal days beginning and ending at midnight. This method, disregarding fractions of a day, is the general rule, and would appear to be the better construction of the policy in suit. But all question in the present case is obviated by the absence of any evidence or averment in the affidavit of defense of the hour on April 7th, when notice of cancellation was given to the plaintiff. The first assignment of error is overruled.

But the other assignments must be sustained. The affidavit of defense sets up clearly and specifically in the established and approved form that defendant "is informed, believes, and expects to be able to prove" that the plaintiff's loss in respect of equipment was not two hundred and twenty-eight thousand seven hundred and thirty-four dollars as claimed, but did not exceed sixty thousand dollars, and the amount of defendant's liability, if liable at all, was not two thousand and ninety-nine dollars as claimed in the statement, but would not exceed one thousand and thirty-five dollars. This was sufficient to prevent judgment and put the plaintiff to proof of the amount of its loss. The plaintiff relied on the appraisal, but that is never

conclusive, and is not even evidence at all unless made so by the parties uniting in it. It gets its entire force from the joint act of the parties through their agents, and where it is *ex parte* and, though averred by plaintiff in his statement, is denied by defendant, it goes for naught and is not evidence at all either on the motion for judgment or at the trial.

But the court below was of opinion that by defendant's refusal to join in the appointment of appraisers, coupled with a total denial of liability, defendant was estopped from disputing the amount of the loss as estimated by appraisers appointed by other insurance companies and by plaintiff, *ex parte* as regards this defendant. This was serious error. There was no element of estoppel in such action. The policy provides that, in case of disagreement as to the amount of loss, it shall be ascertained by appraisers, and further that no action shall be brought on the policy until after compliance with all its requirements, ²⁶¹ among which is that relating to appraisers. Such appraisalment or the effort to have it would be at the most a condition precedent to an action by the insured, and the failure to have it a ground for a plea in abatement by the company. Refusal to join in the appointment of appraisers, or denial of liability altogether, either or both, would estop the defendant from such a plea, but it could go no further. The provision of the policy in this respect raises a preliminary question for the court in the same manner and with the same limited effect as the analogous question of proofs of loss, which is discussed and determined by our brother Dean in *Cole v. Manchester Fire Assur. Co.*, 188 Pa. St. 345. Neither appraisalment nor the technically so-called "proof of loss" is of itself competent evidence of the fact or amount of loss except as against a party who has made it his own act by joining in it.

But it has been held that the condition of the policy as to appraisalment before suit is in substance no more than an undertaking to refer to arbitrators to be chosen in the future, and therefore revocable. Suit by the insured without preliminary appraisalment has been sustained because the agreement being revocable could not bind him: *Mentz v. American Fire Ins. Co.*, 79 Pa. St. 478; 21 Am. Rep. 80; *Commercial Union Assurance Co. v. Hocking*, 115 Pa. St. 407; 2 Am. St. Rep. 562; *Yost v. McKee*, 179 Pa. St. 381; 57 Am. St. Rep. 604. The same rule must apply to the other party to the contract, and therefore if the defendant company omits or refuses to join in an appraisalment, its rights cannot be prejudiced thereby, and it certainly

cannot be estopped by a denial of liability from requiring that if its liability is established, the amount of it shall be proved by competent evidence.

The learned judge below refers to *McCormick v. Royal Ins. Co.*, 163 Pa. St. 184, but that case falls far short of sustaining the present judgment. If a defendant, by his action, misleads the plaintiff as to a certain line of defense he may be estopped from bringing forward that defense at the trial, but he is not thereby estopped from requiring the plaintiff to prove the ground on which he is allowed to recover. The principles by which the subject of waiver by estoppel, in regard especially to insurance companies, is governed, were carefully considered and intended to be settled in *Gould v. Dwellinghouse Ins. Co.*, 134 Pa. St. 570, 19 Am. St. Rep. 717, and the authority of that case has been affirmed in *Everett v. London etc. Ins. Co.*, 142 Pa. St. 332; 24 Am. St. Rep. 499; *Whitmore v. Dwellinghouse Ins. Co.*, 148 Pa. St. 405; 33 Am. St. Rep. 838; *Freedman v. Fire Assn.*, 168 Pa. St. 249; *Freedman v. Providence etc. Ins. Co.*, 175 Pa. St. 350, and other cases. In the last mentioned it was said by Fell, J.: "In most of the cases in which it has been held that an insurance company by specifying one ground of defense was estopped from asserting other grounds at the trial, the failure of the insured has been in not complying with a condition precedent to the right of action, and they came within the rule stated in *Gould v. Dwellinghouse Ins. Co.*, 134 Pa. St. 570, 19 Am. St. Rep. 717, or were decided upon the ground of express waiver. In *McCormick v. Royal Ins. Co.*, 163 Pa. St. 184, by mutual understanding of the parties, the only matter in controversy between them was the ownership of the property destroyed; all other grounds of defense had been relinquished. Suit having been brought with this understanding to determine the question of ownership, and nothing else, it was held that the company could not be permitted to defend on the violation of a clause in the policy regulating the manner in which the lumber should be stored." In the very numerous cases of this class upon insurance policies, most of them as said by our brother Fell, *supra*, turning on technical defenses upon conditions precedent to the right of action, there are no doubt some in which there is room for difference of opinion as to the application of the principles laid down in *Gould v. Dwellinghouse Ins. Co.*, 134 Pa. St. 570, 19 Am. St. Rep. 717, but in no case has there been any effort or intention to change or impair those principles as

the guide to decision. The judgment in the present case is far outside of the rule there laid down.

Judgment reversed and procedendo awarded.

INSURANCE.—PROOF OF LOSS, or the certificate of a magistrate as to the amount of loss, is not conclusive as to the amount recoverable on a policy of insurance, but the true amount of the loss may be established by witnesses: *Crittenden v. Springfield etc. Ins. Co.*, 85 Iowa, 652; 39 Am. St. Rep. 321, and note.

INSURANCE—DENIAL OF LIABILITY—APPRAISEMENT.—If the insurer denies the general right of the insured to recover anything, an award by arbitrators or appraisers, provided for in the policy, is not absolutely essential to a cause of action: *Note to Stephens v. Union Assur. Soc.*, 67 Am. St. Rep. 599.

FIDELITY TITLE AND TRUST COMPANY v. SCHENLEY PARK AND HIGHLANDS RAILWAY COMPANY.

[189 PENNSYLVANIA STATE, 303.]

RAILWAY MORTGAGES—VALIDITY OF—PRIOR LIENS. Under the laws of Pennsylvania, a railway mortgage, given after debts to "contractors, laborers, and workmen" have been incurred, is illegal and void only as against such persons. As against all other persons, and as between the parties to it, the mortgage is valid.

RECEIVERS—SALES BY—DIVESTITURE OF PRIOR LIENS.—Liens upon property held by a receiver are not divested by virtue of a sale made by him. If the order of sale makes no mention of such prior lien, or of encumbrances of any kind, the sale passes the title in the property as it is in the receiver, and subject to whatever encumbrances there may be existing upon it.

RECEIVERS—SALES BY—EQUITY JURISDICTION.—The jurisdiction to appoint receivers and to order sales by them of the property and franchises of corporations resides in courts of equity, and is conducted according to the principles of equity practice.

EQUITY—FORECLOSURE—BAR OF PRIOR LIENS—NOTICE.—The general practice, in equity, in cases of foreclosure, is, that liens are not barred unless the holder has notice of the proceeding, and this proposition applies to sales by receivers.

RECEIVERS—SALES BY—BAR OF PRIOR LIEN—EQUITY JURISDICTION.—By the laws of Pennsylvania, the jurisdiction under which corporation mortgages are foreclosed, so as to sell the property and franchises of railroad and other designated corporations, is the general equity jurisdiction, and not the common-law jurisdiction of the courts. Hence, it follows that a lien is not barred, in that state, by a receiver's sale, unless the holder has notice of the proceeding.

Scire facias on a mortgage. The defendant appealed from a judgment for the plaintiff.

John F. Sanderson, W. F. McCook, and Hays & Noble, for the appellant.

W. H. McClung, S. Blaine Ewing, and E. W. Smith, for the appellee.

³⁶⁷ GREEN, J. This proceeding is a scire facias on a mortgage given by the Squirrel Hill Railroad Company to secure the payment of fifty bonds of one thousand dollars each, of which only six thousand were issued. These bonds were issued to the Gilbert Car Manufacturing Company, who transferred them to H. S. Hale, for whose benefit the present suit was brought by the Fidelity Title and Trust Company. The bonds were issued on January 4, 1890. Afterward, in June, 1890, when the road was nearly finished, a bill was filed against the Squirrel Hill Railroad Company by certain creditors of the company, the object of which was to stay proceedings in execution upon a judgment obtained against the railroad company by certain other creditors. On June 21, 1890, an injunction was granted against the proceedings on the judgment and a receiver was appointed to take possession of the railroad and all the property and franchises of the company and proceed to manage the same according to law. Later, on August 11, 1890, a receiver's petition was presented in court, setting forth that the road was nearly completed and that it would require only a small expenditure of about five thousand dollars to finish, and asking for power to issue receiver's certificate for this purpose. The authority was granted. On September 6, 1890, an order was granted to the receiver to sell the road and property and franchises of the company at public sale on September 27, 1890. A second order of sale was granted subsequently to sell the property and franchises on November 2, 1890, and to that order the receiver made return on November 29, 1890, that he had sold the property to one Noble for nine thousand six hundred dollars. After the sale a new company was organized upon the basis of the property purchased, called the Schenley Park and Highlands Railway Company, and that company is the defendant in the present action.

The learned court below distinctly found as a fact, and it is not controverted, that "the Fidelity Title and Trust Company never had notice of the proceedings which resulted in the appointment of the receiver and sale of the road until several years after the sale had taken place, and the owner of the bonds was ³⁶⁸ not a party to the proceeding, so neither he nor anyone representing him or the trustee in the mortgage had any notice of the proceeding or sale, except a notice that the sale had been confirmed nisi and would become absolute in ten days."

It was also admitted on the trial "that neither in the petition for the sale, the order of the court authorizing the sale, nor in the order confirming the sale, is there any reference made to the existence or divestiture of this mortgage, nor is there anything upon the record to indicate any intention or purpose to disturb the lien of said mortgage by the receiver's sale aforesaid."

It was contended for the defendant that the mortgage to the plaintiff was given after debts to contractors and others had been incurred, and it was therefore illegal and void under the joint resolution of January 21, 1843: Pub. Laws, 367; Paschal and Lawrence's Digest, 3962. But the terms of that resolution only make void such a mortgage as against "any such contractors, laborers, and workmen creditors as aforesaid," and not absolutely void as to all persons. It was expressly decided by this court in *Shamokin etc. R. R. Co. v. Malone*, 85 Pa. St. 25, that the object of the resolution was simply to give a priority of claim over the mortgage to the contractors and others. Sharswood, J., delivering the opinion quotes the language of Justice Strong in *Fox v. Seal*, 22 Wall. 424, with reference to this resolution as follows: "The language of the resolution is too clear to admit of question that the legislature intended to give an unpaid contractor a priority of claim to the company's property over every right that might be acquired by a mortgagee, or acquired under a mortgage, if the mortgage was made after the debt to the contractor was made." It would follow from this that as between the parties to the mortgage, and as against all other persons the mortgage is valid. So far as the claims of contractors prior to the mortgage are concerned, it would occupy the relation of a junior lien.

This being so, it is necessary to consider the question raised by the contention that the receiver's sale will not divest the lien of the mortgage in cases where no notice has been given to the mortgagee, or the holder of the bonds which it was given to secure, of the application for the order to sell. The rule on this subject is very familiar, and is without question. In *Beach on Receivers*, section 732, it is thus stated: "Liens upon property held ³⁶⁹ by a receiver are not divested by virtue of a sale made by him. If the order of sale make no mention of such prior lien or of encumbrances of any kind, the sale passes the title in the property as it is in the receiver, and subject to whatever encumbrances there may be existing upon it." In *High on Receivers*, section 199 a, it is said: "A sale of a receiver under

an order of court which makes no mention of prior liens or encumbrances operates as a transfer of title to the purchaser subject to the lien of whatever encumbrances may be outstanding."

In Gluck and Becker on Receivers, page 115, the rule is thus stated: "A sale by a receiver under an order directing a sale by public auction without any mention of prior liens or encumbrances will transfer the property to the purchaser subject to whatever encumbrances may be upon it with the right of the purchaser, nevertheless, to contest the validity of apparent encumbrances, either with respect to their legal existence or the amount due upon them."

The jurisdiction to appoint receivers and to order sales by them of the property and franchises of corporations resides in courts of equity, and is conducted according to the principles of equity practice. That practice is well expressed in Story's Equity Pleading, tenth edition, section 193, thus: "All persons whose interests are to be affected or concluded ought to be made parties if indeed any encumbrancers, whether prior or subsequent, are not made parties, a decree of foreclosure does not bind them, as, also, a decree of sale would not. The prior encumbrancers are not bound, because their rights are paramount to those of the foreclosing party. The subsequent encumbrancers are not bound, because their interests would otherwise be concluded without any opportunity to assert or protect them." In Jones on Corporate Bonds and Mortgages, section 401, it is said: "If a subsequent mortgage creditor is not made a party to the foreclosure of a prior mortgage his mortgage is not affected by the sale. He may redeem at any time." In *Snow v. Winslow*, 54 Iowa, 200, the plaintiff, Snow, had a statutory lien on a railroad which went into the hands of a receiver. The receiver was authorized to issue receiver's certificates for the purpose of raising money to complete the road. After the road had been completed, proceedings to foreclose the certificates were instituted, and a decree entered declaring them to be a first lien, and that ⁸⁷⁰ the road should be sold for their payment. Winslow became the purchaser at the sale. Snow, who had not been made a party to the proceedings, afterward instituted proceedings to collect his lien, which was junior to the lien of the certificates upon which the road had been sold to Winslow. Held, that Snow's lien was not divested by the sale. In *Howard v. Railway Co.*, 101 U. S. 848, 849, it is said: "Subsequent encumbrancers when not made parties to a bill to foreclose are not bound by the decree. . . . Whatever rights the

plaintiff (a subsequent) encumbrancer had prior to a sale in equity, he still has them wholly unimpeached by that sale or by any other cause, unless they are barred by lapse of time or laches. . . . It by no means follows that the decree of sale is void because a second encumbrancer is not made a party to the foreclosure, as it is clear that his lien stands in full force, notwithstanding the decree of sale entered pursuant to such proceeding."

It thus appears that the general practice in equity in cases of foreclosure is that liens are not barred unless the holder has notice of the proceeding. This proposition is also true in cases of sales by receivers, and this appears to be the law in the federal courts and, generally, in the courts of the other states. Does this rule prevail in Pennsylvania in cases of similar sales, or sales under proceedings to foreclose? It must be conceded, of course, that in Pennsylvania, in all ordinary sales of real estate by force of judicial proceedings, all liens are divested except first mortgages under the acts of 1830 and 1867. But the franchises of a corporation are not real estate, and when these were in the hands of receivers a different system became applicable to their treatment when general equity powers were conferred upon our common pleas courts. Prior to that time the lien creditor had a remedy by sequestration under the execution act of 1836, sections 72-75, but that did not confer a power of sale. The supplemental act of 1870 authorized a sale on the second fieri facias, but that made provision for unsecured creditors only. The sale did not discharge liens, but simply brought the corporation into liquidation for the benefit of all unsecured creditors: Bayard's Appeal, 72 Pa. St. 453. In the meantime the act of April 11, 1862 (Pub. Laws, 477), was passed, providing "that the supreme court of this commonwealth shall have and exercise all the powers and jurisdiction of a court of chancery in ⁸⁷¹ all cases of mortgages given by corporations," and this was held by this court to authorize the foreclosure of a railroad mortgage by plenary bill: McElrath v. Pittsburg etc. R. R. Co., 55 Pa. St. 203. This jurisdiction was afterward extended to the courts of common pleas by the act of May 1, 1876, so far as relates to mortgages given by railroad, canal, and navigation companies, and by the act of March 23, 1877, so far as concerns mortgages given by other designated corporations: 1 Purdon's Digest, 781, pl. 35, 38. It will thus be seen that the jurisdiction under which corporation mortgages are foreclosed, so as to sell the property and franchises of railroad and other designated corporations, is the

general equity jurisdiction, and not the common-law jurisdiction of the courts. It follows hence that the rules and practice which prevail in equity in this class of cases are now the rules and practice which prevail in Pennsylvania, and under the decisions cited supra, the plaintiff's lien was not divested by the receivers's sale. That being so, the judgment of the court below was correct.

Judgment affirmed.

RECEIVERS—SALES BY—LIENS—RAILWAY MORTGAGES.—Statutory liens should be paid before mortgage bonds: See monographic note to *Green v. Coast Line R. R. Co.*, 54 Am. St. Rep. 423, on claims which take precedence over mortgages of railway and like property; but, as against the purchaser at a valid receiver's sale, no lien can be made to attach to the property which did not rest upon it at the time of the institution of the suit under which the sale was made: Note to *Houston etc. Ry. Co. v. Crawford*, 53 Am. St. Rep. 757.

WEISS v. MUSICAL MUTUAL PROTECTIVE UNION.

[189 PENNSYLVANIA STATE, 446.]

MANDAMUS—ILLEGAL EXPULSION OF MEMBER OF MUTUAL BENEFIT ASSOCIATION — RESTORATION. — Mandamus lies to restore a member of an incorporated mutual benefit association, such as a musical protective union, who has been illegally expelled therefrom, where the association has a surplus fund in its treasury, and a property right, the interest of the member in such fund, is involved.

ASSOCIATIONS—MUTUAL BENEFIT SOCIETIES—POWER OF EXPULSION—LIMIT UPON EXERCISE OF.—If the charter of an incorporated mutual benefit association, such as a musical protective union, contains no power of expulsion, that power can only be exercised by the association when the member has been guilty of some infamous offense, or has done some act tending to the destruction of the society.

ASSOCIATIONS—MUTUAL BENEFIT SOCIETIES—EXPULSION OF MEMBER—ACT NOT AUTHORIZING.—The fact that a member of a mutual benefit association, such as a musical protective union, issued a manifesto criticising the management of the union, and inviting other members thereof to participate in a meeting at which matters affecting the interest of the union would be discussed, is no ground for expelling him, and depriving him of his interest in the funds of the union, where there is nothing to show that the manifesto tended to disrupt or destroy the association, or to cause the withdrawal of any of its members.

ASSOCIATIONS—MUTUAL BENEFIT SOCIETIES—ILLEGAL EXPULSION—RESORT TO COURTS—EXHAUSTING REMEDY WITHIN SOCIETY.—A member of an incorporated mutual benefit association, such as a musical protective union, who has been illegally expelled therefrom, is not required, before resorting to the courts, to first exhaust his remedy, by appeal, within the organization itself, where the by-laws do not provide for an appeal, and the

only provision for an appeal rests upon the adoption of an illegal resolution.

ASSOCIATIONS—MUTUAL BENEFIT SOCIETIES—PASSAGE OF ILLEGAL RESOLUTION—ESTOPPEL UPON MEMBERS.—The passage of an illegal resolution at a meeting of a mutual benefit association, such as a musical protective union, which resolution purports to amend the by-laws of the union, does not, if the illegality of the resolution is subsequently raised, bind members who were present at the time it was passed, although they did not then object thereto.

ASSOCIATIONS—MUTUAL BENEFIT SOCIETIES—EXPULSION—NOTICE TO APPEAR AND DEFEND CHARGES—SUFFICIENCY OF.—If charges have been made against a member of a mutual benefit association, such as a musical protective union, having in view his expulsion, a notice to appear and defend such charges is insufficient if it contains no copy of the accusations.

Petition for mandamus brought by Weiss and Young against the defendant society and its board of directors. The defendants appealed from an order directing a peremptory writ to issue.

E. G. Ferguson and J. S. Ferguson, for the appellants.

A. E. Anderson, for the appellees.

455 PER CURIAM. The judgment entered by the learned court below in this case is affirmed on the opinion of the court.

The following is the opinion of the lower court referred to above:

447 KENNEDY, P. J. This is an application to compel by writ of mandamus the restoration of plaintiffs to membership in the Musical Mutual Protective Union, defendant, which is a corporation under the laws of Pennsylvania, organized for the "promotion of music and to unite the instrumental portion of the musical profession for the better protection of its interests in general," of which corporation the plaintiffs were members in good standing up to the time of their expulsion complained of in these proceedings. At the time of the expulsion of plaintiffs the membership of the organization was over four hundred, and it had a surplus fund of over five thousand dollars.

It seems to be well settled that courts have power to supervise the acts of corporations, the principle being thus stated in *Burt v. Grand Lodge*, 66 Mich. 85: "The only ground on which this court can interfere with organized bodies by mandamus in aid of a member is that, as corporations, they are subject to our judicial oversight, to prevent their depriving members of corporate privileges." This principle certainly obtains where, as in this case, property rights are involved. Let us see whether

such a case is presented here as justifies the court in interfering. It must be stated here, that by agreement filed, counsel for both parties waived the right of trial by jury, and also the question raised in the answer filed as to the right of plaintiffs to jointly maintain this proceeding.

At a meeting of the respondent corporation held December 5, 1897, the following preamble and resolution were adopted, viz.: "Whereas, a manifesto has been issued and received by quite a number of the members of this union, which manifesto bears the signature, 'Pittsburgh Musical Society,' with signatures of president and secretary—A. G. Weiss, president, and Charles A. Young, secretary—and, further, that the manifesto states that the Pittsburgh Musical Society is a member of the National League of Musicians of the United States; and is further misleading, inasmuch as it reflects unjustly upon the integrity of this union, ⁴⁴⁸ and, further, advocates the organization of a society under auspices that are in opposition to the action of the union, after due notice to each member in writing, therefore, be it resolved, that the incoming board of directors make a thorough investigation of this action, summon such witnesses as they may deem proper to fix this act upon such member, or members, as are guilty of this action, and then proceed to a regular trial under the laws of this union, and, if found guilty according to the laws of this union, the penalty to be inflicted in such manner as the law warrants. An appeal from the board of directors to be allowed; provided that the finding of the board be complied with first and all expenses of placing the entire record of the proceedings before the members of this union be borne by the appellant or appellants."

A copy of the manifesto referred to in the following preamble and resolution is as follows, viz:

"A. G. Weiss, President, Chas. A. Young, Secretary,
"303 Smithfield Street, Room 401, No. 1015, Penn Avenue.

"Office of Pittsburgh Musical Society,

"Local 60, American Federation of Musicians (Affiliated with
A. F. of L.).

"Affiliated with United Labor League of Western Penna.

"Members National League of Musicians of United States.

"Manifesto.

"Pittsburgh, Pa., November 29, 1897.

"To the Musicians of Pittsburgh, Allegheny and Vicinity,
Greeting:

"Owing to the unsatisfactory condition of musical protective

organization affairs generally, in this vicinity, which was brought about in a peculiar manner, of which most of you are familiar, and inasmuch as the musicians here have, through beguilement and overconfidence in a few, been led into a misconception of the relations of the musical profession with other professions and trades, also on account of the decided stand taken by you against affiliation with laborers in other industries, as a result of the above-mentioned apparent trickery, it behooves the musicians to immediately rescind their former and present actions and place themselves on friendly terms with union labor, ere the unionist class you as their enemies.

449 "In order that you may have an opportunity to hear this important subject discussed, both from local and national standpoints, Pittsburg Musical Society, Local 60, American Federation of Musicians, has made arrangements for an open installation meeting to be held at K. of L. Hall, Market street and Third avenue, Friday morning, December 3, at 10 o'clock sharp, to which you are earnestly invited.

"We fully understand that for ten years you have had doctrines and ideas administered to you which generally were enacted into laws and they have finally proven absolutely disastrous, and it is now to your interest, both morally and financially, to consider the adoption of a new platform on which to labor in the musical profession, hence we impress on you to be present at this meeting.

"Prominent among those who will make addresses are: Hon. Owen Miller, St. Louis, President, A. F. of M., ex-President N. L. M. of U. S.; Jacob Schmalz, Cincinnati, Secretary A. F. of M., member Executive Board N. L. M.; Geo. Nachman, Baltimore, 1st Vice-Pres. A. F. of M. and 1st Vice-Pres. N. L. M.; S. S. Bonbright, Cincinnati, Gen'l Organizer A. F. of M. and Editor 'American Musician'; I. J. Masten, Cleveland, President M. M. P. U.; M. M. Garland, Pittsburg, 4th Vice-Pres. A. F. of L.; Thos. Grundy, Pittsburg, Labor Leader; Mr. Klumpf, President United Labor League of Western Penn.

"Trusting you will appreciate the fact that the holding of this meeting is done with the sole purpose of showing you how you stand and the course necessary for you to pursue to protect your interests, we are,

"Fraternally,

PITTSBURGH MUSICAL SOCIETY.

"Andrew G. Weiss, President.

"Charles A. Young, Secretary."

At a meeting of the board of directors of respondent, held January 23, 1898, the secretary was instructed to prefer charges against plaintiffs, and on February 14, 1898, each of the plaintiffs received notice to appear before the board on Sunday, February 20, 1898, to answer charges preferred by the secretary, of violation of article 2 of the constitution of the corporation, but no copy of the charges accompanied the notice. Plaintiffs appeared ⁴⁵⁰ in response to said notice, and at the meeting the charges were read to plaintiffs, the same being as follows:

“No. 1 Wylie Ave., Pittsburgh, Pa.

“Feb’y 14, 1898.

“To the Board of Directors of Musical Mutual Protective Union:

“I, the undersigned, in accordance with your instructions, do hereby charge A. G. Weiss and Chas. A. Young with the violation of article 2 of the constitution; said violation of the circulation of a manifesto among our members, bearing date of November 29, 1897, and bearing the signature of A. G. Weiss, president, and Chas. A. Young, secretary, the contents of which circular was calculated to disrupt and destroy the Musical Mutual Protective Union, Local No. 15, N. L. M. of U. S.

“Fraternally yours,

“THOMAS J. WELSH,

“Secretary.”

At this meeting one witness was called, who stated he had received a copy of the manifesto. No other testimony was taken, and no action was taken, the plaintiffs protesting that they had not received any proper notice. On February 28th the plaintiffs each received another notice to appear before the board on Sunday, March 20th, to answer charges preferred by Thomas J. Welsh, secretary, of violation of article 2 of the constitution, inclosing a copy of the charges, as given last above, signed by the secretary, but the notice was not accompanied by copy of the manifesto. Plaintiffs appeared in response to this notice. At this meeting a copy of the manifesto was produced, which the petitioners admitted they had signed, but no testimony was taken, nor was there any effort made to show that the manifesto was circulated by plaintiffs, or that it tended to disrupt or destroy the union, or cause the withdrawal of members, nor, indeed, was there anything tending to sustain the charges against plaintiffs, and they, after protesting as before, withdrew from the meeting. The matter was then dropped, but subsequently at the same meeting, and without passing upon the guilt or innocence of the plaintiffs of the offense charged, a resolution

was passed erasing the names of the plaintiffs from the roll of membership of the union. At this meeting there were present ⁴⁵¹ eight of the members of the board, and while no votes were cast against the resolution of erasure, it is very doubtful that the requisite two-thirds of those present were cast in its favor. Brecht, one of those present, says he did not vote; Welsh, the secretary, and nominally the prosecutor, says he did not vote. Allen, the president, says he only voted when there was a tie, and it also appears plainly that he had prejudged the case and was disqualified to vote.

Can the proceeding here recited be properly called a trial in which were involved the rights and privileges of the plaintiffs? And can it be said that they were deprived of those rights and privileges after a fair and impartial trial? The charter of this corporation contains no power of expulsion, and where no such power is so given it can only be exercised by the corporation when the member has been guilty of some infamous offense, or has done some act tending to the destruction of the society. Does the act complained of here tend to the injury or destruction of the union? The charge states that the manifesto bearing the signatures of the plaintiffs tended to disrupt and destroy the union, but there was no proof at this pretended trial that it did so tend. The circular or manifesto, as it is called, in itself certainly contains nothing rendering it or its authors liable to such charge. In substance, it is nothing but an invitation to participate in a meeting at which were to be discussed matters affecting the interest of the union. It is plain that there were diverse opinions among the members with regard to the policy to be pursued by the union in reference to its relations to what are known as labor organizations; and it can be inferred, too, that those issuing the manifesto held views at variance with those controlling this union; but surely that is no reason why those who invite all members to attend a meeting where these different views should be discussed in order to reach a determination of the question as to what were the best interests of the association should be charged with an effort to disrupt and destroy the union. If the issuance of the manifesto was an offense at all it was a minor one, for the commission of which the plaintiffs could not be expelled from the society and deprived of their interest in the funds of the union. If we are correct in this, the mandamus must issue as prayed for in this case, but there are some other features which it seems proper ⁴⁵² to discuss briefly. It is claimed by the respondents that it was the duty

of the relators to first exhaust their remedies within the organization itself by appeal, which is provided for by section 2 of article 11 of the by-laws, and expressly provided for by the resolution of December 5, 1897, before asking for this writ. An examination of section 2, article 11 of the by-laws shows that it does not cover this case, and that so far as the by-laws were concerned the plaintiffs were without remedy by appeal or otherwise. As to the provision for appeal in the resolution of December 5, 1897, it seems to be an attempt to amend the by-laws, which must be done in a very different manner from that adopted here. The by-laws themselves prescribe the mode for their amendment, and this was not followed; however, this attempt of the resolution to provide an appeal impresses conditions which render it burdensome and ineffective, in that it requires a compliance with the findings of the board and the payment of all expenses. Another anomalous feature of the resolution of December 5, 1897, is that it makes the board of directors both prosecutors and judges of the matter in dispute. It is said that plaintiffs assented to this resolution by their presence at the meeting and failure to object thereto at the time. This, however, does not bind them to an illegal resolution and by-law, if they elect to raise the question of its illegality subsequently. The plaintiffs claim too, and with grounds, we think, that the notices of the meetings for the trial on February 20 and March 20, 1898, were insufficient in that they contained no complete copy of the charges preferred. Objection also is raised by the plaintiffs that all the proceedings leading to their expulsion were taken on Sunday, and for this reason they are invalid. We have not deemed it necessary to discuss this objection, as well as many others raised by the relators, it being very plain that this expulsion must fall for other reasons given.

It seems clear that provisions of the constitution and by-laws of the respondent corporation which were intended for the protection of members against illegal expulsion, and to secure to them a fair and impartial trial, were violated in both the letter and spirit on the trial of these plaintiffs, if such proceedings can be called a trial.

Upon the question of damages claimed by the plaintiffs to be allowed them in this proceeding, no sufficient testimony was ⁴⁵³ taken to enable the court to pass on at this time, and it must remain open. What we determine now is that the mandamus must issue as prayed for.

And now, to wit, July 21, 1898, it is ordered that judgment

be entered in this case for plaintiffs, and that a peremptory writ of mandamus issue; costs of this proceeding to be paid by the defendants.

ASSOCIATIONS—MUTUAL BENEFIT SOCIETIES—ILLEGAL EXPULSION—RESTORATION BY MANDAMUS.—A member of a voluntary association, whether incorporated or not, who has been illegally expelled therefrom, is entitled to a writ of mandamus for the purpose of compelling the society to restore him to membership: See monographic note to *Robinson v. Templar Lodge*, 59 Am. St. Rep. 201, on remedies of members of fraternal and other associations. Especially is this true where property rights are involved, as the member's right to participate in a benefit fund: *Otto v. Journeyman Tailors' etc. Union*, 75 Cal. 308; 7 Am. St. Rep. 156. The decisions of voluntary societies in admitting members, suspending, disciplining, and expelling them will not be interfered with by the courts except to see that the proceeding was according to the rules of the society, in good faith, and not in violation of the law of the land: Note to *American etc. Commission Co. v. Chicago etc. Stock Exchange*, 36 Am. St. Rep. 401. But the courts will decide whether a ground for expulsion was well taken: *Otto v. Journeyman Tailors' etc. Union*, 75 Cal. 308; 7 Am. St. Rep. 156. An expulsion is not justified where there was no sufficient cause, or where the member was not given any notice or an opportunity to be heard in his defense; or, where the proceedings were irregular in substantial particulars: Note to *Robinson v. Templar Lodge*, 59 Am. St. Rep. 201-203; monographic note to *Otto v. Journeyman Tailors' etc. Union*, 7 Am. St. Rep. 164, on voluntary associations. See, also, the extended note to *Connelly v. Masonic etc. Assn.*, 18 Am. St. Rep. 301, on redress in courts of law against proceedings in lodges, churches, and other voluntary associations.

COMMONWEALTH v. HILLMAN.

[189 PENNSYLVANIA STATE, 548.]

HOMICIDE—INSTRUCTIONS—REDUCING DEGREE OF MURDER.—If the defendant, in a murder case, requests a charge substantially as follows: If the jury believe that the prisoner, at the time of the killing, though he intellectually comprehended right and wrong, and knew the killing to be forbidden and punishable by law, was yet so disordered mentally as to be unable to adjust his conduct to the law and avoid that forbidden thing, he is not answerable, at least, for murder in the first degree; it is not error for the court to give the instruction modified as follows: "If the mental condition of the defendant was such that he could not consciously form the purpose to kill and deliberately execute that purpose, he is not guilty of murder in the first degree."

HOMICIDE—PROOF OF HOMICIDAL MANIA.—To establish homicidal mania as a justification for the killing of a human being in any particular case, it is necessary either to show, by clear proof, its contemporaneous existence, evidenced by present circumstances, or the existence of an habitual tendency developed in previous cases, becoming in itself a second nature.

HOMICIDE—DEFENSE OF INSANITY—WHEN NOT SUSTAINABLE.—In a murder case, where the commission of the crime by the accused is undisputed, and it is shown that he made preparation for it by his purchase, a few days before the murder, of the revolver and cartridges he used in the perpetration of it, a verdict of murder in the first degree should be sustained, notwithstanding the defense of insanity, where such defense is not established; and it is not established by the testimony of the prisoner's mother and sister, two brothers and his uncle, that, before the murder, he was subject to frequent attacks of epileptic fits, which had affected his mind, and that they regarded him as insane, added to the testimony of two physicians, who had no knowledge of the prisoner's condition before the murder, that, in their opinion, he was insane, where neighbors of the defendant testify that they were well acquainted with him, and never saw anything in his conduct suggestive of insanity.

Indictment for murder.

Rody P. Marshall and John S. Robb, for the appellant.

John C. Haymaker, district attorney, and John S. Robb, Jr., first assistant district attorney, for the commonwealth.

⁵⁵⁶ **McCOLLUM, J.** William Hillman, the appellant in this case, is under sentence ⁵⁵⁷ of death for the murder of Bertha Spiegel, a girl under fifteen years of age, and for whom he appeared to have formed an attachment evidenced by his frequent visits to her at the home of her grandparents with whom she lived. It was a most atrocious murder with which he was charged and of which he was convicted. That it was committed by him is undisputed, and that he made preparation for it was shown by his purchase, a few days before the murder, of the revolver and cartridges he used in the perpetration of it. We need not describe in this opinion the shocking details of his crime, as the brutality, as well as the commission of it, is unquestioned. All that we have to consider on this appeal is whether the instructions of the court to the jury were adequate and free from error. The first assignment of error relates to the answer of the court to defendant's first point. The point and answer are as follows: "If the jury believe that the defendant at the time of the killing of Bertha Spiegel was so disordered mentally as, while intellectually comprehending right and wrong, and knowing the killing of her to be forbidden and punished by law, to be unable to adjust his conduct to the law and avoid that forbidden thing, he is not responsible, at least to answer for the higher grade of murder." The answer of the court to the point was: "If the mental condition of the defendant was such that he could not consciously form the purpose to kill and deliber-

ately execute that purpose he is not guilty of murder in the first degree." We do not discover in the answer to the point anything prejudicial to the defendant, nor do we think that an unqualified refusal of the point could be properly characterized as error. The evidence in the case certainly furnished no warrant for an unqualified affirmance of it. The cases cited as authority for the point do not sustain it. This clearly appears in the opinions in them. In *Commonwealth v. Mosler*, 4 Pa. St. 267, Chief Justice Gibson, in speaking of moral or homicidal mania, said: "The frequency of this constitutional malady is fortunately small, and it is better to confine it within the strictest limits. If jurors were to allow it as a general motive, operating in cases of this character, its recognition would destroy social order as well as personal safety. To establish it as a justification in any particular case, it is necessary either to show by clear proof its contemporaneous existence, evidenced by present circumstances, or the existence ⁵⁵⁸ of an habitual tendency developed in previous cases, becoming in itself a second nature." In *Coyle v. Commonwealth*, 100 Pa. St. 573, 45 Am. Rep. 397, this court in speaking of the defense of homicidal mania, said: "The validity of such a defense is admitted, but the existence of such a form of mania must not be assumed without satisfactory proof. Care must be taken not to confound it with acts of reckless frenzy. When interposed as a defense to a commission of a high crime, its existence should be clearly manifest."

These excerpts from the opinions in the cases cited are referred to as showing the kind of proof required to establish the existence of homicidal mania, and the consequences of its recognition in the absence of such proof. In the case at bar, no such proof was made, and no suggestion of homicidal mania appears except in the defendant's first point and the argument on appeal.

The only defense interposed in the case was that of insanity, and the principal evidence relied on to establish it was that of the defendant's mother and sister, his two brothers and his uncle, to the effect that he was subject to epileptic fits, the first of which was in June, 1897, the next on the 25th of November following, and that after that time he had them more frequently. These witnesses also testified that the fits to which he was subject had an effect upon his mind, and that they regarded him as insane. To their testimony on this subject may be added that of Dr. Chessrown, the jail physician, and that of Dr. Diller, both of whom testified that in their opinion he was insane.

Neither of the doctors, however, had any knowledge of his condition before the murder. In answer to this testimony there was that of the neighbors, who testified that they were well acquainted with the defendant and never saw anything in his conduct suggestive of insanity.

The second, third, fourth, fifth, sixth, and seventh assignments of error relate to the charge of the court; all of them except the seventh are based on excerpts from it. A careful examination of the charge has satisfied us that there is no ground for reversal in it. The instructions are adequate and impartial and there is no just cause for criticism of them. All the assignments are overruled.

The judgment is affirmed, and it is ordered that the record be remitted to the court below for execution.

HOMICIDE—DEFENSE—UNCONTROLLABLE IMPULSE.—INSANITY is not available as a defense to an indictment for murder, if the accused, at the time of the killing, was capable of distinguishing between right and wrong, with respect to that act, and was conscious that the act was one which he ought not to have done, although he might have been impelled by an irresistible impulse to do it: *Genz v. State*, 59 N. J. L. 488; 59 Am. St. Rep. 619, and note. Irresistible impulse to kill cannot be set up as a defense to murder so long as the accused knew that the act he was committing was a crime morally, and punishable by the law of his country. Such knowledge makes it imperative that he shall control himself at his peril: *State v. Alexander*, 30 S. C. 74; 14 Am. St. Rep. 879. One cannot be guilty of murder in the first degree, unless the act was perpetrated not only with intent to kill, but also with deliberation and premeditation: *People v. Barberi*, 149 N. Y. 256; 52 Am. St. Rep. 717. The defense of insanity, upon a charge of murder, must be affirmatively proved; but this may be done by fairly preponderating evidence: *Kelch v. State*, 55 Ohio St. 146; 60 Am. St. Rep. 680, and note.

GRIMES v. PENNSYLVANIA RAILROAD COMPANY.

[189 PENNSYLVANIA STATE, 619.]

EXECUTORS AND ADMINISTRATORS—SHARES OF STOCK HERE MAY BE TRANSFERRED BY FOREIGN EXECUTRIX WITHOUT LETTERS DE BONIS NON, CUM TESTAMENTO ANNEXO.—If a citizen and resident of Great Britain dies in England, the executrix of his executrix may transfer the stock of a Pennsylvania corporation, belonging to the estate of the testator in that commonwealth, without any grant to her of letters of administration de bonis non, cum testamento annexo, as such letters are unnecessary, either in that state or in England, for the purpose named.

Case stated to determine the right to transfer certain shares of stock, under the circumstances mentioned in the opinion.

Both wills were probated in the high court of justice of England, and letters of administration on the estate of Mary Ann Lund, but not upon that of George Lund, were granted by that court to Mrs. Grimes, who, by virtue of her office as executrix of the executrix of George Lund, demanded to make the transfer in question, but the company refused. There was a judgment for the plaintiff and the defendant appealed.

John G. Johnson, for the appellant.

J. Rodman Paul, for the appellee.

626 PER CURIAM. The questions presented by the "case stated" were correctly decided by the learned president of the court below, and judgment was accordingly entered in favor of the plaintiff. There appears to be nothing in the questions involved that requires special notice or further discussion.

The judgment is affirmed on the opinion sent up with the record.

Judgment affirmed.

The following is the opinion of the lower court, referred to above:

620 ARNOLD, P. J. At common law, upon the death of an executor, the executorship devolved upon his executor; and upon the death of one or more joint executors, it devolved upon the survivors and passed ultimately, upon the death of the last survivor, to his executor. Upon the death of the executor of an executor, the executorship passed to his executor, and so long as the chain of representation remained unbroken by an intestacy, the ultimate executor represented every preceding testator: 7 Am. & Eng. Ency. of Law, ed. 1889, tit. Executors and Administrators, 204. In 2 Blackstone's Commentaries, *506, the law and the reason of it is thus clearly stated: "The interest vested in the executor by the will of the deceased may be continued and kept alive by the will of the same executor, so that the executor of A's executor is to all intents and purposes the executor and representative of A himself; but the executor of A's administrator, or the administrator of A's executor, is not the representative of A; for the power of an executor is founded upon the special confidence and actual appointment of the deceased; and such executor is therefore allowed to transmit that power to another in whom he has equal confidence; but the administrator of A is merely the officer of the ordinary, prescribed

to him by act of parliament, in whom the deceased has reposed no trust at all; and therefore, on the death of that officer, it results back to the ordinary to appoint another." Other text-writers state the law the same way: See Wentworth on the Office and Duty of Executors, 14th ed., 462; 1 Williams on Executors, 9th ed., 293; 3 Redfield on Wills, 73, pl. 17. This is the law of England at this time, and also of some of the American states, as may be seen by reference to Woerner on the American Law of Administration, section 350, and note, and Williams on Executors, 293, and note. It was ⁶²¹ also the law of Pennsylvania until the act of March 15, 1832 (Pub. Laws, 135, sec. 6), restricted administration of goods within this commonwealth to persons appointed here, by providing that no letters testamentary or of administration, granted out of this commonwealth, shall confer any of the powers and authorities possessed by an executor or administrator under letters granted within this state. But to furnish means of administering the estates of citizens of any other state or country, it was provided in the twelfth section of the same act, that copies of wills and testaments proved in any other state or country according to the laws thereof, and duly authenticated, and of the letters testamentary or other authority to administer issued thereon, duly attested, shall be deemed sufficient proof for granting letters testamentary or of administration with the will annexed in this state. By section 19 of the same act, it was provided that whenever a sole executor or the survivor of several executors shall die, leaving goods of the estate of his testator unadministered, the registrar shall, notwithstanding the executor may have made his last will and testament and appointed an executor or executors thereof, grant letters of administration of all such goods and estate in the same manner as if such executor had died without having made any testament or last will, and the executor of such deceased executor shall in no case be deemed executor of the first testator.

Of this act it was said by Dean, J., in *Shinn's Estate*, 166 Pa. St. 121, 45 Am. St. Rep. 656, that "it was found inconveniently rigorous," so that it was amended by a series of exempting acts providing for the transfer of investment securities by the person representing the estate of the owner according to the law of his domicile. The first of these acts which we have to consider appears to be the act of June 16, 1836 (Pub. Laws, 682, sec. 3), which declared that so much of the sixth section of the act of March 15, 1832, as provides that no letters testamentary or of administration or otherwise, purporting to authorize any person

to intermeddle with the estate of a decedent, which may be granted out of this commonwealth, shall confer upon such person any of the powers and authorities possessed by an executor or administrator under letters granted within this state, and so much of the seventh section of the act of March 29, 1832, as provides that no appointment of a guardian made or granted out of this state shall ⁶²² authorize the person so appointed to interfere with the estate of a minor in this state, are declared and enacted not to apply to shares of stock in any bank or other incorporated company within this commonwealth, but such shares of stock shall pass and be transferable, and the dividends thereon be receivable in like manner and under the same regulations, powers, and authorities as were used and practiced with the loans or public debt of the United States and of this commonwealth before the said recited acts were passed, unless the by-laws, rules, and regulations of any such bank or corporation shall otherwise provide and declare.

On January 29, 1872, the supreme court decided in Alfonso's Appeal, 70 Pa. St. 347, that executors acting under authority conferred by a foreign country cannot transfer stock in this state, but that executors appointed by a sister state may, and thereupon the act of April 8, 1872 (Pub. Laws, 44), was enacted, as was said by Sharswood, J., in *Williams v. Pennsylvania Ry. Co.*, 9 Phila. 298, no doubt in consequence of this decision. That act provides that "it shall and may be lawful for an executor, administrator, or other person representing the estate of any decedent, or for any guardian or other legal representative of the estate of a minor, acting under letters testamentary or of administration, or other authority granted by or under the laws of any other state or territory of the United States, or of any country, state, sovereignty, or kingdom, to transfer any and all shares of stock and registered loan, or either, of any incorporated company of this commonwealth, standing in the name of any decedent, minor, or cestui que trust, and to receive the dividends and interest thereof, whenever a duly authenticated copy of the will, or other grant of authority under which such transfer or receipt is proposed to be made, shall have been filed in the office of the register of wills for the county in which such incorporated company has its transfer office or principal place of business."

It is to be noticed that this act confers authority upon any executor, administrator, or other person representing the estate of any decedent, or any guardian, acting under letters testa-

mentary, of administration, or other authority granted by or under the laws of any other state or territory of the United States, or of any country, state, sovereignty, or kingdom.

⁶²³ Indicative of the intention of the legislature are the various acts on this subject, to be found in the twelfth edition of Purdon's Digest, on pages 589 and 590, to wit: The act of March 12, 1842 (Pub. Laws, 67, sec. 5), declaring that the act of 1832 shall not apply to the stock or loan of the city or county of Philadelphia; the act of May 15, 1850 (Pub. Laws, 767, sec. 8), declaring that the act of 1832 shall not apply to the loans of any incorporated company within this commonwealth, but that such stock or loans shall pass and be transferable and the interest thereon receivable, in like manner as before said acts were passed (that is, by the executor of an executor, in cases where the appointment of an administrator de bonis non cannot be obtained), and the act of May 15, 1874 (Pub. Laws, 195), permitting the transfer of the loans of this commonwealth and the city of Philadelphia, by the person or persons duly authorized by the laws of the state or country in which the foreign bondholder was domiciled or resided at the time of his death; provided an affidavit is filed with the clerk of the orphans' courts that the decedent is not indebted to any person within this commonwealth. All this legislation has been passed for the purpose of facilitating the transfer of public and corporation loans and stocks, in pursuance of the policy which actuates commercial nations in such matters. In order to induce persons residing outside of this state to invest their capital in business enterprises here, the legislature has enacted these statutes to permit a transfer upon the death of the owner, to be made according to the law of his domicile, without putting his representatives to the inconvenience, expense, and delay of administration here.

By the case stated we are informed that George Lund, a resident and citizen of England, died on June 5, 1888, leaving by his will all his personal estate to his widow, Mary Ann Lund, and appointed her his sole executrix. She died on May 20, 1897, in England, and by her will bequeathed her residuary estate to her daughter, Mary Ann Grimes, and appointed her sole executrix. Copies of these wills and grants of letters testamentary thereon have been filed in the office of the register of wills in this county. George Lund owned five hundred and ten shares of the stock of the Pennsylvania Railroad Company, and during the life of his widow and executrix she received the dividends thereon. By the law of England the plaintiff, as executrix of

Mary Ann ⁶²⁴ Lund, the executrix of George Lund, deceased, is the legal representative of the unadministered estate of George Lund, deceased, and as executrix of his executrix is entitled, under the law of England, to transfer shares of stock and other securities standing in the name of George Lund, and by reason of that law, the chief registrar of the principal registry of the probate, divorce, and admiralty division of the high court of justice of England, has declined to grant letters of administration de bonis non cum testamento annexo to the plaintiff in England, saying that the same are unnecessary. The plaintiff has demanded of the defendant company a transfer by her, as executrix of Mary Ann Lund, executrix of George Lund, deceased, of the said five hundred and ten shares of stock, but the defendant company has refused to permit any person other than an administrator de bonis non cum testamento annexo of the estate of George Lund, appointed in England or in Pennsylvania, to make the transfer, and the question is, Under what law is the power to make the transfer to be derived?

We are of opinion that the act of 1872, being a remedial statute, should receive a liberal construction in aid of the relief given. It was intended to relieve the representatives of the owners of loans and stocks, who are authorized by the law of the state or country in which such owners lived and died, from the necessity of taking out letters of ancillary administration in this state, and to permit such representatives to transfer such loans and shares the same as if they derived their authority under the law of this state; and that the inquiry for the person representing the estate of any decedent should be for the person representing such estate according to the law of the domicile of the deceased owner, and not the law of this state. The nineteenth section of the act of 1832 is not repealed as to the ordinary goods and chattels of the estate of a nonresident, but it is superseded as to his investments in public and corporation bonds and stocks within this commonwealth by the several acts before cited; and as to such loans or stocks, the power to transfer them is derived from the grant under the law of the domicile of the decedent. As to our citizens the law is that the executor of an executor cannot make such a transfer, because we have provided a person to take his place; but as there is no provision for an administrator de bonis non in England, when there is an executor of an executor, who is the person representing the estate ⁶²⁵ of the decedent and has authority to transfer the shares of the first testator there, the executor of the executor

should be permitted to make the transfer here. We are required to give these acts a reasonable interpretation so as to facilitate and not impede the transmission of the property.

No case could show the necessity of such an interpretation as the one before us. Here the testator has been dead ten years. His widow, as legatee, owner, and executrix, has received the dividends since his death. Now his daughter is legatee, owner, and executrix, and it is contended that she cannot receive the dividends or transfer the shares without being put to the expense of an administration, involving the giving of security to a large amount, and the settlement of an account and distribution by the orphans' court, with an attendant inconvenience and delay. No question as to domestic creditors is involved, because the legislature, by enacting that foreign executors and administrators may make the transfer, has disregarded any rights of local creditors as to public and corporation loans and shares of stock, except that the act of 1874 requires an affidavit that the decedent is not indebted here. As the plaintiff in this case is the person representing the estate of the decedent, and is duly authorized by the law of England, where the decedent was domiciled and his will was proved, she is entitled to make the transfer she desires to make.

Judgment for plaintiff according to the terms of the case stated.

EXECUTORS AND ADMINISTRATORS, FOREIGN—POWER OF, AS TO TRANSFERS.—A foreign executor can dispose of personal assets in the state of New York; and one to whom he assigns stock in a corporation of that state may require a transfer thereof on the books of the corporation: Note to Peterson v. Chemical Bank, 88 Am. Dec. 308. A foreign administrator has a perfect right to assign the choses in action of his decedent, so as to confer title against every one but creditors and legatees: See monographic note to Shinn's Estate, 45 Am. St. Rep. 673, on the power and duty of an executor or administrator as to property outside of the state.

COMMONWEALTH v. MCGOWAN.

[189 PENNSYLVANIA STATE, 64L.]

HOMICIDE—APPEAL—ASSIGNMENT OF ERROR.—If the rulings and instructions of the court, on a murder trial, are not objected to at the time, and their relevancy to the defense, set up in the defendant's account of the murder, is not denied, they furnish no basis for an assignment of error, or for just criticism, on an appeal from a verdict of guilty.

HOMICIDE—INSTRUCTIONS—EXPRESSION OF OPINION BY COURT.—When justified by the evidence, a court's mere

expression of opinion, in a murder trial, that there is nothing in the case to reduce the crime to manslaughter, furnishes no ground of complaint, where the same is not given as a binding instruction, and where the jurors are instructed that the questions of fact depending upon the evidence are determinable by them, and not by the court.

HOMICIDE—SELF-DEFENSE.—A murder, purposely committed, is not excusable on the ground of self-defense, unless the slayer reasonably believed the killing to be necessary to save his own life, or to avoid great bodily harm.

HOMICIDE—INTOXICATION AS A DEFENSE—INSTRUCTIONS.—It is not error, on a trial for murder, to charge that "the jury must bear in mind that it is only the effect the intoxication in this case had upon the prisoner's mind in regard to his ability to design, deliberate, and meditate upon, and fully comprehend the act he did, previous to its performance, which is material."

HOMICIDE—INSTRUCTIONS — INTOXICATION—REDUCING OFFENSE.—The intoxication of one accused of murder will not reduce the grade of the murder to that of the second degree, where the evidence shows that the act was committed with deliberation and premeditation.

Indictment for murder. It appeared, at the trial, that the prisoner had shot and killed his wife, on December 31, 1897. He alleged that, at the time of the shooting, his wife attacked him with a knife, and that he killed her in self-defense. He also alleged that he was under the influence of liquor at the time. Evidence was offered that, in 1889, Mrs. McGowan kept a speak-easy, but, under objection and exception, the court refused to admit it. The defendant, while on the stand, was asked by the court whether he was angry at the time his wife made the attack upon him, to which the prisoner answered, "No, sir." The court also asked him, "You were cool and deliberate?" The prisoner answered, "I was not very angry. We hadn't spoken to one another all day for a week." No exception was taken to these questions. The court, in charging the jury, expressed the opinion that there was nothing in the prisoner's own evidence which showed any such rage or anger on his part as would reduce the offense to manslaughter, if the killing was unlawful. "The fact, however," he continued, "is for your determination, and not mine. In answer to the court he said he was not excited and was not enraged, and was perfectly cool, at least, in substance. If that was so, then, if the killing was unlawful, it could not be reduced to voluntary manslaughter. It must be, at least, murder." The jury were instructed that drunkenness itself is no excuse whatever for crime, but that, if it affects the condition of the mind at the time the offense is committed, it is to be considered so far only as it may affect the particular offense alleged, where the mental condition is an element in the

question under consideration. "But the jury must bear in mind that it is only the effect the intoxication in this case had upon the prisoner's mind in regard to his ability to design, deliberate, and meditate upon, and fully comprehend the act he did, previous to its performance, which is material. If he knew what he was about, and fully comprehended the situation when he fired the fatal shot, it makes no difference how drunk he may have been at the time." The substance of the second point was that if the killing was done under the influence of a sudden passion, growing out of a quarrel, the verdict should not be of a higher degree than voluntary manslaughter. The court affirmed this point, but admonished the jury to remember the prisoner's statement that he was perfectly cool and not in a passion when he fired the fatal shot. A juryman's request, after the charge, for further information about a certain plan, and another matter, was denied, but he was given the plan. There was a verdict of guilty of murder in the first degree.

D. F. Patterson, E. J. Smail, and Thomas L. Kerin, for the appellant.

John C. Haymaker, district attorney, and Edwin H. Stowe, assistant district attorney, for the appellee.

⁶⁴⁵ **McCOLLUM, J.** Anthony McGowan was charged with and indicted for the murder of his wife. On his arraignment he met the charge with the plea of not guilty. His trial resulted in a verdict against him of murder of the first degree. The verdict was sustained by the trial court and sentence according to law was pronounced upon it. On his appeal to this court it is alleged that errors were committed on the trial which require a reversal of the judgment. The alleged errors are said to consist of certain questions put to the defendant by the trial court on his examination as a witness in his own behalf; of the answers of the court to the defendant's first and second points; of its refusal to grant the request made by a juryman; of its ruling upon the offer of the defendant to prove by Bernard Rowan that when he boarded with the defendant and his wife in 1889 she kept a speak-easy, and of the instructions to the jury in the general charge.

As the questions now complained of were not objected to on the trial, and their relevancy to the defense set up in the appellant's account of the murder is not denied, they furnish no

basis for an assignment of error or for just criticism. The answers to the questions were in accord with his explanation of the homicide and with his conduct immediately following it. His testimony descriptive of his alleged altercation with his wife, before and when he shot her, showed a degree of self-possession and coolness on his part inconsistent with fear, excitement, or rage. There was really nothing elicited by the answers to the questions complained of which was at variance with his previous testimony. There is therefore no error in that part of the charge which is the subject of the second assignment, or in the answer to the appellant's second point. The court had an undoubted right to express its opinion upon the evidence and where, as in this case, the jurors were instructed that the questions of fact depending upon it were determinable by them and ~~646~~ not by the court, the expression of the opinion furnishes no ground for complaint. "In charging a jury in a homicide case, the court may express an opinion that there is nothing in the case to reduce the crime to manslaughter, where the same is not given as a binding instruction, and is moreover warranted by the evidence": *McClain v. Commonwealth*, 110 Pa. St. 263. As there is nothing discoverable in the appellant's evidence which has a tendency to reduce his offense to manslaughter, the court did not err in saying so. There is certainly nothing in his answers to the questions of the court which can possibly be construed as having such a tendency. It follows therefore that there is no misstatement of the evidence prejudicial to his defense.

There is no error in the answer of the court to the appellant's first point. The substance of the point is that if the appellant at the time he fired the fatal shot was acting under the belief that it was necessary to shoot his wife in order to prevent her from inflicting grievous bodily harm upon him, he was entitled to an acquittal. The only modification of the point in the answer of the court to it is that if the appellant had reason to believe it was necessary to shoot her to prevent the infliction of such bodily harm upon him, then his homicidal act was excusable. In *McDermott v. State*, 89 Ind. 187, it was held that "a homicide purposely committed is not excusable on the ground of self-defense, unless the accused reasonably believed it necessary to save his own life or avoid great bodily harm." To the same effect is *Murray v. Commonwealth*, 79 Pa. St. 312, and *Pistorius v. Commonwealth*, 84 Pa. St. 158. The modification complained of is not only in accord with the decisions of this

court, but with the decisions of the courts of other states, and with the view taken of the subject by Mr. Bishop in his treatise on Criminal Law. To what we have already said respecting the answers of the court to the appellant's first point we may add that his counsel has not referred us to any decision of this court which sustains the point or condemns the answer to it.

We find nothing in the fifth or sixth assignments of error which requires discussion or is prejudicial to or violative of any right of the defendant.

The excerpt from the charge which is the subject of the seventh assignment is not opposed to the settled law regarding the ~~647~~ matter to which it relates. In 1 McClain on Criminal Law, section 162, it is said: "But even though there is intoxication, there may be deliberation and premeditation, and if the evidence shows these elements of murder in the first degree to have been present, the intoxication will not reduce the murder to the second degree." To the same effect is *Keenan v. Commonwealth*, 44 Pa. St. 55, 84 Am. Dec. 414, and Bishop on Criminal Law, section 410.

Upon a careful consideration of the assignments and of the evidence in the case, we are satisfied that there is no error in the rulings and instructions complained of which warrants a reversal of the judgment, and that the verdict was fully authorized by the evidence.

Judgment affirmed and record remitted for the purpose of execution.

HOMICIDE—SELF-DEFENSE.—Life may be lawfully taken in self-defense, but it must appear that he who takes it was in imminent danger of death or great bodily harm, and that no other way of escape from the danger was open to him: *Commonwealth v. Breyessee*, 160 Pa. St. 451; 40 Am. St. Rep. 729.

HOMICIDE—INTOXICATION AS A DEFENSE.—Drunkenness is no excuse for murder or other crime. Intoxication, to excuse crime, must be of such a degree as to render the offender incapable of entertaining an intent to commit it. If it falls short of this, it is worthless as a defense: Note to *State v. Kraemer*, 62 Am. St. Rep. 672. When murder is divided, by statute, into degrees, the intoxication of one accused of such crime is generally admissible to determine the degree of the crime: Note to *State v. Kraemer*, 62 Am. St. Rep. 672; *Evers v. State*, 31 Tex. Cr. Rep. 318; 37 Am. St. Rep. 811; but intoxication must go to the extent of producing temporary insanity before it can mitigate the penalty, or be considered in murder cases to determine the degree of murder: *Evers v. State*, 31 Tex. Cr. Rep. 318; 37 Am. St. Rep. 811.

TRIAL—EXPRESSION OF OPINION BY JUDGE—INSTRUCTIONS.—It is error for a judge, in his charge to the jury, to express an opinion as to the weight of evidence concerning any fact in issue, or as to what has, or has not, been proved during the trial:

Garner v. State, 28 Fla. 113; 29 Am. St. Rep. 232, and note; People v. King, 27 Cal. 507; 87 Am. Dec. 95; particularly where he fails to inform the jury that they are judges of the evidence and must decide as they find the truth to be: Note to Garner v. State, 29 Am. St. Rep. 232; Potts v. House, 6 Ga. 324; 50 Am. Dec. 329; and it has been held that such error is not cured by his informing the jury that they are independent of him in all matters of fact pertaining to the issues: State v. Dick, 2 Winst. 45; 86 Am. Dec. 430.

CASES
IN THE
SUPREME COURT
OF
SOUTH CAROLINA.

ZEIGLER v. MANER.

[53 SOUTH CAROLINA, 115.]

USURY.—THE RIGHT TO PLEAD USURY in a contract is personal to the debtor alone.

USURY.—USURIOUS INTEREST PAID TO A MORTGAGEE may be pleaded as a counterclaim against the assignee of the mortgage. •

JUDGMENTS—RES JUDICATA.—A judgment of foreclosure against a mortgagor is not *res judicata* as to the grantee of the mortgage not a party to the action and holding under a deed executed before such action was commenced.

I. L. Tobin, for the appellants.

Patterson & Holman, for the appellee.

115 GARY, J. The plaintiff brought this action to foreclose a mortgage of real estate. On the 31st of December, 1890, the defendant, Anna B. Maner, executed a mortgage in favor of the Bank of Allendale on the land **116** described in the complaint. Anna B. Maner conveyed said land to the other defendants on the 16th of January, 1892. On the 29th of April, 1893, the Bank of Allendale, for valuable consideration, released a part of said land from the lien of the mortgage. The Bank of Allendale, for value, assigned said mortgage to the plaintiff on the 15th of June, 1895. On the 17th of June, 1895, the plaintiff commenced an action against Anna B. Maner to foreclose said mortgage, and on the 20th of August, 1895, a judgment of foreclosure was rendered against the defendant, Anna B. Maner, for the sale of the said land. The plaintiff then discovered that

Anna B. Maner had previously conveyed the said land, and he was allowed to amend his summons and complaint by making the grantees of Anna B. Maner parties defendant.

The defendant, Anna B. Maner, did not file an answer, but her codefendants answered, setting up, as a defense, that the amount mentioned in the said mortgage included usurious interest. They also set up a counterclaim, arising out of the alleged fact that they had made various payments of usurious interest to the Bank of Allendale, while it was the owner of said mortgage.

The plaintiff replied to the counterclaim, denying that the payments were made as stated in the answer, and, also, set up as a defense that the matters involved herein, by reason of the judgment of foreclosure recovered against Anna B. Maner, are *res judicata*. His honor, Judge Benet, overruled the defense and the counterclaim for usury interposed by the appellants, and sustained the defense of *res judicata* set up in plaintiff's reply to the counterclaim, and granted judgment of foreclosure.

The three defendants who answered the complaint have appealed upon exceptions which raise the following questions, to wit: 1. Was there error on the part of the circuit judge in deciding that the appellants did not have the right to set up as a defense that the contract entered into between Anna B. Maner and the Bank of Allendale, when the mortgage ¹¹⁷ was executed, was tainted with usury? 2. Was he in error in deciding that the appellants did not have the right to set up a counterclaim for usurious interest alleged to have been paid by the appellants to the Bank of Allendale while it was owner of the mortgage? 3. Was he in error in deciding that the matters involved herein are *res judicata*, by reason of the judgment of foreclosure against Anna B. Maner?

We proceed to a consideration of the first question. The general rule that the right to plead usury is a privilege personal to the debtor is well established by the authorities: *Jeffries v. Allen*, 29 S. C. 501; 27 Am. & Eng. Ency. of Law, 949. The cause of action for usurious interest, alleged to have been charged when the mortgage was executed, accrued to Anna B. Maner, and, under the authority of *Turner v. Building & Loan Assn.*, 47 S. C. 397, she alone could exercise such privilege. The exceptions raising the first question are overruled.

We next proceed to a consideration of the second question. The cause of action accrued to appellants when they paid their alleged usurious interest to the Bank of Allendale while it

owned said mortgage. The alleged wrong was suffered by these appellants. They, therefore, had the right to set up a counterclaim: *Turner v. Building & Loan Assn.*, 47 S. C. 397. The plaintiff to whom the mortgage was assigned did not acquire any greater rights than were possessed by the Bank of Allendale, and, therefore, cannot defeat the counterclaim on the ground that the payments were not made to him: Code, sec. 133. The exceptions raising the second question are sustained.

We lastly proceed to consider the third question. Anna B. Maner had conveyed the land before the action herein was commenced. These appellants had not been made parties when the judgment of foreclosure was rendered against Anna B. Maner, and they were not bound thereby. If the judgment of foreclosure just mentioned was *res judicata* as to the rights of these appellants, ¹¹⁸ then there was no necessity for the plaintiff to have amended his pleadings by making them parties. The exceptions raising this question are sustained.

The circuit judge decided that the counterclaim could not be set up by these appellants, and, therefore, did not, very properly, under his view of the case, decide as to the merits of the said counterclaim. It will, therefore, be necessary that the case be remanded for that purpose, and, if it is sustained, the amount mentioned in the judgment of foreclosure will necessarily have to be corrected. If the counterclaim is sustained, of course, the plaintiff will not be entitled to interest or costs: Rev. Stats., sec. 1390.

It is the judgment of this court that the judgment of the circuit court be modified and the case remanded for the purposes herein mentioned.

USURY—RIGHT TO PLEAD.—Usury is a strictly personal defense, and the right to affirmative relief is likewise personal, and can only be taken advantage of by the parties to the usurious agreement and their privies: *Scott v. Williams*, 100 Ga. 540; 62 Am. St. Rep. 340, and note; *Hill v. Alliance Building Co.*, 6 S. Dak. 160; 55 Am. St. Rep. 819. See extended note to *Davis v. Garr*, 55 Am. Dec. 398.

USURY—DEFENSE TO MORTGAGE CONTRACT—RECOVERY OF INTEREST.—So long as a mortgage providing for usurious interest remains executory, the mortgagor may avail himself of the usury as a defense; but when the mortgage contract is executed by foreclosure or otherwise, and when others have in good faith acquired an interest in the property, the defense of usury is no longer available to the mortgagor, and this is especially the case when he has been guilty of laches: *Ferguson v. Soden*, 111 Mo. 208; 33 Am. St. Rep. 512. The general rule is that usurious interest may be recovered back: See the monographic note to *Davis v. Garr*, 55 Am. Dec. 399. See, also, the note to *Bexar Building etc. Assn. v. Robin-*

son, 22 Am. St. Rep. 41. Contra, *Ferguson v. Soden*, 111 Mo. 208; 33 Am. St. Rep. 512.

JUDGMENT—RES JUDICATA.—An assignor is not in privity with his assignee as to facts transpiring after the assignment. Therefore, a judgment against a mortgagee foreclosing a mechanic's lien does not bind his assignee holding under a prior unrecorded assignment: *Nashua Trust Co. v. Edwards Mfg. Co.*, 99 Iowa, 109; 61 Am. St. Rep. 226. One not made a party to foreclosure proceedings is not bound by the decree therein, and may attack the mortgage for want of good faith, or a valid consideration, as though such decree had not been entered: *Landigan v. Mayer*, 32 Or. 245; 67 Am. St. Rep. 521.

STATE v. DAVIS.

[53 SOUTH CAROLINA, 150.]

TRIAL—ERRONEOUS CHARGE AS TO REASONABLE DOUBT.—If the court, in defining reasonable doubt to the jury, says that "under the facts and evidence as strong as that in this case, that would be a reasonable doubt," it expresses an opinion as to the weight of the testimony, and commits a reversible error.

TRIAL — ERRONEOUS INSTRUCTIONS — OPINION ON WEIGHT OF TESTIMONY.—If the court, in instructing the jury, says that "in this case the question of the right to make an arrest cannot arise, it expresses an opinion on the weight of the testimony, and commits reversible error.

TRIAL—ERRONEOUS.—If the court expresses its opinion on the weight of the evidence in giving instructions to the jury, it commits reversible error.

TRIAL — ERRONEOUS INSTRUCTIONS — MANSLAUGHTER.—A court commits reversible error in instructing the jury that manslaughter from the accidental, but negligent, killing of a human being cannot arise in the case on trial, as he thus expresses an opinion on the weight of the evidence.

ARREST, UNLAWFUL—RIGHT TO RESIST.—A person resisting an unlawful arrest has the right to use as much force as may be necessary to regain his liberty, even to the actual taking of life.

ARREST, UNLAWFUL—RIGHT TO RESIST.—A person has the same right to resist an unlawful arrest as he has to resist a threatened injury to life or limb.

J. E. McDonald and J. W. Hanahan, for the appellant.

J. K. Henry, for the appellee.

¹⁵⁰ POPE, J. This is the second time this case has been before this court on appeal. It seems that the appellant was again convicted of the murder of James E. Suber by a jury in Fairfield county. The grounds of appeal allege that the circuit judge in his charge to the jury ¹⁵¹ commented on the facts, in violation of that provision of the constitution which interdicts such a course. By the brief it appears that the circuit judge

used this language: "Now, in considering this whole case, Mr. Foreman and gentlemen, if you have a reasonable doubt of the guilt of the accused, if you have a doubt in considering the testimony, which is well founded—a doubt such as a reasonable and prudent man would entertain in affairs of his own concern—*under the facts and evidence as strong as that in this case, that would be a reasonable doubt,*" *et cetera* (italics ours). And also in his charge he said: "In this case the question of the right to make an arrest cannot arise." As to the first quotation, it is very evident that the circuit judge was betrayed into an expression of his opinion upon the weight of the testimony. So, also, in the second quotation, it appears that the circuit judge unintentionally stated what was his inference from the testimony which had been offered. Such a course as to either of the questions was not open to the judge. By the constitution he was debarred this privilege, and both instances present reversible error. This disposes of the second and fourth grounds of appeal.

Another question is as to the power of the circuit judge in his charge to limit the inquiry of the jury in the application of the facts to the crime of manslaughter, by declaring that manslaughter, from the accidental but negligent killing of a human creature, could not arise in this case. This was error. It is but due to the circuit judge to state that his charge in laying down the principles of law touching murder, manslaughter, and self-defense were admirably put, and it is to be regretted that these mistakes have occurred.

The last question presented by the appeal is that relating to an alleged error in the circuit judge in his reference to the second request to charge, which request was as follows: "Every touching of the person of another in a rude, violent, or revengeful manner, without a warrant, except in cases of felony, is in law an assault, which the person so touched ¹⁵² has a right to resist, and against which he may use as much force as is necessary." The language of the charge in this connection was as follows: "In this case the right to make an arrest cannot arise. The law in this state has been correctly stated and has been established in this very case, because it existed long before this case ever arose, that a private person—that is, a person not an officer of the law—may arrest another who is guilty of a felony, either when the felony is committed in view of the party making the arrest or where he has reasonable and certain information that a felony has been committed. But except in cases of felony, a private individual has no right under the law of this

state to make an arrest. There is nothing in this case to show that the deceased was an officer of the law, and there is nothing to show—at least, there is no sufficient proof to show—that there had been a felony committed; and, therefore, under the facts of this case, you would be bound to conclude that if he were attempting to arrest this defendant, in the legal sense of restraining or detaining him, it would not have been a lawful arrest. But, Mr. Foreman and gentlemen, the mere fact that a person is making an arrest without a warrant, and is making an illegal arrest, will not justify the party being arrested in taking the life of his assailant. It is an assault and battery for a man without a warrant to make an arrest—that is, to make an illegal arrest. If he lays his hands on a party and arrests him illegally, it is an assault and battery, and an assault and battery may be repelled with so much force as may be necessary. But the mere restraining a man, depriving him for a time of his liberty, would not justify the other in taking his life. The law only allows the plea of self-defense, where the act is done in defense of life and limb, not in the defense of liberty, and for the very manifest reason that a man in danger of losing his life, or of receiving serious harm to his body, is impelled, the necessity exists for his immediate action, in order to defend himself against such danger. But if it is a mere restraint of his liberty, it is better, and the ¹⁵³ law would hold it to be his duty to submit even to illegal restraint rather than to take the life of his fellow-man, because the law furnishes abundant means for him to regain his liberty and affords him sufficient remedy for illegal restraint, but it cannot afford to him sufficient remedy for the taking of his life or for inflicting such injury upon his person as may result in permanently maiming him; and, therefore, it permits a man to exercise such force as may even result in taking the life of his assailant, when his own life or personal security, the security of his body, is involved. So with these comments I charge you the second proposition of law.” We remark that, although the language of the circuit judge, when he spoke of the right of arrest not arising in this case, might, if it had occurred without any explanatory words from the judge, have occasioned some criticism, but following these words as he did, with the fullest explanation, there is no reversible error so far as this language is concerned. A much more serious question arises when the circuit judge comes to discuss the right of a man to relieve himself from an illegal arrest. We cannot hold that the judge has stated the law of this state on this subject. The con-

stitution sacredly guards life, liberty, and property of the citizen, and our laws have always upheld the sacred boon of liberty. In the last edition of the American and English Encyclopedia of Law, at page 852 of volume 2, occur these words: "An unlawful arrest vests no authority in the one arresting; hence, one arrested may lawfully escape, if possible, and he has the right to use as much force as may be necessary to regain his liberty, even to the actual taking of life." We cannot agree that the circuit judge is correct in laying down the law so as to maintain a distinction between the right of a man to resist an injury to life or body, and his right to resist an invasion of his personal liberty, for each of the three occupy the same plane. This position by no means lays down the rule that a man may kill his assailant to protect any one of the three, but it is the province of the jury to determine if the facts and circumstances surrounding ¹⁵⁴ each case would justify the taking of the life of the person who shall seemingly jeopardize life or serious bodily injury, or the liberty of the person assailed. While all this is true, it does seem to the writer of this opinion that when a thief is detected by the owner with his goods while in his house or on the premises of the owner, that the owner is justified in making efforts to regain his property from the thief, even if he has to use force to accomplish his purpose. It seems idle to say that if the goods stolen shall amount in value to twenty dollars or more, that such being a felony, the thief may be arrested without a warrant for such arrest; but that if the goods be of the value of nineteen dollars or less, stolen from the owner in his presence, the owner will not be justified in arresting the thief and recovering his property. Take the case at bar as an illustration: Here Mr. Suber, the owner, sees the defendant take money from his money drawer, and goes to the money drawer and sees for himself that the thief has actually taken his money, and when he immediately calls upon the thief to restore his money to him, and upon the refusal of the thief to deliver to him his money, the owner catches hold of the thief to try and regain his money, and he is killed by the thief—does it not seem that the law should justify the owner in this arrest of the thief? I would be understood upon this matter, for we mean only to hold that when a thief is caught in the act of stealing from the person, or the house, or the premises, the owner in such a case is authorized to arrest the thief and regain his property at that moment in the possession of the thief. This is what, no doubt, was in the mind of the circuit judge, and if he

had charged in this restricted sense, I would not have been willing to hold him in error.

As we have seen, there must be a new trial. It is, therefore, the judgment of this court that the judgment of the circuit court be reversed and that the case be remanded to the circuit court for a new trial.

¹⁵⁵ Mr. Chief Justice McIver and Justices Jones and Gary concur in the result.

TRIAL — ERRONEOUS INSTRUCTIONS — OPINION ON WEIGHT OF EVIDENCE.—Instructions upon the weight of evidence are erroneous: *Harkey v. State*, 33 Tex. Cr. Rep. 100; 47 Am. St. Rep. 19; *State v. Gleim*, 17 Mont. 17; 52 Am. St. Rep. 655. Instructions for the defendant are erroneous, as being on the weight of evidence, if they single out a part of the testimony and inform the jury that it alone is not enough to warrant a conviction: *Burt v. State*, 72 Miss. 408; 48 Am. St. Rep. 563. A charge which presents facts, or suggests a conclusion from facts, without informing the jury that they are the exclusive judges of such facts, is erroneous: *Horne v. State*, 1 Kan. 42; 81 Am. Dec. 499; *State v. Dick*, 2 Winst. 45; 86 Am. Dec. 439.

ARREST, UNLAWFUL—RIGHT TO RESIST.—One person has a right to resist an illegal arrest by another, whether an officer or a private individual, with as much and no more force, than is necessary for the purpose of resistance: *Miers v. State*, 34 Tex. Cr. Rep. 161; 53 Am. St. Rep. 705; *Miller v. State*, 31 Tex. Cr. Rep. 609; 37 Am. St. Rep. 836. A person resisting an attempted arrest by one acting without authority has the right to use only such force as is necessary to protect himself from assault, and has no right to take the life of the person attempting his arrest, unless it is necessary to save his own life or his person from great bodily harm: *Creighton v. Commonwealth*, 83 Ky. 142; 4 Am. St. Rep. 143. See *Cryer v. State*, 71 Miss. 467; 42 Am. St. Rep. 473.

JOHNSON v. SOUTHERN RAILWAY COMPANY.

[53 SOUTH CAROLINA, 203.]

RAILROAD COMPANIES—PASSENGERS—NEGLIGENCE.
A person holding a ticket entitling him or her to transportation as a passenger on a railroad train, if feeble, or encumbered with heavy baggage or other impediments, is entitled to have assistance in boarding the train, and if it is not afforded by the railway officials or servants, the escort of such person may render the necessary assistance, and is entitled to enter the train for such purpose, and also to a reasonable time to leave the train before it is put in motion. Failure to afford such reasonable time in which to leave the train is negligence, provided the railway servants have notice of the purpose of the escort in entering the train and of his desire to leave it.

RAILROAD COMPANIES—PLEADINGS—NEGLIGENCE.—
An allegation in a complaint against a railroad company to recover for personal injury received in alighting from a train and caused

by "negligently and carelessly starting the train," supports an instruction that a railway company is liable for injuries to persons lawfully on its cars caused by negligent "jolting and jerking" of which there is proof.

NEGLIGENCE—PLEADING.—If a complaint is general in its allegations of negligence, and the defendant desires to know upon what particular acts of negligence the plaintiff relies, he must move to have the complaint made more definite and certain, and failing in this, the plaintiff may introduce any competent evidence tending to show the negligence of the defendant.

B. L. Abney and J. P. Thomas, Jr., for the appellant.

Tompkins & Wells and S. McG. Simkins, for the appellee.

²⁰⁴ McIVER, C. J. This was an action to recover ²⁰⁵ damages for injuries sustained by plaintiff in alighting from defendant's train, caused, as alleged, by the negligence of the defendant company. The case, in brief, was this: The plaintiff bought a ticket for his wife from defendant's agent at Monetta, a station on defendant's line, which entitled her to be carried as a passenger from that station to Augusta, Georgia. The train was behind time in reaching Monetta, and the plaintiff's wife, who was encumbered with heavy baggage—a valise—needed assistance in boarding the train, which not being afforded by any of the railroad employes, her husband, the plaintiff, undertook to carry her valise on the train for her, and in leaving the train, while it was in motion, fell or was thrown to the ground, thereby sustaining the injuries complained of. At the close of the testimony on the part of the plaintiff the defendant moved for a nonsuit upon the ground that there was no testimony tending to show any negligence on the part of the defendant company. The motion was refused by his honor, Judge Klugh, saying: "The testimony is that the plaintiff made known his wish to the conductor (that is, his wish to get off the train); that the conductor, the agent of the railroad, told him to get off. That tends to show—I don't say it shows—negligence, but it is a question which must go to the jury, whether that was negligence of the company or not." The defendant then introduced its testimony, and after the charge of the circuit judge, which, it seems to us, was entirely correct, and eminently fair to both parties, the case was submitted to the jury, who returned a verdict in favor of the plaintiff for six hundred dollars, and judgment was entered thereon. From this judgment the defendant gave notice of appeal, basing the same upon four exceptions; but as two of them—the second and third—were abandoned, and very

properly abandoned, at the hearing, it is only necessary to state and consider the first and fourth exceptions.

The first exception imputes error to the circuit judge in refusing the motion for a nonsuit. This turns upon the ²⁰⁶ question whether there was any evidence tending to show negligence on the part of the defendant company from which the injuries complained of resulted. While it is true that the evidence did not tend to show that the plaintiff was a passenger, and, hence, that the defendant company owed plaintiff no duty as such, yet it is equally true that the evidence did tend to show that plaintiff went to the train for the purpose of assisting his wife, who was encumbered with heavy baggage, to board the train as a passenger; that the wife needed assistance in boarding the train, and none being offered or rendered by any of the railroad officials, it became necessary for the plaintiff, her husband, to render the assistance necessary; that for this purpose he took his wife's heavy valise and went up the steps of the second-class car for which his wife had a ticket; that as soon as he reached the platform he felt the train moving, and called to his wife to take the valise, so as to let him get off the train; that she took the valise and the plaintiff went down the steps as quick as he could, saying to the conductor, who was standing on the front steps of the first-class car, that he wanted to get off; when the conductor told him to get off while the train was in motion, and that in doing so he fell or was thrown to the ground, whereby he sustained the injuries complained of. It is not and cannot be denied that such was the purport of the testimony on the part of the plaintiff, which was, of course, the only testimony before the court when the motion for a nonsuit was made. The question, then, is, Did this testimony tend to show negligence on the part of the defendant? This depends upon the inquiry whether the defendant company owed the plaintiff any duty, and if so, what, under the circumstances. There can be no doubt that a female holding a ticket entitling her to transportation as a passenger on a railroad train, if feeble, or encumbered with heavy baggage or other impediments, is entitled to have assistance in boarding the train, and if the same is not afforded by the railroad officials or servants, her husband ²⁰⁷ or other escort may render her the necessary assistance, and for this purpose is entitled to enter the train, and is entitled to a reasonable time to leave the train before it is put in motion. Both reason and authority unite in sustaining this proposition; and, indeed, we do not understand that it is denied in this case,

if accompanied with the proviso that the defendant or its agents have notice of the purpose for which such person enters the train. Accepting the proposition with this proviso, we think it clear that there was some testimony—whether sufficient or not is not the question under a motion for nonsuit—tending to show that defendant neglected to perform its duty to the plaintiff in not allowing him a reasonable time to leave the train which he had started to enter for the purpose of assisting his wife; for the evidence on the part of the plaintiff tends to show that the conductor was standing on the front steps of the first-class car, near enough probably to hear the wife tell her husband to bring in her baggage, as she was going up the steps of the second-class car, and that plaintiff, as soon as he discovered that the train was in motion, informed the conductor that he wanted to get off, and was told by him to get off, although the train was then in motion. This testimony, if true—and that was a question for the jury—certainly tended to show negligence in the performance of the duty which defendant owed plaintiff, under the circumstances stated. It is contended, however, for the appellant that, according to this testimony, the conductor had no notice of plaintiff's wish to get off the train until after it had started. Even if this view of the testimony should be accepted, we do not think it would relieve the defendant from the charge of negligence; for the evidence was that the train, being behind time, stopped for a very short time—about half a minute, as one of plaintiff's witnesses estimated; and if the conductor had started his train after such a very short time, and was then notified that the plaintiff desired to get off the train, he could and should have stopped his train, to enable this old man, ²⁰⁸ sixty-five years of age, to get off the train, especially as the testimony tended to show that the train had not stopped long enough to allow the plaintiff time to get off before it started. Besides, if the conductor was standing near where the wife of the plaintiff got on the train—and that was a question of fact for the jury—the jury might have inferred from the testimony that he was near enough to see and hear what passed between plaintiff and his wife, as she was getting on the train, and if so, that was sufficient to give him notice that the plaintiff merely got on the platform of the second-class car to assist his wife with her baggage and wanted to get off before the train started. We do not think, therefore, that there was any error in refusing the motion for a nonsuit.

The only other exception is the fourth, which reads as fol-

lows: "Because the presiding judge erred as matter of law in charging that 'a railroad company is liable for injuries to persons lawfully in its cars, caused by a certain jolting or jerking of the same, if such jolting or jerking were due to the negligence and carelessness of the defendant, its servants and agents, and the injured party was not contributorily negligent,' because it was not alleged in the complaint that the negligence of defendant was caused by any 'jolting or jerking,' and there was no proof that such jerking or jolting was due to any negligence on the part of the defendant, and said charge was not applicable to the case at bar." It will be observed that the correctness of the legal proposition contained in the charge is not impugned; but the error is alleged to lie in the fact that there was no allegation in the complaint "that the negligence of defendant was caused by any jolting or jerking, and there was no proof that such jerking or jolting was due to any negligence on the part of the defendant," and hence said charge was inapplicable to the case. In the seventh paragraph of the complaint there is a general allegation that the defendant "negligently and carelessly started the train"; and if the defendant desired any more specific allegation of negligence ²⁰⁰ in starting the train—as, for example, in starting the train with a jolt or jerk—the defendant had a right to move the court to make the complaint more specific in its allegations; and not having done so, it is too late now to avail itself of such an exception. As was well said by Mr. Justice Gary, in delivering the opinion of the court, in *Spires v. South Bound R. R. Co.*, 47 S. C. 30: "When a complaint is general in its allegations of negligence, and the defendant desires to know upon what particular acts of negligence the plaintiff relies to sustain his action, it is the duty of the defendant to make a motion to have the complaint made more definite and certain; and when this is not done, the plaintiff has the right to introduce any competent evidence tending to show negligence on the part of the defendant." Accordingly, in this case the plaintiff was allowed to testify, without objection, that as he was about to get off, "the train either ran over a joint or made a jerk, and I fell." So that the charge was applicable to the pleadings and the evidence. The other branch of the exception—that "there was no proof that such jerking or jolting was due to any negligence on the part of the defendant"—is fully disposed of by the terms of the charge, in which the circuit judge was careful to say: "If such jolting or jerking was due to the negligence and carelessness of the defendant, its

servants and agents"; so that if there was no evidence of any negligence, the defendant could not possibly be injured by such a charge.

Counsel for appellant, in his argument, has urged another objection to this charge, which is not indicated in the exception, and is not, therefore, properly before us. But even if it were, it could not avail the defendant. It is contended that the vice in the charge was the failure of his honor to distinguish "between the case of a person in the car in a position of safety and the case of the plaintiff who, at the time of the alleged jerk, was in a position of danger on the bottom step of the car, and in the act of trying to get off a moving train"—it should be added, getting off by the direction of the conductor, as the plaintiff testified. In the first ²¹⁰ place, it does not appear that any such distinction was brought to the attention of the circuit judge either by request to charge or otherwise; and, in the second place, the matter was brought to the attention of the jury by the concluding words, "and the injured party was not contributorily negligent." The fourth exception is overruled.

The judgment of this court is that the judgment of the circuit court be affirmed.

RAILROAD COMPANIES—PASSENGERS—ESCORTS AS PASSENGERS.—Where one enters a railway train merely to render necessary assistance to a passenger, in conformity to a practice approved or acquiesced in by the carrier, upon its implied invitation, and with knowledge of his purpose, it is bound to hold the train a reasonable time to enable him to render such service and to leave the car: *Little Rock etc. Ry. Co. v. Lawton*, 55 Ark. 428; 29 Am. St. Rep. 48, and monographic note thereto. See, also, *Evansville etc. R. R. Co. v. Athon*, 6 Ind. App. 295; 51 Am. St. Rep. 303; *Railway Co. v. Salzman*, 52 Ohio St. 558; 49 Am. St. Rep. 745.

RAILROAD COMPANIES—PLEADING—NEGLIGENCE—EVIDENCE.—Negligence may be charged in general terms; and if the defendant desires a more definite statement of the facts, his remedy is by motion to make the complaint more specific, and not by demurrer: *Ohio etc. Ry. Co. v. Walker*, 113 Ind. 196; 3 Am. St. Rep. 638; *Madden v. Port Royal etc. Ry. Co.*, 35 S. C. 381; 28 Am. St. Rep. 855; *Mississinewa Min. Co. v. Patton*, 129 Ind. 472; 28 Am. St. Rep. 203. When an accident has occurred, and an action is on trial to recover damages for injuries sustained thereby, and the accident is alleged to have been the result of negligence, proof of any facts and circumstances attending the accident is competent and proper: *Illinois Cent. R. R. Co. v. Slater*, 129 Ill. 91; 16 Am. St. Rep. 242; *Davis v. Guernier*, 45 Ohio St. 470; 4 Am. St. Rep. 548.

MAULDIN v. CITY COUNCIL.

[53 SOUTH CAROLINA, 285.]

POLICE POWER—UPON WHAT OPERATES.—The police power, when the public health, public morals, and the public safety or other public purpose is concerned, operates directly upon the person or property of the citizen so as to require that such person or property shall not prove injurious to other citizens, and it may be invoked although the first named citizens are not at fault.

JUDGMENTS—RES JUDICATA.—A judgment of a court of competent jurisdiction directly on the point is res judicata between the same parties upon the same matter directly in question in another court, while a judgment of a court of exclusive jurisdiction directly upon the point is res judicata of the same matter between the same parties coming incidentally in question in another court for a different purpose, but the judgment of neither court is conclusive of any matter which comes collaterally in question, nor of any matter to be inferred only by argument from the judgment.

JUDGMENTS—RES JUDICATA.—To make out the defense of res judicata the subject matter of the judgment set up must be the same, and it must be between the same parties or their privies, and the precise point must have been determined.

CONSTITUTIONAL LAW—STREET ASSESSMENTS.—A statute authorizing a city council to tax the lotowners abutting on a certain street between specified limits for two-thirds of the cost of improvements is unconstitutional and void.

J. A. McCullough and J. P. Cary, for the appellant.

Haynesworth, Parker & Patterson, for the appellee.

287 POPE, J. This action was begun in the court of common pleas for Greenville county, on the first day of September, 1896, to obtain a perpetual injunction restraining the defendant, the city council of Greenville, from levying and collecting an assessment of two-thirds of the cost for laying a sidewalk on each side of Main street, from Reedy river to North street, from those owners of real estate which abutted on said Main street, within the limits above stated, on the ground that the act of the legislature of this state, approved in the year 1891 (see 20 Stats. at Large, 1372), was unconstitutional on the several grounds set up in the complaint. The answer denied that the act in question was unconstitutional, or that there was any failure on the part of the city council that rendered the assessment null and void; or that the plaintiff could controvert the constitutionality of the act in question by reason of the fact that as to him the judgment of this court, as found in the case of Mauldin v. City Council, 42 S. C. 293, 46 Am. St. Rep. 723 (affirming its constitutionality), was res judicata.

The cause came on to be heard before his honor, Judge Watts, upon exceptions to the report of Master Verner, and by Judge Watts' decree it was held that the defendant should be enjoined and restrained from levying the assessments against the plaintiff and other property-owners on Main street for two-thirds of the costs of improvements to the sidewalks and drains.

From this decree the defendant now appeals on eighteen exceptions. There have been two hearings had in this court. On the first, when the argument was finished in this court, an order was passed directing a reargument, with leave to counsel to question "the correctness of the former decision in this case, as reported in 42 S. C. 293, so ²⁸⁸ far as it holds that the city council has power to assess the property of any taxpayer to pay the 'costs of the improvements to the sidewalks and drains fronting their respective lands.'"

The appellant relies upon the police power to sustain the constitutionality of the assessments made by the city council of Greenville against the plaintiffs for the cost of the sidewalks and drains recently improved by the city council of Greenville, and paid for by the said city council out of the general funds of the municipality. Quite recently, in the two cases of the Cornelia Real Estate Co. v. City Council, and Stehmeyer v. City Council, 53 S. C. 259, this court has, with great patience, endeavored to show that the police power, where the public health, the public morals, and the public safety are concerned, operates directly upon the persons and property of the citizen, so as to require that such person or property shall not prove injurious to other citizens, and then, also, such police power is made to operate upon persons and property when the citizen is not at fault, but to further a public purpose; and when, to accomplish the furtherance of a public purpose, the person or property is taken from the citizen or citizens by taxation or the right of eminent domain, that in such cases the right to tax or the right of eminent domain must be exerted in accordance with the provisions of the constitution, adopted in the year 1895, which are therein ordained to regulate taxation or the right of eminent domain. The grounds for these conclusions of this court on the police power need not be produced here, inasmuch, as before remarked, this court has so recently embodied its conclusions on this subject in the two cases just quoted.

But independently of the exercise of the police power, the appellant, the city council of Greenville, seeks on two other grounds to sustain the assessment of these lotowners for the cost

of improvement of the sidewalks ²⁸⁹ and drains in front of their property, respectively: 1. It is insisted that this question is *res judicata* as to W. L. Mauldin; and 2. That such an assessment is perfectly consistent with the provisions of our present constitution. Let us examine these positions in their order. Is the decision of the case of *Mauldin v. City Council*, 42 S. C. 293, 46 Am. St. Rep. 723, controlling as *res judicata* of the question now presented by the case at bar? We uphold the doctrine of *res judicata* as it is presented in *Hart v. Bates*, 17 S. C. 35, namely: "The doctrine of *res judicata* is very far-reaching and effective. It is founded on principles of the wisest policy, because the peace and order of society require that a matter that is once litigated should not again be drawn in question between the same parties or those claiming through them. But while it is important to maintain the principle in all its integrity, it is not less important that it should be clearly defined and kept within its proper limits. All agree as to its utility and necessity, but there has been a difference of opinion as to its precise limits and its application in particular cases. As we understand it, the rule established in the *Duchess of Kingston's* case, is: 1. That the judgment of a court of competent jurisdiction directly on the point, is, as a plea in bar or as evidence, conclusive between the same parties upon the same matter directly in question in another court; 2. That the judgment of a court of exclusive jurisdiction directly upon the point is in like manner conclusive upon the same matter between the same parties coming incidentally in question in another court for a different purpose. But neither the judgment of a concurrent or exclusive jurisdiction is evidence of any matter which comes collaterally in question, though within their jurisdiction, nor of any matter incidentally cognizable, nor of any matter to be inferred by argument from the judgment': 2 *Smith's Land Cases*, 424, and notes. It seems, therefore, to make out the defense at least three things are necessary: the parties must be the same or their privies; the subject matter must be the same; ²⁹⁰ and the precise point must have been ruled." We may remark at the beginning that the present action was commenced by W. L. Mauldin for himself and such others in like plight with himself who would elect to come into this suit, and that by a consent order passed in the case at bar, Theron Earle, James McPherson, W. C. Gibson, and others did come in under such invitation. Each of these parties hold their property separately from each other, and are not privies of W. L. Mauldin. So, therefore, it

would seem that even if W. L. Mauldin was bound by the former judgment, under the doctrine of *res judicata*, his coplaintiffs are not so bound. But is W. L. Mauldin precluded from this suit by the former adjudication? In the former suit W. L. Mauldin sought to enjoin the city council of Greenville from levying an assessment upon his property on Main street to pay for the cost of an improvement to the street (Main) running in front of his property, but in praying for an injunction against the assessment upon his property because of the improvement to the street, he also prayed that the city of Greenville should be restrained from levying an assessment on his property to improve the sidewalk and the drain in front of his property. So, therefore, the judgment of this court, composed as it was then of the present chief justice and Mr. Justice Pope (for Mr. Justice Gary did not sit in that case), was in these words: "It is, therefore, the judgment of this court that so much of the judgment of the circuit court as grants a perpetual injunction against the defendants, preventing any assessment upon the property of the plaintiff and other citizens of the city of Greenville in like plight as the plaintiff, to pay for the cost of improving the roadway of Main street in said city, be affirmed; but where the said judgment enjoins the defendants from levying and assessing upon the plaintiff and others in like plight with him the cost of the improvements to the sidewalks and drains fronting their respective lands, it be reversed." The plaintiff seeks to show that although such was the judgment of this court in the previous case, yet that judgment ²⁰¹ referred to the status of the parties in the year 1893, and that since that time, to wit, in the year 1896, the city council of Greenville has caused its engineer to relocate both the sidewalk and drain, claiming to act under the act of the legislature passed in the year 1891, and also by virtue of sundry resolutions passed by the said city council of Greenville, whereby they required the taxpayers in question to pay of the cost of such improvements and drains, so that each of such taxpayers would pay one-third of the cost of sidewalks and drains in front of his property, and also one-third of the cost of such improvements of the sidewalk and drain on the opposite side of the street, thus making each taxpayer who owns land on Main street pay two-thirds of one-half of the aggregate cost of such sidewalks and drains on both sides of such street so improved.

It is thus hoped by the taxpayers in question that the doctrine of *res judicata* may be avoided. This matter thus presented is

not free from difficulty, but we much prefer not to be misled by any apparent avoidance of the former decision, so far as sidewalks and drains are concerned. The two justices who rendered the former decision confessed with candor that so much of their judgment as related to sidewalks and drains was reluctantly made because of some previous decisions rendered while the constitution of 1790 was of force, and not because, in their opinion, such previous decisions were bottomed upon correct principles of law. The two justices in question felt a reluctance to overrule such decisions; but now, when the court is full, we propose to go to the root of the matter, and if it becomes necessary to destroy the former decision, as found in *Mauldin v. City Council*, 42 S. C. 293, 46 Am. Rep. 723, so far as sidewalks and drains are concerned, to do so. It must be borne in mind that the constitutions of 1787 and 1790 contained no restriction upon the power of the general assembly in the matter of taxation than that which ordained: "No freeman of this state shall be taken or imprisoned, or exiled or disseised of his freehold, liberties, or privileges, or outlawed or exiled, ²⁰² or in any manner destroyed of life, liberty, or property, but by the judgment of his peers or by the law of the land." So that whenever the general assembly itself, or any municipal corporation created by it and clothed by it with power, should desire and ordain the payment of a tax by the citizens, it was only necessary that the provisions of section 2 of article 9 of the constitution of 1790 (which we have partly quoted) should not be violated. Under previous legislation which had been continued of force, the citizens of the city of Charleston were required to pay for sidewalks and drains fronting their premises; therefore, under these wholesome provisions and "by the law of the land," these improvements in the city of Charleston as to sidewalks and drains were held by the courts to be constitutional. But by the constitutions of the years 1868 and 1895 very radical changes were made in the subject of taxation. It was no longer left to the general assembly or its municipalities to tax as they pleased. All taxes were required to be levied according to the value of the property, real and personal. All persons and property were required to be taxed uniformly. Whenever any property was exempted from taxation, it was specifically named in the constitution itself. The assessments of the value of property for taxation were required to be made in anticipation of the laying of taxes. Great care was taken in providing that taxes, as laid by the state, should be for public purposes, and by muni-

icipal corporations that taxation should be for corporate purposes. Taxes for municipalities were required not to exceed eight per cent of taxable property. It is true, municipalities were allowed to tax, by a graduation tax, incomes, and to impose a graduated tax on occupations and business. By section 5 of article 10 in the constitution of 1895, the general assembly was required to compel municipal corporations to exact a tax on all the property, except that specially exempted under the constitution, for corporate purposes, and for the payment of debts contracted under authority of law. We thus see what strides the organic ²⁰³ law of the state has made in regulating this power of taxation by the state and her municipalities. What a public purpose is to the state, a corporate purpose is to the municipality. It is the same thing in each, being differently named, so as to emphasize the difference in territorial limits. In *Loan Assn. v. Topeka*, 20 Wall. 655, Mr. Justice Miller very ably discussed the necessity in a tax, that it could only be legally laid for a public purpose. It is admitted that an effort is made by some persons to justify the imposition of a special assessment, as they are called, by claiming that such assessments are made for specific divisions of corporate territory, so that certain streets are called tax districts; but it is enough for our purpose to say that in our constitution no power is given to the general assembly to carve the territory of the state into special tax districts for state taxation except into counties, townships, school districts, cities, towns, and villages; and what is denied under the constitution to the general assembly for state purposes is equally denied to chartered cities, towns, or villages, in dividing up such cities, towns, or villages, as the case may be, into separate tax districts to answer corporate purposes. Wherever there is a public or corporate purpose, the whole property of the city, town, or village must be taxed to subserve such public or corporate purpose. It is admitted everywhere that a public highway belongs to no one citizen or set of citizens, to the exclusion of other citizens—it belongs to the public, and the public should keep it in repair. Navigable streams are always open to the public as highways. Sidewalks are, after all, nothing but a part of the highway or roadway. The highway is for vehicles and for men and animals to use whenever they see proper. So with sidewalks—all pedestrians may use them without let or hindrance; they belong to the public. The same argument that would convert a highway into a taxing district would convert a sidewalk into one, and vice versa. As well

might it be demanded that inasmuch as a state house or a courthouse or a state college happens to be located nearer the ²⁹⁴ property of some citizens than others (as must be the case), therefore such persons living nearest each of these must be responsible for a larger proportion of the expense of their construction than all other citizens. Such is not the law, and has never been the law, because opposed to common sense. W. L. Mauldin, James McPherson, and Theron Earle had good, hard-paved sidewalks in front of their respective lots on Main street, in the city of Greenville. Both Mauldin and McPherson had taken the pains, before laying their sidewalks, to confer with the city authorities and locate the same on the grade required by said city authorities. But when the latter saw proper to regrade the roadway of Main street, the result was that these sidewalks in front of the lots owned by Mauldin, McPherson, and Earle were either too high or too low with reference to the new roadway. Hence, the city council saw proper to regrade the sidewalks and lay afresh an improved pavement on the sidewalk. For this, for the distance of one hundred and five feet, Mauldin was required to pay one hundred and seventy-four dollars and fifty cents. Now, look at this proposition. Mauldin had, prior to the year 1896, under the direction of the city authorities, constructed a sidewalk and drain in front of his property, which sidewalk and drain comported with the grade of said Main street up to the year 1893. But the city authorities determined to improve Main street as a roadway by changing the grade, because thereby it facilitated public travel over said street, and such improvement was completed. Then the city council concluded to improve the sidewalks, so that the grade of the same, when paved, should be in keeping with the newly-graded roadway on Main street, and to do this they assess two-thirds of the cost of the same upon the said W. L. Mauldin for his one hundred and five feet frontage on Main street. Was this not all required for the benefit of the public? Who would be responsible for any damages to the pedestrian which might occur by reason of this defective sidewalk? Certainly not W. L. Mauldin, or McPherson, or Theron Earle, if such damages occurred on the pavement in front of their respective lots. ²⁹⁵ In *Mauldin v. City Council*, 42 S. C. 293, 46 Am. St. Rep. 723, this court had announced that this state has repudiated, and still continues to repudiate, the doctrine of supposed benefit to owners of lots of land abutting on public streets in levying taxes, and we are now satisfied that such former decision, where it upheld

assessments made upon owners of lots abutting on streets where improved sidewalks and drains are constructed, was wrong, and should be reversed, as opposed to our present constitution. Such conclusion on our part renders it unnecessary that we should pass upon any other questions raised by this appeal.

It is, therefore, the judgment of this court that the judgment of the circuit court be affirmed.

Mr. Justice Jones dissents.

POLICE POWER—UPON WHAT OPERATES.—The police power of the state extends in the direction of so regulating the use of private property, or of so restraining personal action, as manifestly to secure, or to tend to the comfort, prosperity, or protection of the community: *People v. Ewer*, 141 N. Y. 129; 38 Am. St. Rep. 788; *Meadowcroft v. People*, 163 Ill. 56; 54 Am. St. Rep. 447; *Chicago etc. R. R. Co. v. State*, 47 Neb. 549; 53 Am. St. Rep. 557, and note; *Morris v. Columbus*, 102 Ga. 792; 66 Am. St. Rep. 243.

JUDGMENTS—RES JUDICATA.—It is true that a fact once decided shall not be again disputed between the same parties; but the fact must be established by a final judgment; it must have been in issue under the pleadings, and must also have been actually litigated and determined; it must be identical with the fact sought to be established in the second action; and the identical persons between whom the fact was adjudicated, in the same right or capacity, or their privies claiming under them, must be the parties to the second action: *Fuller v. Metropolitan Life Ins. Co.*, 68 Conn. 55; 57 Am. St. Rep. 84; *Morrison v. Clark*, 89 Me. 103; 56 Am. St. Rep. 895; *White v. Sherman*, 168 Ill. 589; 61 Am. St. Rep. 132. As to what issues a judgment is conclusive on the parties in a subsequent litigation, see *Short v. Taylor*, 137 Mo. 517; 59 Am. St. Rep. 508. As to what facts are not *res judicata*, see monographic note to *Lea v. Lea*, 96 Am. Dec. 775.

CONSTITUTIONAL LAW—STREET ASSESSMENTS—TAXATION.—Taxation for either state or municipal purposes must be equal and uniform upon all persons and property within the state, or within the municipality: *Mauldin v. City Council*, 42 S. C. 203, 46 Am. St. Rep. 723. A statute, authorizing the expense of paving the roadbed of a city street, to be assessed in the proportion of two-thirds on the property abutting on the street, and the remaining third on the public at large, is unconstitutional: *State v. Mayor etc.*, 37 N. J. L. 415; 18 Am. Rep. 729. See, also, *Seeley v. Pittsburg*, 82 Pa. St. 360; 22 Am. Rep. 760; *Thomas v. Gain*, 35 Mich. 155; 24 Am. Rep. 535; *Washington Avenue*, 69 Pa. St. 352; 8 Am. Rep. 255; *Howell v. Tacoma*, 3 Wash. 711; 28 Am. St. Rep. 83. On the general question of taxation, see *In re Madera Irr. Dist.*, 92 Cal. 296; 27 Am. St. Rep. 106.

CAIN v. CAIN.

[53 SOUTH CAROLINA, 350.]

COTENANCY — RENTS AND PROFITS—ACCOUNTING.— An occupying cotenant may limit his accountability for rents and profits by showing the amount actually received, but if he fails to do this, it may be shown by speculative testimony what he has probably received, and evidence of the fair rental value of the premises is admissible for this purpose.

COTENANCY — ACCOUNTING—SETOFF.—In an equitable accounting between cotenants for rents and profits received by the tenant in possession he may set off against such rents and profits the increased value of the premises resulting from improvements put thereon by him.

COTENANCY — RENTS AND PROFITS—ACCOUNTING—PARENT AND CHILDREN AS COTENANTS.—In an equitable accounting between cotenants for rents and profits, the father, as occupying cotenant, is not required to account for rents and profits used in maintaining his minor children, who reside on the common property and are his cotenants.

COTENANCY—RENTS AND PROFITS—ACCOUNTING.—In case the cotenant in possession cultivates or uses the common property in excess of his share, and takes or appropriates the proceeds or use, he is accountable to his cotenant for the net profits arising from such use.

COTENANCY—RENTS AND PROFITS—ACCOUNTING —TORTIOUS POSSESSION.—When the possession of the occupying cotenant is tortious, he is chargeable, not with what rents and profits he actually received or took, but with what he ought to have received, namely, the rental value.

COTENANCY — RENTS AND PROFITS—ACCOUNTING—PEACEABLE POSSESSION.—If the possession of the occupying cotenant is not tortious, it is essential that he take or receive more than his just share of the proceeds or products of the common property, in order to render him liable to account to his cotenant, in the absence of agreement, express or implied.

ADVANCEMENTS.—A VESTED REMAINDER in real estate is the subject of an advancement.

ESTATES IN REMAINDER.—The value of a vested estate in remainder is the difference between the value of the estate in fee and the value of the life estate.

ESTATES IN REMAINDER—VALUE.—An estate in remainder after a life estate may be valued at one-half of the value of the fee.

ADVANCEMENTS — PURCHASE MONEY AS AFFECTING.—Although a tenant for life furnishes part of the purchase money of a tract of land agreed to be conveyed to such life tenant with remainder to his heirs, this fact cannot affect the question of advancement to such heirs of the remainder of the value of the land.

Wilcox & Wilcox, for the appellants.

Woods & Shipp and J. P. Neill, for the appellee.

351 JONES, J. Plaintiffs bring this action for partition of land, an accounting for rents and profits, and to have certain of

the defendants to account for advancements. Sarah E. Cain died intestate in June, 1883, seised of one of the tracts of land described in the complaint, leaving as her heirs-at-law her husband, T. C. Cain, and the plaintiffs, Charlton and Sallie Cain, her children. T. C. Cain and the plaintiffs, who are still minors, lived on and received their support from the land until February, 1888, when T. C. Cain married the defendant, Hattie C. Cain. The family, including the plaintiffs, continued to reside on the place and to derive their support therefrom until the death of T. C. Cain, in 1896. Hattie C. Cain became administratrix of T. C. Cain. Four of the defendants are minor children of T. C. Cain by his second wife, Hattie. A few days before his death T. C. Cain conveyed a tract of land, said to be worth sixteen hundred dollars, to his wife, Hattie C. Cain, for life, and at her death to her said four children. Plaintiffs now seek an accounting by the administratrix of T. C. Cain for rents and profits of the tract inherited from Sarah E. Cain, from the death of Sarah E. Cain in 1883 to the death of T. C. Cain in 1896, and an accounting by the four children of Hattie C. Cain for the value of their estate in remainder in the tract conveyed to them by T. C. Cain just before his death.

The special referee to whom the case was referred held the administratrix accountable for two-thirds of the rents ³⁵² and profits received by T. C. Cain for twelve years, at ninety dollars per year, that sum, according to the testimony, being about the rental value of the premises. In reaching this result the referee admitted and considered the testimony as to the rental value of the land. The circuit court held that the referee erred in this, and that he should have held the administratrix accountable for only the value of the rents and profits actually received. We think the circuit court misunderstood the ruling of the referee in this regard, as the referee's report clearly shows that he held the administratrix of the occupying tenant accountable only for rents and profits received. The evidence as to the rental value of the premises occupied and cultivated was admitted and considered merely as tending to establish the value of the rents and profits received, in the absence of any definite showing by the administratrix as to the actual receipts. Under such circumstances, the evidence was admissible. If the occupying tenant wishes to limit his accountability to rents and profits actually received, it is his privilege to show what he has received; but if he is unwilling or unable to make such showing, it is competent to show by speculative testimony what he has

probably received. Under ordinary conditions, it is probable that a fair rental value of premises will closely approximate the value of rents received in case of a lease to third persons, or the value of the net profits received in case the occupying tenant cultivates the land himself and takes and appropriates the products thereof.

We agree, however, with the circuit court in holding that the referee erred in charging the occupying tenant with one thousand and eighty dollars, as the amount of rents and profits received. It is true, this sum represents the rental value of the premises for twelve years, as estimated by several witnesses, but it also appeared in evidence that this rental value was due in part, at least, to the fact that T. C. Cain, the occupying tenant, had made improvements on the common property, clearing some eighteen acres, building barns, ³⁵³ et cetera. At an early period in this state the rule was stated to be that the occupying tenant was liable for the rents and profits received of so much of the premises as was capable of producing rent at the time he took possession, but was not liable for what was rendered capable by his labor, so that he was not charged with rents and profits received from land cleared and put in cultivation during his occupancy: *Thompson v. Bostick*, 1 McMull. Eq. 75; *Hancock v. Day*, 1 McMull. Eq. 69; 36 Am. Dec. 293; *Holt v. Robertson*, 1 McMull. Eq. 475; *Valentine v. Johnson*, 1 Hill (S. C.), 49. This was upon the theory that, as the occupying tenant could not as matter of right charge for improvements made without the consent of his cotenants, it would be inequitable to charge him with rents and profits resulting therefrom. But the rule is now established in this state that in an equitable accounting for rents and profits, the occupying tenant may be allowed, as a setoff against rents and profits received, not the cost of the improvements made by him, but the increased value of the premises resulting from such improvements, provided the circumstances are such as to render it an obvious hardship to deprive him of it; and provided further, that the allowance for such improvements may be made consistently with the equity of the cotenant: *Johnson v. Harrelson*, 18 S. C. 604; *Buck v. Martin*, 21 S. C. 592; 53 Am. Rep. 702; *Johnson v. Pelot*, 24 S. C. 264; 53 Am. Rep. 253. In such equitable accounting "the rents and profits shall be regarded as paid and discharged pro tanto by the increased value which may have been imparted to the premises by the improvements": *Sutton v. Sutton*, 26 S. C.

33; quoted with approval in *Tribble v. Poore*, 28 S. C. 565. While the testimony does not show specifically the value of the improvements, there was general testimony by Mrs. Cain to the effect that, after supporting the family, including the plaintiffs, T. C. Cain put what money he made back on the place in improvements, fertilizing, building barns, et cetera. The referee erred in not ascertaining the value which the improvements imparted to the premises, and in not deducting the same from the rents and profits actually received by T. C. Cain. In this connection ³⁵⁴ the referee should ascertain and report what amount of the rents and profits T. C. Cain received, took, or appropriated in excess of his share.

The testimony shows that while T. C. Cain cultivated the tillable land, yet the plaintiffs occupied with him the common dwelling-house, and received their support from the products of the farm. The referee seemed to think that, since it is the duty of a father to support his minor children, no account should be taken so much of the farm products as went to the support of the plaintiffs; but this case is not one involving the liability of a father to support his minor children, but is an equitable accounting for rents and profits received among cotenants; and it would be inequitable to make the father, under the circumstances of this case, account for the whole rents and profits of the farm as received by him, when the children resided with him as a family on the common property and received their support therefrom. The land held in common seems to have been the main, if not sole, reliance for the support of the family. But whatever of the rents and profits T. C. Cain received and appropriated to himself in excess of his share, to the exclusion of plaintiffs, he should account for.

By the common law, one tenant in common, in the absence of an agreement, express or implied, could not require his cotenant to account for receiving more than his share of the rents or use of the common property. But, by statute 4 and 5 Anne, chapter 16, one cotenant was allowed an accounting against his cotenant "for receiving more than comes to his just share or proportion." The courts of England and many of the states of this Union have held that this statute is confined to cases where rents have been received from a third person, and has no application to cases wherein the occupying tenant has cultivated the land and appropriated to himself the products. Hence, authorities elsewhere are numerous to the effect that an occupying tenant is not liable to account to his cotenant ³⁵⁵ for the products

of the common property which he appropriates to his own use: See 3 Leading Cases on American Law of Real Property, 93; note to *Griswald v. Johnson*, 5 Conn. 363, and note to *Ward v. Ward*, 52 Am. St. Rep. 924. But the courts of equity in this state grant relief to cotenants beyond the statute of Anne or statutes of similar import. It is the settled law of South Carolina that the occupying tenant is not only liable to account for rents of the common property received from others in excess of his share, but in case he cultivates or uses the common property in excess of his share, and takes or appropriates the proceeds or use, he is accountable to his cotenant for the net profits arising from such use. This is the rule of accountability when the possession of the occupying tenant is not tortious; when, however his possession is tortious, he is chargeable, not with what he actually received or took, but with what he ought to have received, viz., the rental value: *Jones v. Massey*, 14 S. C. 309; *Thompson v. Peake*, 38 S. C. 454. But to make the rule stated applicable to the present case, where the cotenants all occupy the dwelling-house of the common property, and all receive their support from the proceeds of the farm, it should be shown that T. C. Cain appropriated to himself more than his share of the proceeds of the farm, and for that excess he should account. Under the authorities in this state, to take the net profits arising from the occupying tenant's cultivation of more than his share of the common property, is to receive the "rents and profits" thereof: *Jones v. Massey*, 14 S. C. 309; *Thompson v. Bostick*, 1 McMull. Eq. 75. But in every case where the possession of the occupying tenant is not tortious, it is essential that the occupier take or receive more than his just share of the proceeds or products of the common property, in order to render him liable to account to his cotenant, in the absence of agreement, express or implied.

As to the matter of advancements. The circuit court ought to have ruled on this question, but did not. The referee decided against the claim for advancements. He ³⁵⁶ held that "no advancement has been shown for the purpose of this case. A future interest to the children is only shown, and which they may never actually enjoy. The life tenant has been given only a life estate. The nature of the estate conveyed and the estate descended is so different, that I know of no rule by which to determine the value of the alleged advancement. Advancements are purely statutory, and I have been furnished no authority for applying by analogy the rule for estimating dower interest. Besides, a large part of the original purchase money was fur-

nished by the life tenant on condition of this conveyance to herself and children." We do not think the claim for advancements can be rejected on the grounds stated by the referee, and as the case must go back to the referee, the question of advancements must also be reconsidered by him. A vested remainder in real estate is clearly the subject of an advancement; for while the possession is in futuro, such a remainder is a present and fixed interest in the seisin and property: *Hughey v. Eichelberger*, 11 S. C. 36; 1 Ency. Law, 766. In the case of *Hughey v. Eichelberger*, 11 S. C. 36, where the donor reserved the right to use, occupy, and enjoy the land, and even to revoke the gift, the land, on the death of the donor intestate, was held to be an advancement. In this case, there is no contingency which might defeat the estate given the children in remainder. Such an estate being the subject of advancement, is, of course, capable of valuation. The value of the estate in remainder is the difference between the value of the estate in fee and the value of the life estate. In the absence of the adoption in this state of any table of life annuities, we see no good reason why the rule, which experience has approved, of assessing the one-sixth of the fee-simple value of the estate in money, in lieu of the widow's dower, or life estate in one-third, may not be adopted in estimating as an advancement the value of an estate in remainder after a life estate. If a life estate in one-third is valued at one-sixth of the fee-simple value of ³⁵⁸ the whole, then a life estate in the whole, or any definite part, may be valued at one-half its fee-simple value. Hence, an estate in remainder after a life estate may be valued at one-half of the fee-simple value of the whole. It may be, in estimating the value of the life estate, as Judge Nott said, in *Wright v. Jennings*, 1 Bail. 280, in reference to assessing one-sixth of the fee-simple value in lieu of dower, that "in extreme cases of youth, on the one hand, or of age and infirmity, on the other, something more or less, according to circumstances, may be allowed." It might be more scientific to have a rule based on life expectancies and tables of annuities; but, in the absence of legislation, we prefer to follow the rule above stated, which is simple, easy of application, and approximately just.

In reference to the fact that the life tenant furnished six hundred dollars of the money with which T. C. Cain originally purchased the land under an agreement that T. C. Cain would convey the land to her and her children, we would say that this ought not to control in determining whether there was any ad-

vancement at all. The consideration expressed in the deed to Hattie C. Cain and children was sixteen hundred dollars, no part of which was paid by the grantees, except as the six hundred dollars originally furnished by Hattie C. Cain may be regarded as entering into that consideration. The remaining one thousand dollars of the original purchase money was paid by T. C. Cain; and if there was an understanding, as Mrs. Cain testifies, that the land was to be conveyed to her and the children in the manner it was done, then T. C. Cain intended to make provision for the children in the land when he bought it, and this intention he carried out in the deed executed a few days before his death. Having died intestate, if he had not conveyed this land as he did, it would have been distributable among all his heirs-at-law, subject at most to a resulting trust in favor of Hattie C. Cain, to the extent of the purchase money furnished by her. The testimony shows that the original purchase price of the land was sixteen hundred dollars, and that the land was worth that sum. If, therefore, ³⁵⁸ Hattie C. Cain furnished six-sixteenths of the purchase money on condition of a conveyance to herself and children, all the claims of equity as to the money furnished by her may be met by regarding the value of the remainder in ten-sixteenths of the land as the value of the advancement to the four children by T. C. Cain from his own estate, for which they should account. According to our statute and decisions thereon, the value of an advancement must be estimated at the time of the death of the intestate, relation being had to its condition at the time of the gift.

The judgment of the circuit court is modified so as to commit the case to the referee to take the accounting and determine the question as to advancements, in accordance with the principles herein announced.

COTENANCY—RENTS AND PROFITS—ACCOUNTING—SET-OFF.—The rights of cotenants to accruing rents, issues, and profits, from the common property do not depend upon an express contract between them: *Bates v. Hamilton*, 144 Mo. 1; 66 Am. St. Rep. 407. A cotenant in exclusive possession is not liable for use and occupation or rents and profits until after demand made therefor by his cotenants: *Leake v. Hayes*, 13 Wash. 213; 52 Am. St. Rep. 34. But in South Carolina, sole possession of property incapable of actual division or separate occupancy by one cotenant is an ouster as to the other and entitles the latter thereafter to his share of the rents and profits: *Annely v. De Saussure*, 26 S. C. 497; 4 Am. St. Rep. 725. As apparently holding the same doctrine, see *Early v. Friend*, 16 Gratt. 21; 78 Am. Dec. 649, and monographic note thereto discussing the question. Generally, and at the common law, a tenant in common who made permanent improvements could not recover from his

cotenants any part of his expenditures made for that purpose: *Cosgriff v. Foss*, 152 N. Y. 104; 57 Am. St. Rep. 500. But where a tenant makes improvements which add to the value of the common property he should be credited with the increased value when charged with rents and profits: See note to *Moon v. Jennings*, 12 Am. St. Rep. 890; *Stewart v. Stewart*, 90 Wis. 516; 48 Am. St. Rep. 949. For an elaborate discussion of the entire question of the liability of one cotenant to another for rents and profits received from, and for expenditures made upon their common property, see the monographic note to *Ward v. Ward*, 52 Am. St. Rep. 924-941.

ADVANCEMENTS — ESTATES IN REMAINDER.—That a remainder in real estate is the subject of an advancement, see *Allen v. De Groodt*, 98 Mo. 159; 14 Am. St. Rep. 626. On the general question of advancements, see the note to *Miller's Appeal*, 80 Am. Dec. 559; *Cazassa v. Cazassa*, 92 Tenn. 578; 36 Am. St. Rep. 112.

VERNER v. BOOKMAN.

[53 SOUTH CAROLINA, 898.]

JUDGMENT AGAINST AN ADMINISTRATOR ascertaining and directing the payment of a final balance against him in a suit for an accounting and settlement of the estate, is a judgment against him personally.

JUDGMENTS — RENEWAL OF MORTGAGES.—Under a statute providing that "final judgments hereafter entered in any court of record in this state shall constitute a lien upon the real estate of the judgment debtor for ten years from the date of entry, provided that the plaintiff in such judgment may at any time within three years after its active energy has expired revive the judgment with like liens as in the original for a like period," a judgment revived under the statute within three years after its active energy has expired, has, upon its revival, a continuous lien from the date of its entry, and preserves its rank of priority as against all liens existing against the judgment debtor during the period of its original active energy. Hence, a sale of land under a judgment renewed after its active energy has expired divests the lien of a mortgage executed during the active energy of the judgment.

JUDGMENTS—RENEWAL.—**SCIRE FACIAS** on a judgment must pursue the terms of the judgment as it is a continuance of the action, and must conform to the record. The authority to issue execution on a judgment is derived from the original judgment, which revived, continues its vitality with lien and other incidents from the time of its rendition.

Bachman & Youmans, for the appellants.

J. A. Muller, for the appellees.

407 JONES, J. We concur with the circuit court that the decree in the case of *Fry v. Bookman*, administrator, signed and filed September 26, 1879, and entered in the book of abstract of judgments, ascertaining and directing the payment of a final balance against the administrator, in a suit for accounting and set-

tlement of the estate, was a judgment against Carroll Bookman individually: *Rhodes v. Casey*, 20 S. C. 493.

The main question presented by this appeal is, whether this judgment of September 26, 1879, revived in favor of Mrs. H. I. Benjamin, assignee, September 23, 1892, was a lien on the mortgaged land herein, in February, 1893, when said land was sold under said judgment by the sheriff to Monteith, who subsequently conveyed to Mrs. Bookman, superior to the lien of the mortgage herein sought to be foreclosed, executed in 1885. The debt was in force. The act (15 Stats. 498) provided as follows: "Final judgments hereafter entered in any court of record in this state shall constitute a lien upon the real estate of the judgment debtor for a period of ten years from the date of entry of such judgments. . . . Provided, further, that the plaintiff in such judgment may, at any time in three years after its active energy has expired, revive the judgment, with like liens as in the original for a like period, by the service of a summons on the debtor, as provided by law, requiring him to show cause, if any he can, at the next term of the court for his county, why such judgment should not be revived; and if no good cause be shown to the contrary, then it shall be decreed that such judgment is revived according to the force, form, and effect of the former recovery." We are of opinion that a judgment, ⁴⁰⁸ revived under this act, within three years after its active energy has expired, has, upon its revival, a continuous lien from the date of its entry, and preserves its rank of priority as against all liens existing against the judgment debtor during the period of its original active energy. We cannot do better than reproduce what Mr. Justice McGowan said on this subject in *Ex parte Witte*, 32 S. C. 228, as follows: "We have always supposed that a scire facias on judgment must pursue the terms of the judgment; that it is a continuance of the action and must conform to the record; that the authority to issue an execution on a judgment is derived from the original judgment, which, revived, continues its validity with lien and other incidents from the time of its rendition: See *Ingram v. Belk*, 2 Strob. 208; 47 Am. Dec. 591; *Parnell v. James*, 6 Rich. 373; *Dougherty's Estate*, 42 Am. Dec. 326; *Irwin v. Nixon*, 51 Am. Dec. 559. In the case from 6 Rich., Judge Withers forcibly said: 'When scire facias is issued between the same parties to a judgment, it is . . . manifestly not an original proceeding, but a continuance of a former

suit. . . . If the first judgment be merged, this might greatly disturb the plaintiff's relative priority of lien, et cetera.' It seems to me that any other interpretation of the act of 1873 would necessarily result in great confusion, surprise, and injustice to parties who have been resting upon what was believed to be the acknowledged law—that diligence was rewarded, and that a judgment regularly 'revived' continues to have a lien from its original entry." In the case of *Woodward v. Woodward*, 39 S. C. 264, 39 Am. St. Rep. 716, these general views were reaffirmed, but an exception was made in the case of an innocent purchaser from the judgment debtor, and it was held that such a purchaser of the judgment debtor's land, after the expiration of the judgment's active energy, but before its revival, was not affected by the subsequent revival. But the court reiterated the principle announced in this case as follows: "It seems that the doctrine as to the effect of a revival under the circumstances stated leaves untouched the rights of the ⁴⁰⁰ parties to the judgment, and the relative rank of all liens acquired before the judgment lost its active energy, and protects only the rights of innocent third parties; in the view as stated, 'that it would be against principle, and work manifest injustice, to give it this retrospective operation so as to extinguish the intermediately acquired rights of third persons.' " The case of *Kaminsky v. Trantham*, 45 S. C. 393, does not lead to a contrary view. In that case the court held that a purchaser at a sale under a "junior" judgment, obtained after a "senior" judgment had lost its active energy, the sale being made before the revival of the senior judgment, could not refer his title to the senior judgment so as to defeat the lien of an intermediate mortgage existing before the senior judgment lost its active energy. In that case there was a very vigorous dissent by the chief justice, stressing the point that the lien of the senior judgment was continuous from its entry, because revived according to law, and that, therefore, the sale under the junior judgment was referable to the senior judgment. That case was but an application of the doctrine that the revival of a judgment within the time allowed by the act of 1873 could not relate back to the original entry, so as to defeat or affect liens and rights of purchasers created and intervening between the expiration of its original active energy and its revival. The law requires the proceeds of the sale of real estate by a sheriff to be applied "to any judgment having prior lien thereon." The real point in *Kaminisky's* case was not so much whether the Pegues or senior judgment was a continuous lien on the land

bought by Hay, but whether it was a prior lien to the lien of the junior judgment under which Hay bought. The latter judgment, while junior in point of time, was prior in point of right and lien to the Pegues judgment, because it was created after the Pegues judgment had lost its energy and before its revival; and, therefore, the sale under the junior judgment having prior lien could not be referred to the judgment, which, though senior in point of its original entry, was not a prior lien. ⁴¹⁰ In the case at bar the mortgage lien was created before, not after, the judgment lost its original energy. No liens or rights of purchasers created during the dormancy of the judgment are involved in this case. The judgment, originally senior in time and lien to the mortgage, having been revived in the time allowed by law, according to the force, form, and effect of the former recovery, its revived lien, under the act of 1873, relates back to its original entry, and so preserves its rank of lien according to the status existing when its active energy expired or was suspended. The legislature so construed the act of 1873, for in 1885 it enacted that "such (revival) lien shall not revert back to the date of the original entry of such judgment." Our conclusion renders it unnecessary to consider the other grounds of appeal.

The judgment of the circuit court is reversed.

JUDGMENTS—REVIVAL OF LIEN.—The lien of a judgment revived within the time allowed by statute, after its expiration by limitation, cannot relate back so as to defeat the title of a bona fide purchaser of the debtor's property between the date when the original judgment lien expired by limitation and the revival thereof: *Woodward v. Woodward*, 39 S. C. 259; 39 Am. St. Rep. 716, and note collecting previous cases.

LIABILITY OF EXECUTORS AND ADMINISTRATORS.—Executors and administrators are liable only for what they actually receive, except in cases of gross negligence: *Konigmacher v. Kimmel*, 1 Penr. & W. 207; 21 Am. Dec. 374; *Webb's Estate*, 165 Pa. St. 330; 44 Am. St. Rep. 666.

JUDGMENTS—RENEWAL—SCIRE FACIAS.—A scire facias to revive a judgment is not a new action, but the continuance of an old one: *Rice v. Moore*, 48 Kan. 590; 30 Am. St. Rep. 318. The revival of a judgment by scire facias continues its vitality, with its lien and other incidents, from the time of its rendition: *Irwin v. Nixon*, 11 Pa. St. 419; 51 Am. Dec. 559.

**GARRICK v. FLORIDA CENTRAL AND PENINSULAR
RAILROAD COMPANY.**

[53 SOUTH CAROLINA, 448.]

EVIDENCE—RES GESTAE.—DECLARATIONS OF AN AGENT made after the happening of an event, and not in the course of his agency, are not part of the res gestae, and are inadmissible in evidence.

EVIDENCE—ADMISSION OF—HARMLESS ERROR.—If a fact is first proved by incompetent evidence, the error in admitting such evidence is rendered harmless if such fact is afterward proved by competent evidence.

TRIAL—INSTRUCTIONS ON NEGLIGENCE.—It is not within the province of the court to instruct the jury that any given state of facts would constitute negligence, as that is a question for the jury under all the facts and circumstances of the case.

NEGLECT—EXEMPLARY DAMAGES.—If a personal injury is caused by gross carelessness, or recklessness or willfulness, the jury may assess exemplary damages in a proper case.

DAMAGES, EXEMPLARY—DEATH BY FAULT OF ANOTHER.—The personal representative of a decedent cannot recover exemplary damages for the death of such decedent by the fault of another when the statute which gives the right to maintain such action provides for the recovery of compensatory damages only.

STATUTES.—TITLES OF STATUTES MAY BE RESORTED TO, as well as their preamble, to aid in their interpretation.

DAMAGES—DEATH BY FAULT OF ANOTHER.—Although the right of action conferred by statute upon an executor or administrator to recover for the death of his decedent caused by wrongful act, is but a continuation of the same cause of action which the deceased would have had if death had not ensued, yet the personal representative has no right to recover the same kind of damages which the deceased would have had, especially when the statute creating the right to maintain such action has in terms prescribed what kind of damages may be recovered.

C. J. C. Huston and S. Dibble, for the appellant.

Raysor & Summers and J. F. Izlar, for the appellee.

450 McIVER, C. J. The plaintiff, as administratrix of her deceased husband, brought this action to recover damages from the defendant company, for the killing of her said husband by the alleged negligence of said defendant. It appears that the deceased was in the employ of the defendant company, working on the bridges and trestles of said railroad, under the direction of one Renfro, who was charged with the duty of keeping said bridges and trestles in proper repair; that on Friday evening, the 3d of September, 1897, the deceased, when they quit work for the day, started to go back up the road to see his wife, who was

in a delicate situation, using a velocipede for the purpose, and going in a northerly direction toward Norway, a station on the road. Before reaching that point he was struck by a material-train moving backward in a southerly direction and thrown from the track, sustaining serious injuries from which he died on the following Monday. In the course of the testimony on behalf of the plaintiff a witness, Brown, was asked if he knew how the deceased came from South Edisto—the place where he was working, that evening. To which the reply was: “He started from there on foot; Mr. Renfroe told me so.” To this defendant objected, and the objection being overruled, to which exception was taken, the witness proceeded to say: “Mr. Renfroe told me on Sunday morning that Garrick started from there on foot, and he called him back and told him to take ⁴⁵¹ the wheels [meaning the velocipede]. Mr. Renfroe said he thought he was doing the poor boy a favor.” Another witness on the part of the plaintiff was asked if he knew how Garrick came to use the velocipede that night, to which he replied: “I don’t know positively. I had a conversation on that subject with Mr. Renfroe afterward. (Objected to; objection overruled; ruling excepted to by the defense.) I heard Mr. Renfroe say the night that Mr. Garrick was hurt that Mr. Garrick started home on foot, and he called him back and told him to go home on the velocipede, and Mr. Garrick came back and started home on it.” The jury returned a verdict in favor of the plaintiff for the sum of nineteen hundred and ninety-five dollars, the whole amount claimed in the complaint, and judgment having been entered thereon, defendant appeals upon the several exceptions set out in the record.

The first exception complains of error in allowing the testimony above stated to be received over the objection of defendant. It seems to us that these declarations of Renfroe, made after the event, were no part of the *res gestae*, and were not made in the course of his agency, and were, therefore, inadmissible under the case of *Petrie v. Columbia etc. R. R. Co.*, 27 S. C. 63. But while there was error in the ruling of the circuit judge as to the admissibility of the testimony above referred to and stated, yet such error was rendered entirely harmless by reason of the fact that the testimony of J. Lee Nease and S. B. Sawyer, Jr., received without objection, was quite sufficient to prove the same fact which the declarations objected to tended to prove. This exception must, therefore, be overruled.

Exception 2 is in the following form: “Because his honor, the circuit judge, erred in making the qualifications in his charge

upon the requests 1, 2, and 4, of the defendant's counsel, whereas he should have granted said requests without qualification." This exception is entirely too general to entitle it to any consideration on our part, ⁴⁵² under the well-established rule, which has been so often applied as to supersede the necessity for any citation of authority. Indeed, it is difficult to conceive how an exception could have been made more general than this. We may add, however, that the circuit judge could not have charged either the first or second requests to charge without a violation of the constitutional provision forbidding a charge on the facts. He could not instruct the jury that any given state of facts would constitute negligence, either contributory or otherwise, for that was a question for the jury to determine, under all the facts and circumstances of the case: *China v. Sumter*, 51 S. C. 453.

As to the fourth request, that was distinctly charged, and all that the circuit judge did was simply to go on and explain the nature of the contributory negligence on the part of the plaintiff, which would relieve the defendant from liability; and in this there was no error.

The third exception is in these words: "Because his honor erred in his charge to the jury in stating as follows: 'If there was gross carelessness or recklessness or willfulness, then you may give what is known as punitive or smart-money damages. So it is for you to say what damages should be awarded to her, if you find she is entitled to recover.'" This exception raises the main question in the case, and is the one to which the argument was principally directed. It is an entirely novel question—in this state, at least—and its solution depends upon the proper construction of the statute, under which alone can such an action as this be maintained.

Before proceeding, however, to consider this question it will be necessary to dispose of two preliminary objections which have been raised by counsel for respondent: 1. That the exception is too general; 2. That the jury could not have considered the question of exemplary damages in making up their verdict. As to the first objection, while there are cases which condemn the practice of framing exceptions by basing them upon mere extracts ⁴⁵³ from the judge's charge, in which no distinct legal proposition is stated, yet this case does not come under such an objection. Here the circuit judge in his charge has stated a distinct and separate legal proposition as applicable to this case, and if there is error in such statement of the legal proposition,

then such error is sufficiently pointed out by the exception. The first objection is not tenable.

As to the second objection, we do not see how it is possible for this court to ascertain what elements of damages the jury considered in making up their verdict. All that we can possibly know is that the jury were explicitly instructed that "if there was gross carelessness or recklessness or willfulness," then that they might give exemplary damages; and if the law does not allow such damages in a case like this, then there was error of law in the charge, and we have no right to conjecture or speculate as to what effect such erroneous instruction may have had upon the minds of the jury. But it is said in argument here that "exemplary damages were not insisted upon, neither was any proof offered respecting such damages." We can only say that the "case" does not disclose the fact that exemplary damages were not insisted upon, and it is from that source alone that we are at liberty to ascertain what occurred in the court below. But we do learn from the "case" that plaintiff offered evidence tending to show that the defendants, by their agents, were running a heavy material-train in the night-time backward, without lights, over a road on which it was reasonable to expect that some one of the employes of the company might be passing on the velocipede, which plaintiff's testimony tended to show was habitually used by the employes in passing from their work just about the time the disaster occurred. If this was not testimony tending to show "gross carelessness," if not "recklessness," it is difficult to say what was its intention. The second objection is not tenable.

We come, then to the consideration of the question presented by the third exception: Is a plaintiff, in a case like ⁴⁵⁴ this, entitled to recover exemplary damages—sometimes called vindictive or punitive damages—or is he limited to the damages expressly provided for in the statute, to wit, such damages as the jury "may think proportioned to the injury resulting from such death, to the parties respectively for whom and for whose benefit such action shall be brought"? It is not, and cannot be, denied that prior to the passage of the act of 1859 (12 Stats. 825) an action of this kind could not have been maintained at all, and no damages of any kind could have been recovered by any person. It is obvious, therefore, that the plaintiff in this case derives her right to bring this action solely from the provisions of the statute above referred to, and the extent and measure of her rights must be determined by a proper construction of those pro-

visions. The title of that act is as follows: "An act to provide for compensation in damages to the families of persons killed by the fault of others." The first section of the act reads as follows: "That whenever, after the passing of this act, the death of a person shall be caused by the wrongful act, neglect, or default of another, and the act, neglect, or default is such as would, if death had not ensued, have entitled the party injured to maintain an action and recover damages in respect thereof, then, and in every such case, the person or corporation, who would have been liable if death had not ensued, shall be liable to an action for damages, notwithstanding the death of the person injured, although the death shall have been caused under such circumstances as make the killing in law a felony." The second section reads as follows: "That every such action shall be for the benefit of the wife, husband, parent, and children of the person whose death shall have been so caused, and shall be brought by or in the name of the executor or administratr of such person; and in every such action, the jury may give such damages as they may think proportioned to the injury resulting from such death, to the parties respectively for whom and for whose benefit such action shall be brought; and the amount ⁴⁵⁵ so recovered shall be divided among the beforementioned parties in such shares as they would have been entitled to if the deceased had died intestate, and the amount recovered had been personal assets of his or her estate," et cetera. The balance of this section need not be quoted, as we do not deem it pertinent to the question presented by this appeal. The third section need not be copied, as its sole purpose seems to be to prevent a double recovery for the same injury, as was said in the case of Price v. Richmond etc. R. R. Co., 33 S. C. 561; 26 Am. St. Rep. 700. This act of 1859 was incorporated in the general statutes of 1882 as sections 2183-2186, inclusive, in substantially the same terms, and has here lately been incorporated in the Revised Statutes of 1893 as sections 2315-2318, inclusive, in like terms, except for the insertion of the amendment made by the act of 1893 (21 Stats. 523), which amendment does not affect the present inquiry. So that the law now stands precisely as it did upon the passage of the act of 1859, with the single addition made by the amendment of 1893 to the clause providing for the benefit of what persons the action shall be brought, which amendment manifestly does not in any way affect the present inquiry. Looking at the title of the act of 1859, it is very manifest that the intention of the legislature was "to provide for compensa-

tion in damages to the families of persons killed by the fault of others"; for it is so expressly declared in the title. Now, while it is true that in England it was held that the title was no part of the statute, and, therefore, could not afford any light in the construction of the statute, for the reason that the practice there was at one time to pass bills without any title, which was usually framed by the clerk of the house in which it first passes, after the passage of the bill; yet even there authorities may be found holding that "the title to an act, though no part of an act, is not to be wholly disregarded in putting a construction upon the statute. The object of the legislature is very often avowed in the title to an act, as well as in the preamble": Potter's Dwarries on Statutes, 103. ⁴⁵⁰ But, as shown by the notes, the rule is otherwise in this country, where the whole statute, including the title as well as the preamble (if any), is all before the legislature when the act is upon its passage; and where, we may add, the title is not infrequently amended before the bill passes its final reading. So, also, it is said in Endlich on the Interpretation of Statutes, section 58, after stating the rule in England: "In this country, whilst the title of a statute is not, in general, regarded as a part of the same, it is nevertheless regarded as a legitimate aid in ascertaining the intention of the legislature, when the language and provisions in the body of the act are ambiguous and of doubtful meaning and application." But we need not pursue the discussion of this point, as it has been conclusively determined by one of our own decisions (*State v. Stephenson*, 2 Bail. 334), where it was distinctly held that the title of a statute may be resorted to, as well as the preamble, to aid the interpretation, even in the case of a penal statute. We have, therefore, here, first, the title of the act, in which the avowed object of the statute was to provide compensation in damages for the families of persons killed by the fault of others, and next we have, in the second section of the act, language in which it is distinctly declared what kind of damages the jury may give in such cases—"such damages as they may think proportioned to the injury resulting from such death to the parties respectively for whom and for whose benefit such action shall be brought"; and this necessarily implies compensatory damages, and not exemplary or punitive damages, for it is impossible to conceive how exemplary or punitive damages could be "proportioned" to the injury resulting to the parties intended to be benefited, while it is very easy to see how compensatory damages could be measured by and proportioned to the injury sus-

tained by the parties intended to be benefited. Compensatory damages and exemplary or punitive damages are of an entirely different nature, and rest upon wholly different principles. The former is intended to provide a ⁴⁵⁷ recompense for injuries sustained, while the latter is intended only as a punishment to the wrongdoer, and to furnish an example to him and other wrongdoers of the danger attending such wrongdoing. Hence, it is very natural to find that the legislature, after having distinctly declared in the title of the act that their intention was to provide compensatory damages, has, in the body of the act, carried out such intention by declaring what kind of damages the jury might give in those cases, in which, for the first time, a right of action was provided for. It seems to us very clear, therefore, that the legislature, in providing for a right of action which never before existed, has manifested, in unmistakable terms, its intention to provide that, in such new action, compensatory damages may be recovered, and has made no provision for the recovery of any other kind of damages, and that no court has the power to amend the act by adding to the expressly declared intention of the legislature a further provision that in such an action damages other than compensatory may be recovered. The legislature having said that the object of the act was to enable the sufferers to recover compensation in damages, the courts are not at liberty to say that another kind of damages, intended as a punishment for the wrongdoer, may also be recovered. The legislature having said that its object was compensation, the courts have no authority to say that its object was punishment also. If the legislature had intended to authorize the recovery of any kind of damages in this new action there for the first time authorized, it would have been very easy and most natural to have said so; but the legislature did not so say. On the contrary, after providing in the first section that, in a case like this, "an action for damages" might be brought, it proceeds in the next section to provide what kind of damages may be recovered, precisely in accordance with the object of the act as expressly declared in the title. If the legislature had made no further provision than that contained in the first section of the act—authorizing "an ⁴⁵⁸ action for damages"—then, possibly, it might have been inferred that the intention was, though contrary to the avowed object declared in the title, to confer the right to recover any kind of damages recoverable in other actions of a similar character. But when, in the second section, the legislature proceeded to prescribe what kind of damages

might be recovered, precisely in accordance with the avowed object of the act, as expressly declared in the title, there is no room for any such inference. It is quite true, as has been held in *Petrie v. Columbia etc. R. R. Co.*, 29 S. C. 303, and affirmed in *Strother v. South Carolina etc. R. R. Co.*, 47 S. C. 375, and now again affirmed in this case, that the measure of damages is not the pecuniary loss alone of the beneficiaries, in a case like this, but the jury may give such damages as they may think proportionate to the injury, whether pecuniary or otherwise, sustained by the beneficiaries; for it is obvious that such injury may be far beyond any mere pecuniary loss. But what this has to do with the question which we are called upon to decide, we are unable to perceive. The fact that the jury, in determining what amount of damages will be proportioned to the injury resulting to the beneficiaries from the death of their relative, are not confined to the consideration of the pecuniary loss sustained, but may, and should, consider any other injury, whatever may be its character, in ascertaining the proportion contemplated by the statute, throws no light whatever upon the question whether the jury has been authorized to give, in addition to the damages of the character just spoken of, exemplary damages, as a punishment to the wrongdoer or as an example of the danger attending such wrongdoing.

We have not deemed it necessary to consider the cases cited from the other states, for the reason that they are not authority here, and for the further and more important reason that such decisions were made under statutes differing from ours, and, therefore, afford no light in the construction of the language of our own statute, from which alone are we at liberty to ascertain the intention of our ⁴⁵⁰ legislature. Take, for instance, the Virginia statute, by which the jury is authorized to "award such damages as to it may seem fair and just." The court there construed that language as authorizing the jury to award exemplary or punitive damages. It is very easy to conceive of a case in which a jury might be fully warranted in considering it "fair and just" that exemplary or punitive damages should be awarded; for there may be a case in which the killing was attended with such circumstances of wanton cruelty as would render it eminently "fair and just" that the slayer should be mulcted in very heavy punitive damages, while, perhaps, the injury resulting from his death to the beneficiaries might be comparatively small. But our statute contains no such lan-

guage, and, on the contrary, as we have seen, its language necessarily implies that compensatory, and not punitive, damages may be awarded.

Again, it is contended for the respondent that the right of action conferred upon the executor or administrator for the benefit of certain relatives of the deceased is but a continuation of the same cause of action which deceased would have had if death had not ensued, and two cases have been cited in support of this view—*Hooper v. Columbia etc. R. R. Co.*, 21 S. C. 545, 546, 53 Am. Rep. 691, and *Price v. Richmond etc. R. R. Co.*, 33 S. C. 562, 26 Am. St. Rep. 700. Neither of these cases, however, decide the point, and this, we understand, was conceded by the distinguished counsel who cited them; but he relies upon certain language, which he quotes from them, as indicating a view in accordance with that for which he contends. Whatever may be the tendency of the language quoted from these cases, which it would be unprofitable now to discuss, it is enough to say that such language is not authoritative, as the question here presented was not raised or considered in either of those cases; and, indeed, in the *Price* case it was expressly stated that it was deemed unnecessary to consider the question, “for our conclusion is drawn from the terms of the statute, as evidencing the true intent of the legislature.” But without going into this question, which has ⁴⁶⁰ been much discussed elsewhere and variously decided, and assuming, without deciding, however, that the right of action conferred by the statute is but a continuation of the same cause of action which the deceased would have had if death had not ensued, it by no means follows that the legislature intended, by conferring this right of action on the executor or administrator of the deceased for the benefit of the persons specified, to give such executor or administrator the right to recover the same kind of damages which the deceased would have had, especially in view of the fact that the statute has in terms prescribed what kind of damages may be recovered. For it cannot be doubted that the legislature, if so minded, might have limited the amount of damages recoverable in such an action, as has been done in several of the states; and if so, no reason is perceived why the legislature might not place any other limit upon the damages authorized to be recovered. The same may be said of the case of *Reed v. Northeastern R. R. Co.*, 37 S. C. 42; for the sole question, so far as this matter is considered, which was either considered or decided in that case was whether an action could be maintained by the administrator of one who had been instantaneously killed; and we are unable to find any-

thing in the language used by Mr. Justice Pope, in vindicating the conclusion of the court, which indicates even that his mind was ever turned to the question which we are now called upon to decide. He was not called upon to express or even indicate any opinion upon the question before us, and he did not express or even intimate an opinion as to such question.

After a very careful consideration and study of this case, we are of opinion that the circuit judge erred, as matter of law, in instructing the jury that "if there was gross carelessness or recklessness or willfulness, then you may give what is known as punitive or smart-money damages," as the statute, which alone authorizes the bringing of this action, does not contemplate or permit damages of that character to be awarded in such a case as this.

461 The judgment of this court is that the judgment of the circuit court be reversed and that the case be remanded to that court for a new trial.

EVIDENCE—RES GESTÆ.—DECLARATIONS AND ADMIS-
SIONS OF AN AGENT made after a transaction is fully completed are not admissible against his principal: *Giberson v. Patterson Mills Co.*, 174 Pa. St. 369; 52 Am. St. Rep. 823, and cases collected in the note. As to what declarations are a part of the *res gestæ*, see *State v. Arnold*, 47 S. C. 9; 58 Am. St. Rep. 867.

EVIDENCE—ADMISSION OF HARMLESS ERROR.—Testimony improperly admitted in proof of a fact is harmless error, if the same fact was proved by other evidence which was competent and uncontradicted: *Barnett v. Vincent*, 69 Tex. 685; 5 Am. St. Rep. 98, and note; *St. Louis etc. Ry. Co. v. Mackie*, 71 Tex. 491; 10 Am. St. Rep. 766.

TRIAL—INSTRUCTIONS ON NEGLIGENCE.—Where the subject of inquiry is whether the defendant had used such diligence as prudent and reasonable men would have exercised, the court may properly refuse to instruct the jury, that if they believed certain facts to be proved, of which evidence had been given, the defendant was guilty of negligence as matter of law, and that the plaintiff was entitled to recover: *McCully v. Clarke*, 40 Pa. St. 399; 80 Am. Dec. 584.

DAMAGES—EXEMPLARY—DEATH BY WRONGFUL ACT.—The right of action for wrongfully or negligently causing the death of a person is purely statutory: *McDonald v. Pittsburgh etc. Ry. Co.*, 144 Ind. 459; 55 Am. St. Rep. 185, and note. The general rule is that the damages for the death of another are limited to the actual pecuniary injury sustained: *Morgan v. Southern Pac. Co.*, 95 Cal. 510; 29 Am. St. Rep. 143; *English v. Southern Pac. Co.*, 13 Utah, 407; 57 Am. St. Rep. 772. But see *Mattise v. Consumers' Ice Mfg. Co.*, 46 La. Ann. 1535; 49 Am. St. Rep. 356. Punitive damages are not recoverable in such actions, unless they are given by the statute: See monographic note to *Louisville etc. Ry. Co. v. Goodykoontz*, 12 Am. St. Rep. 377; *Louisville etc. R. R. Co. v. Brooks*, 83 Ky. 129; 4 Am. St. Rep. 135.

STATUTES.—THE TITLE OF AN ACT may be considered to aid in determining the legislative intent: *State v. Roby*, 142 Ind. 168; 51 Am. St. Rep. 174, and note.

LANAHAN v. BAILEY.

[53 SOUTH CAROLINA, 439.]

EXECUTIONS—PROPERTY NOT SUBJECT TO.—Intoxicating liquors shipped into the state for an unlawful purpose are not subject to attachment or execution, when the statute of such state makes any sale of such liquor unlawful.

J. A. McCullough, for the appellant.

Wells, Ansel & Cothran, for the appellee.

⁴⁹⁰ GARY, J. The case contains the following statement of facts: This is an action commenced November 8, 1897, upon an open account for liquors sold by plaintiffs, citizens of Maryland, to defendant, a citizen of Georgia. Amount of account, fifteen hundred and seventy-five dollars. The action was commenced by attachment upon certain stocks of liquors in the possession of J. E. Payne and F. M. Simmons, Greenville, and Cobb & Morris, in Abbeville. In August, 1897, the defendant, who was a large wholesale dealer in liquor in Atlanta, entered into several agreements with the said Payne, Simmons, and Cobb & Morris, by which each of them became the agent of said defendant for the sale of liquor in original packages in said localities. The defendant shipped large quantities of liquor to her said agents in original packages, and said agents conducted business for her under the protection of the interstate commerce law, and the decisions of the United States court sustaining the same. That at the time said liquors were attached they were in the possession, respectively, of the said Payne, Simmons, and Cobb & Morris, in the original form in which they were imported into this state, and had not been distributed to purchasers within the state. The defendant, within due time, answered the plaintiff's complaint and the case was placed on calendar 1 for trial by jury. Before the court convened, to wit, February 23, 1898, the defendant served upon the attorneys for the plaintiffs a notice of a motion to be heard by his honor, Judge James Aldrich, at his chambers, for an order vacating the attachment in the said cause, upon the ground that the said liquors attached were exempt from sale under the dispensary law of this state by any officer of the court, under mesne or final process, and, therefore, exempt from attachment. The motion was heard by his honor, Judge James Aldrich. The attorney for the defendant stated that he would rest the entire motion upon the ground above

stated. Argument was, therefore, directed to the issue thus made.

After argument, the presiding judge overruled the motion ⁴⁹¹ by the following order: "This is a motion by defendant to dissolve the attachment herein, upon several grounds, all of which were abandoned at the hearing, except the one that the property attached was intoxicating liquors, which the sheriff, under the dispensary law, had not the authority to sell, and, therefore, could not attach. The goods were imported by the defendants to be sold under the practice and custom of original package houses. They were in the hands of the defendants' agents for the purpose stated when attached. The sheriff is the legally constituted and appointed agent of the judgment debtor, and the purchaser from the sheriff takes his title, not mediately, but immediately, from the judgment debtor: McKnight v. Gordon, 13 Rich. Eq. 222; 94 Am. Dec. 164. And all kinds of personal property which can be made the subject of a voluntary transfer of title by the debtor can, by execution, be made the subject of an involuntary transfer: Freeman on Executions, sec. 110. If the defendant could sell the liquor by her agents, then the sheriff, under the circumstances, is her legally constituted agent, and, as such, can sell the same. The motion to dissolve the attachment is refused."

The defendant appealed from said order upon three exceptions, but it will not be necessary to consider them in detail, as they raise practically the single question whether the said property could be attached. Section 1 of the dispensary act (22 Stats. 123), of force at the time of said attachment, contains the following provisions: "That the manufacture, sale, barter or exchange, receipt or acceptance, for unlawful use, delivery, storing, and keeping in possession, within this state, of any spirituous, malt, vinous, fermented, brewed (whether lager or rice beer), or other liquor, any compound or mixture thereof, by whatever name called or known, which contains alcohol and is used as a beverage, by any person, firm, or corporation; the transportation, removal, the taking from the depot or other place by consignee or other person, or the payment of freight or express or other charges by any person, firm, association or ⁴⁹² corporation upon any spirituous, malt, vinous, fermented, brewed (whether lager, rice, or other beer), or other liquor, or any compound or mixture thereof, by whatever name called or known, which contains alcohol and is used as a beverage, except as is hereinafter provided, is hereby prohibited under a penalty of not

less than three nor more than twelve months at hard labor in the state penitentiary, or pay a fine of not less than one hundred dollars nor more than five hundred dollars, or both fine and imprisonment, in the discretion of the court, for each offense." It is not contended that there was a compliance with the requirements of the dispensary act so as to make the possession of said liquors lawful under said act; on the contrary, it is not denied that the purpose for which the said liquors were shipped into this state has been declared by the supreme court of the United States, in the case of *Vance v. W. A. Vandercook Co.*, 170 U. S. 438, to be unlawful. Section 25 is as follows: "That any of the liquors set forth in section 1 of this act, which are contraband, may be seized and taken without warrant by any constable, sheriff, or policeman while in transit or after arrival, whether in possession of a common carrier, depot agent, express agent, private person, firm, corporation, or association, and reported to the state commissioner at once, who shall dispose of the same as hereinafter provided." Section 26 is as follows: "That the possession of said illicit liquors is hereby prohibited and declared unlawful, and any obligation, note, or indebtedness contracted in their sale or transportation is declared to be absolutely null and void, nor shall any action or suit for the recovery of the same be entertained in any court in this state." Section 33 contains the following provision: "All liquors in this state, except dispensary liquors, and those passing through this state consigned to points beyond this state, shall be deemed contraband, and may be seized in transit without warrant." The following provision is contained in section 35: "All alcoholic liquors, other than domestic wine, which do not have on the packages in which they are contained the label and certificates ⁴⁰³ going to show that they have been tested by the chemist, and purchased from a state officer authorized to sell them, are hereby declared contraband, and on seizure will be forfeited to the state, as provided in section 31; provided, that this section shall not apply to liquor held by the owners of registered stills in bonded warehouses. Persons having liquor which they wish to keep for their own use may throw the protection of the law around the same by furnishing an inventory of the quantity and kinds to the state commissioner and applying for certificates to affix thereto."

We have quoted from these sections of the act for the purpose of showing that the use and possession of the liquor, under the circumstances set forth in the case, are forbidden by law as

against public policy, that it was contraband, and that the intention of the statute was to destroy the right of property therein by subjecting it to seizure without warrant and to forfeiture to the state. The statute, in its efforts to prevent the mischief arising from the illegal use and possession, as aforesaid, has even gone to the extent of declaring null and void all obligations contracted in the sale thereof. For the court to allow the use of its process in making the liquor liable to the payment of debts would be to lend its aid in thwarting the provisions of the act, and deprive the state of its rights arising from forfeiture. This distinction between statutes merely prohibiting the sale of liquor and those that destroy the right of property therein, and declare the ownership illegal under penalty, is clearly pointed out by Mr. Justice Little, who, in delivering the opinion of the court in the case of *Fears v. State*, 102 Ga. 274, uses the following language: "The object of this act was, as its caption recites, to prevent the evils of intemperance; and the means of preventing such evils was to prohibit the selling or giving away of the liquors enumerated. Further than this the act does not go. It is a valid and constitutional act of the general assembly, and is entitled to have full force and effect; and in construing such acts, the spirit as well as the letter of the law will be ⁴⁹⁴ regarded to accomplish the object sought. It will be noted, however, that the inhibition under this act extends only to the sale, barter, furnishing, or giving away of spirituous liquors. There is no attempt under the act to destroy the right of property in liquors, nor is there anything deducible from any of its provisions which declare the ownership of such liquors illegal. The mandate of the law is that they shall not be sold; they shall not be given away; they shall not be bartered; they shall not be furnished. Under the provisions of the act they may be held, kept, owned, and used in counties where its provisions apply. If they can be so kept and owned, then they are property. Property, in its appropriate sense, means that dominion or indefinite right of user and disposition which one may lawfully exercise over particular things or subjects, and generally to the exclusion of all others. . . . In all of the states, so far as we know, police control over the sale of intoxicating liquors is exercised, because of the evils attending their misuse or excessive use; and, while this is true, it does not follow that they are incapable of being lawfully held in possession, or that they are not subjects over which ownership can be exercised. On the contrary, such liquors, when not held under circumstances which constitute a nuisance or a

penal offense, are entitled to protection, as other property: *Brown v. Perkins*, 12 Gray, 89." The attachment proceedings cannot be made effective except by a sale of the liquors, and a sale in this manner is not permitted by the statute, but a penalty is imposed for such infraction of the law. So that, if the court should order a sale under these circumstances, it would be a violation of the law, which not only prohibits such act, but imposes a penalty for so doing: *Fairly v. Wappoo Mills*, 44 S. C. 254. It was well said in *Bank v. Owens*, 2 Pet. 539: "No court of justice can, in its nature, be made the handmaid of iniquity. Courts are instituted to carry into effect the laws of a country. How can they, then, become auxiliary to the consummation of violations of law? . . . There ⁴⁰⁵ can be no civil right when there can be no legal remedy, and there can be no legal remedy for that which is itself illegal."

There was, therefore, error on the part of the circuit judge in refusing to dissolve the attachment, and it is the judgment of this court that the order appealed from be reversed.

EXECUTIONS—PROPERTY NOT SUBJECT TO.—The peculiar cases holding that property is not subject to execution generally turn upon the question whether the right or article is property or not in contemplation of law: See *Barclay v. Smith*, 107 Ill. 349; 47 Am. Rep. 437, where it was held that an untransferable certificate of membership of a board of trade is not property subject to judicial sale. In *Henderson v. Hackney*, 23 Ga. 383, 68 Am. Dec. 529, it was held that the equitable title to lots drawn in a land lottery is not subject to sale under execution, though it is transferable.

PARKER v. CAROLINA SAVINGS BANK.

[58 SOUTH CAROLINA, 563.]

CORPORATIONS—ACTIONS AGAINST—PLEADINGS.—In an action against a private corporation created by public act, the designation of the corporation by its corporate name in the pleadings is a sufficient allegation of its corporate existence.

CORPORATIONS —INSOLVENCY — CREDITORS' BILL—JURISDICTION.—A court of equity has jurisdiction of an action by a creditor on behalf of himself and all other creditors of an insolvent corporation to compel its stockholders to account for its assets and to enforce their statutory liability for its debts. In such case a return of nulla bona against the corporation need not be pleaded or proved if its insolvency is otherwise shown.

CORPORATIONS — INSOLVENCY — CREDITOR'S BILL—LIMITATION OF ACTION.—The statutory liability of a stockholder in an insolvency corporation to a creditor is not barred, under the South Carolina statutes, until the expiration of six years from the maturity of the corporate debt.

CORPORATIONS—INSOLVENCY LIABILITY OF STOCKHOLDERS.—Stockholders in an insolvent corporation are liable to its creditors, under the constitution and statutes of South Carolina, for a sum equal to the amount of their respective shares and five per cent in addition thereto.

CORPORATIONS—INSOLVENCY—LIABILITY OF STOCKHOLDERS—SETOFF.—A stockholder in an insolvent corporation cannot set off a debt due him by the corporation against his statutory liability to its creditors.

CORPORATIONS—INSOLVENCY—STOCKHOLDERS' LIABILITY—TRANSFER OF STOCK.—A stockholder in an insolvent corporation at the time when a debt sued on was contracted and when an assignment for the benefit of creditors was made cannot escape his statutory liability to the corporate creditors by a subsequent assignment of his stock not transferred on the books of the corporation as directed by statute.

CORPORATIONS — INSOLVENCY.—STATUTORY LIABILITY of the shareholders in an insolvent corporation, is exclusively for its creditors' benefit, and is enforceable by them alone, and not by the corporation, and the creditors must sue in their own right and not by or through the corporation.

CORPORATIONS — INSOLVENCY—ASSIGNMENT.—An insolvent corporation may make an assignment for the benefit of creditors, the same as a natural person, by virtue of its general power to contract, acquire, and transfer property.

CORPORATIONS — INSOLVENCY—ASSIGNMENT.—An assignment by an insolvent corporation for the benefit of creditors executed by the proper corporate officers by authority of the directors, is valid, without a vote of the stockholders.

CORPORATIONS—MORTGAGES.—A mortgage of the property of a corporation executed by its president without authority conferred by the corporate stockholders as required by statute, is ultra vires and void.

MORTGAGES.—THE MERE PAROL DEPOSIT OF TITLE DEEDS as security for a debt does create an equitable mortgage on land.

Buist & Buist, T. B. Gary, Simons, Seigling & Coppelman, L. W. Perrin, Graydon & Graydon, and De Bruhl & Lyon, for the appellants.

W. H. Parker, J. N. Brown, and J. W. Quattlebaum, for the appellees.

⁵⁸⁷ **JONES, J.** This is an action by certain creditors suing on behalf of themselves and all other creditors, against the assignee of the Bank of Lowndesville and its stockholders, for an accounting of the assets of the bank, and to enforce the statutory liability of stockholders for the debts of the bank.

From the decree of the circuit court the defendant stockholders appeal on numerous exceptions, which mainly raise questions which will be considered and disposed of as follows: 1. The circuit court properly overruled the oral demurrer of the Carolina Savings Bank, that the complaint ⁵⁸⁸ did not state facts suffi-

cient to constitute a cause of action, in not setting out in the body of the complaint that said bank is a corporation doing business under the laws of this state. In the title of the case the defendant is styled "Carolina Savings Bank, a corporation under and by virtue of the laws of the state of South Carolina," and in the twentieth paragraph of the complaint it is alleged that "the defendants above named were, as appears from the books of said bank, stockholders in said Bank of Lowndesville, each in the amount set out as follows, to wit, Carolina Savings Bank, fifty shares, et cetera." The circuit court held that this was a sufficient allegation of corporate existence. Whether this would be so in a case wherein it is essential to allege a corporate existence may be doubtful, but in this case clearly the ruling is correct. There are numerous authorities or cases to the effect that in an action by or against a corporation in which it was designated by a corporate name, there was no necessity to allege the creation or existence of the corporation: See note to *Miller v. Pine Min. Co.*, 35 Am. St. Rep. 291, 292. In this case it appears that the "Act to amend and renew the charter of 'Carolina Savings Bank,'" approved December 20, 1893 (21 Stats. 572), is made a public act. The validity of this act not being in question, the court would take judicial notice of the fact of defendant's corporate existence. Such fact not being issuable, need not be alleged. The rule which requires that in an action by or against a corporation its corporate existence be shown, does not apply to a domestic municipal corporation or a domestic private corporation created by a public act: Bliss on Code Pleading, sec. 246.

2. The court of equity has jurisdiction to entertain this suit, and the pleadings show a case for equitable relief. The Bank of Lowndesville was incorporated February 16, 1891, under the provisions of the act of December 23, 1886 (19 Stats. 540), and thereby became subject to the act to provide for and regulate the incorporation ⁵⁸⁹ of banks in this state, approved December 24, 1885 (19 Stats. 212). Section 4 of this act (Rev. Stats. 1539) provides: "The stockholders of said bank shall be liable to the amount of their respective share or shares, and five per cent thereof in addition thereto, for all its debts and liabilities upon note, bill, or otherwise." Under this statute all the stockholders are liable to the extent named for all the debts of the corporation. Every creditor has an interest in the liability of every stockholder. Thus a common fund is created in which all the creditors are interested. Unless there is something in the stat-

ute authorizing a different course, the natural and appropriate remedy is in equity to realize and distribute this common fund. The Bank of Lowndesville is alleged and shown to be insolvent, and its creditors and stockholders are numerous. Even if it be conceded that a remedy at law exists under this statute, still jurisdiction in equity is concurrent. To leave each creditor to single out for suit one or more stockholders at law would entail a multiplicity of suits, and result in an unequal distribution of the assets for creditors, all of which is prevented by entertaining this proceeding in equity. The case of *Hall v. Klinck*, 25 S. C. 352, 60 Am. Rep. 505, which held that any creditor might bring his individual action at law against any stockholder, was based upon the peculiar language of the statute involved in that case, which the court construed as fixing a liability to a specified amount upon each stockholder to pay the demand of any creditor. Hence, it was held that an action at law might be maintained in that case, but the court did not hold that even under that statute an action in equity might not also be sustained in a proper case. Where the statute provides a remedy in law or equity, that remedy alone should be followed; but where the statute does not prescribe the remedy to be in law or equity, the remedy may be in either, according to the circumstances of the case or the nature of the relief desired. In this case not only is there a fund, in which all the creditors are interested, to be collected and distributed, but it ⁵⁰⁰ appears that some of the stockholders are also creditors, thus presenting conflicting rights and equities for adjustment. It was not necessary that the complaint should show return of nulla bona against the corporation before proceeding to enforce the statutory liabilities—1. Because the statutory liability is primary; and 2. Because insolvency being alleged and shown, nulla bona would be a useless proceeding: *Bird v. Calvert*, 22 S. C. 292.

3. The claims of creditors who came in under the order of the court and proved the same are not barred under the two years' limitation of the general corporation act: 19 Stats. 540. The banking act—19 Stats. 212—prescribes no limitation to actions against stockholders, and in the general corporation act, section 22, appearing as section 1500 of the Revised Statutes, railroad and banking corporations are expressly exempted from the provisions which include the two years' limitation. By section 130 of the code it is provided that actions against stockholders of a banking corporation to enforce a liability created by law must be brought within six years after the creation of

the liability, unless otherwise provided in the law under which such corporation is organized. It is not contended that the claims were not established within six years after the creation of the liability.

4. The defendant stockholders are liable to the creditors of the bank for a sum equal to the amount of their respective shares, and five per cent in addition thereto. In other words, the measure of the stockholder's liability is a sum equal to one hundred and five per cent of the amount of his stock. Article 12, section 6, of the constitution of 1868 provides that "the general assembly shall grant no charter for banking purposes, nor renew any banking corporations now in existence, except upon condition that the stockholders shall be liable to the amount of their respective share or shares of stock in any such banking institution for all its debts and liabilities upon note, bill, or otherwise." Section 4 of the banking act, already quoted, uses ⁵⁹¹ the language of the constitution in providing for the liability of stockholders. It is contended that the stockholders' liability, as expressed by the words "to the amount of their respective share or shares of stock," is limited to the mere loss of their stock. But this construction would give no force to the provision of the constitution and act pursuant thereto, since, without any such provision, all the corporate property represented by the stock would be liable for the debts of the corporation. Evidently, therefore, the intention was to provide for a liability beyond the mere loss or forfeiture of the stockholders' interest in the corporate property, as this interest is necessarily involved in the liability of the corporation for its debts. By the common law a stockholder is not individually or personally liable for the debts of the corporation; hence the object of such provision was to create a personal liability of the stockholder beyond and cumulative to the liability of the corporation itself, thus affording additional protection to the public dealing with the corporation. The extent of this personal liability is not the stock, but the amount of the stock, or an amount equal to the amount of the stock, the stock being referred to merely as a certain and convenient method of designating or measuring the sum for which each stockholder is liable. With few exceptions, this is the construction generally placed upon similar constitutional or statutory provisions: *Morse on Banks and Banking*, sec. 675; *In re Empire City Bank*, 18 N. Y. 199, citing *Briggs v. Penniman*, 8 Cow. 387, 18 Am. Dec. 454, and *Bank of Poughkeepsie v. Ibbotson*, 24 Wend. 473; *Root v. Sinnock*, 120 Ill. 350; 60

Am. Rep. 559; Pettibone v. McGraw, 6 Mich. 441; Willis v. Mabon, 48 Minn. 140; 31 Am. St. Rep. 628; 23 Ency. Law, 867. We have no case in our own reports directly decisive of the question before us, but see Sackett's Harbour Bank v. Blake, 3 Rich. Eq. 225; Terry v. Calnan, 13 S. C. 225.

It is also contended that the provision in section 4 of the said banking act for the five per cent in addition to the ⁵⁹² amount of the stock is unconstitutional. There would be much force in this contention if section 6, article 12, of the constitution of 1868 was self-executing, and stood alone as fixing the liability of the stockholder at a specified sum, in which case the legislature could neither increase nor diminish the liability. But the above provision of the constitution was not self-executing. It was expressly addressed to the general assembly to regulate its action in granting charters for banking purposes. Section 4 of that article of the constitution provides that "dues from corporations shall be secured by such individual liability of the stockholders and other means as may be prescribed by law"; and section 5 provides: "All general laws and special acts passed pursuant to this section shall make provisions therein for fixing the personal liability of stockholders under proper limitations, et cetera." Reading these sections together, the general assembly had no power to grant a charter for banking purposes without providing for the personal liability of stockholders at least in a sum equal to the amount of their respective shares, but had power to provide for a greater liability. Section 4 of the banking act, therefore, does not conflict with the provisions of the constitution of 1868. We may add here that the provisions of the constitution above quoted, emphasizing the duty of the legislature to secure the debts due by the corporation, by providing for the individual liability of the stockholder, clearly show an intention that the liability should go beyond the mere loss of the stockholder's interest in the corporate property.

5. The Carolina Savings Bank and the estate of A. J. Clinkscales cannot set off the claims due them by the Bank of Lowndesville against their statutory liability as stockholders. The statutory liability is exclusively for the benefit of the creditors, and is enforceable by the creditors, and not by the corporation. Creditors sue in their own right, and not by or through the corporation: 2 Morawetz on Corporations, sec. 869; note to Thompson v. Reno Sav. Bank, 3 Am. St. Rep. 847. ⁵⁹³ The claims of the Carolina Savings Bank and of the estate of Clinkscales are not against the plaintiffs or other creditors, but against

the Bank of Lowndesville. Under our construction of the statute creating the liability, each creditor may not pursue any stockholder for his debt; on the contrary, the statute provides a fund for ratable distribution among all the creditors. It follows from the foregoing that the respective claims lack the essential element of mutuality in order to warrant either a legal counterclaim or an equitable setoff. If each creditor had the right to enforce his claim against any stockholder, some authorities hold that when creditor and stockholder unite in the same person, equity would not take from the stockholder what he was entitled to receive, and had in possession as creditor, merely to give to another creditor with no greater equity. But our statute is not so. But, further, since our statute creates a fund for distribution among all creditors ratably, it would be inequitable to other creditors to allow a stockholder in an insolvent bank to set off his claims against the corporation against his statutory liability, for this would give him a preference. Equality here is equity. The stockholder must pay in his dues under the statute, and then share in the common fund ratably with the other creditors. Authorities are very numerous to the effect that in a suit in equity to compel payment of subscriptions for capital stock, a stockholder cannot set off a debt due him by the corporation. This is so held because stock subscriptions are treated as a trust fund, in case of insolvency, for the benefit of the corporation creditors, and equity requires its ratable distribution. The same rule should prevail when the statute creating the individual liability of stockholders is construed as providing a common fund for all the creditors: See note to *Thompson v. Reno Sav. Bank*, 3 Am. St. Rep. 826; *Thompson on Liability of Stockholders*, sec. 381; 2 *Morawetz on Corporations*, sec. 861; 2 *Morse on Banks and Banking*, sec. 691; 2 *Beach on Corporations*, sec. 727; 23 *Ency. Law*, 846.

6. F. W. Wagner & Co. and G. A. Wagner are not exempt ⁵⁹⁴ from liability as stockholders by reason of the attempted transfer of stock, twenty-seven shares, to J. D. Kelly. It is conceded that they were holders of the stock when the Bank of Lowndesville failed and made an assignment for creditors, March 1, 1894. After this, on June 6, 1894, they sold their stock, executing an assignment or transfer thereof in blank on the certificates of stock and delivering the same, but it is not claimed, and there was no evidence to show, that such stock was transferred on the books of the bank. Section 1529 of the Revised Statutes (20 Stats.

47) provides that "no transfers of stock shall be valid, except as between the parties thereto, until the same shall have been regularly entered upon the books of the company, et cetera." This statute not having been complied with, so far as creditors of the bank are concerned, these appellants were stockholders when the action was commenced. The evidence further shows that they were stockholders when the debts established in this case were contracted. As there was no transfer of stock in this case, we need not consider under what circumstances a transfer of stock would exempt the transferrer from liability under the statute.

7. The assignment for the benefit of creditors by the Bank of Lowndesville is not invalid for want of the vote of the stockholders therefor, it having been executed by the proper officers by resolution of the board of directors. We do not construe section 1524 of the Revised Statutes (19 Stats. 543) as regulating the manner of executing an assignment for the benefit of creditors by a corporation. It provides as follows: "Any company organized under the provisions of this article may borrow money for the purpose of carrying out the object of its charter, and may make notes, bonds, or other evidences of debt, and by a vote of a majority of the stock, had at a meeting called for the purpose, by advertisement, as provided in the preceding section of this article, may secure the payment of said notes, bonds, or evidences of debt by ⁵⁹⁵ mortgage or deed of trust on all or any of its property and franchises, both real and personal." An assignment for the benefit of creditors is a transfer of all of the insolvent debtor's property for the purpose of applying the same to the payment of his debts without preference. The mortgage or deed of trust on all or any of the debtor's property to secure the payment of notes, et cetera, referred to in statute quoted, could not fairly be construed as embracing a deed of assignment for the benefit of creditors. The statute relates to the conduct of the corporation's business as a going concern. In the absence of legislation prohibiting or regulating the same, an insolvent corporation may make an assignment for the benefit of creditors, as a natural person may do, by virtue of its general power to contract, acquire, and transfer property: 1 Morse on Banks and Banking, sec. 120; 1 Beach on Corporations, secs. 357, 358; Dabney v. Bank of State, 3 S. C. 156. The bank, as a corporation, acts through its governing body, the board of directors, unless otherwise provided by law. The assignment, therefore, having been executed by the proper officers by authority of the directors, is valid. Up to this point we concur with the decree

of the circuit court. We come now to the only question as to which we disagree with the circuit court.

8. The Carolina Savings Bank did not acquire an equitable mortgage on the Matthews land by reason of the deposit of the title deeds thereof by the president of the bank of Lowndesville, to secure its debt to the Carolina Savings Bank. In holding to the contrary, the circuit court erred. In the first place, the deposit of the title deeds by the president, if intended as a mortgage, was *ultra vires*. The testimony shows that the title deeds were deposited without any authority from directors or stockholders. Section 1524, already quoted above, is a limitation on the power of the bank to mortgage its property. The power to mortgage must be exercised in the manner prescribed by the act. If the president of the Bank of Lowndesville was without power to ⁵⁹⁶ execute a legal mortgage for want of compliance with the statute, his act in depositing the title deeds without the requisite authority could not create an equitable mortgage. But, in the second place, the deposit of title deed as a security for debt does not, in this state, create an equitable mortgage on the land. The evidence does not satisfy us that there was any written agreement showing a purpose to create a mortgage by the deposit of the deeds. We treat the case, therefore, as a mere parol deposit of title deeds as a security for debt. There are cases in this state containing dicta to the contrary of the view now announced by this court, as in *Harper v. Barsh*, 10 Rich. Eq. 154; *Boyce v. Shiver*, 3 S. C. 528; *Hutzler v. Phillips*, 26 S. C. 146; 4 Am. St. Rep. 687; but it has never been decided in this state that the mere deposit of title deeds to secure a debt creates an equitable mortgage. (See the separate opinion of the present chief justice in the case last above cited.) While Chief Justice Simpson expressed such a view in his opinion, the other members of the court did not commit themselves to that view. The rule is well established in England, and has received some support in this country, that an equitable mortgage on the land is created by the deposit of title deeds as security for debt, but the doctrine is generally rejected in the United States. The rule, as administered in England, grew out of the fact that there was no general system of registration in this country, and the system of conveyancing rendered it necessary to have possession of the muniment of title. Under our system of registration and conveyancing, possession of the original title deeds is of little consequence, as the records or certified copies may take their place. The reason of the rule, therefore, does not exist in this country. It is the general policy here to spread liens upon property upon

the public records and thus avoid the great danger of secret liens: See 6 Ency. Law, 683; Jones on Mortgages, sec. 185, and authorities cited.

The judgment of the circuit court is modified in the particular last above discussed, but in all other respects it is affirmed.

CORPORATIONS — ACTIONS. AGAINST — PLEADINGS.—The weight of authority sustains the position that a suit brought by a corporation, in its corporate name, is an implied assertion of corporate existence, and sufficient, even though the declaration is demurred to: See note to *Harris v. Muskingum Mfg. Co.*, 29 Am. Dec. 375; *Holden v. Great Western Elevator Co.*, 69 Minn. 527; 65 Am. St. Rep. 585, and note.

CORPORATIONS — INSOLVENCY — CREDITORS' BILL.—In equity a creditors' bill may be maintained by the creditors of a corporation against stockholders who have not paid up their stock subscriptions, notwithstanding the statute furnishes other remedies to the creditors: *Washington Sav. Bank v. Butchers' etc. Bank*, 107 Mo. 133; 28 Am. St. Rep. 405, and note; *Baines v. Babcock*, 95 Cal. 581; 29 Am. St. Rep. 158.

CORPORATIONS — ACTIONS AGAINST STOCKHOLDERS — LIMITATIONS OF ACTIONS.—If a statute declares that actions against stockholders to enforce a liability created by law may be brought within three years after the liability, was created, the time within which an action may be maintained cannot be prolonged by the giving of a note by the corporation, or otherwise. Computation of time within which the action may be brought must commence with the creation of the original indebtedness: *Hunt v. Ward*, 99 Cal. 612; 37 Am. St. Rep. 87, and note.

CORPORATIONS—INSOLVENCY — LIABILITY OF STOCKHOLDERS.—Under a provision of a state constitution declaring that each stockholder in a corporation shall be liable to the amount of the stock held by him, each is liable for corporate debts, in addition to the risk of losing the amount of his stock, though he has paid therefor in full: *Willis v. Mabon*, 48 Minn. 140; 31 Am. St. Rep. 626. See monographic note to *Thompson v. Reno Sav. Bank*, 3 Am. St. Rep. 806, discussing the entire question of the liability of stockholders to creditors of corporations.

CORPORATIONS — LIABILITY OF STOCKHOLDERS — SET-OFF.—A stockholder, who is a creditor of a corporation, cannot set off the indebtedness of the corporation against the amount of his unpaid subscription, in a suit against him by a creditor of the corporation, to subject the unpaid subscription to the satisfaction of the plaintiff's claim: *Thompson v. Reno Sav. Bank*, 19 Nev. 103; 3 Am. St. Rep. 797, and note.

CORPORATIONS — STOCKHOLDERS' LIABILITY — TRANSFER OF STOCK.—Transfers of stock in a failing corporation, made by the transferrer, for the purpose of escaping liability as a shareholder, to a person, who from any cause is incapable of responding in respect to such liability, are void as to creditors of the corporation and other shareholders, although, as between the parties themselves, the transfer may be valid: *Burt v. Real Estate Exchange*, 175 Pa. St. 619; 52 Am. St. Rep. 858, and note; *Sprague v. Nat. Bank*, 172 Ill. 149; 64 Am. St. Rep. 17.

CORPORATIONS — INSOLVENCY—ASSIGNMENT.—A corporation may assign its assets for the benefit of creditors, if done in good faith: See note to *Buck v. Ross*, 57 Am. St. Rep. 76. This assignment must be made by a resolution of the board of directors: *Calu-*

met Paper Co. v. Haskell Printing Co., 144 Mo. 831; 66 Am. St. Rep. 425, and note.

CORPORATIONS—ULTRA VIRES CONTRACT.—A corporation may urge the defense of ultra vires as against its contract forbidden by statute or contrary to public policy, though it has received the benefit thereof: Franklin Nat. Bank v. Whitehead, 149 Ind. 560; 63 Am. St. Rep. 802; Marble Co. v. Harvey, 92 Tenn. 115; 36 Am. St. Rep. 71.

MORTGAGES.—AN EQUITABLE MORTGAGE is not created by the deposit of title deeds in pursuance of a parol agreement to make a mortgage: Hutzler v. Phillips, 26 S. C. 186; 4 Am. St. Rep. 687, and monographic note thereto.

CASES
IN THE
SUPREME COURT
OF
WISCONSIN.

**PATTERSON v. NATURAL PREMIUM MUTUAL LIFE
INSURANCE COMPANY.**

[100 WISCONSIN, 118.]

INSURANCE, LIFE—SUICIDE, WHEN NO DEFENSE.—If life insurance is effected for the benefit of wife and children, suicide, while sane, is not a defense in the absence of a condition or exception to that effect in the policy. Especially is this true if the policy provides that it shall be incontestable for any cause save for non-payment of premium.

INSURANCE, LIFE — EFFECT OF ASSIGNMENT OF POLICY TO CHILDREN OF THE ASSURED.—If a policy is issued on the life of the insured, payable to his administrators or assigns, and he afterward, with the consent of the insuring corporation, assigns the policy to his children, it must subsequently be given the same construction and effect as if they had originally been named therein as beneficiaries, and it cannot be avoided by any act of the insured which would not have avoided it had they been named in the policy as beneficiaries.

INSURANCE, LIFE—CONSTRUCTION OF POLICY.—When a policy is capable of two meanings, that which is most favorable to the insured must be adopted.

A CRIME IS ANY WRONG which the state deems injurious to the public at large, and punishes through a judicial proceeding in its name. Though an act is criminal by the common law, it cannot be regarded as a crime in a state by whose laws no judicial proceedings can be maintained for its punishment.

INSURANCE, LIFE—SUICIDE.—A condition that the insurer shall not be answerable if the death of the insured was in consequence of, or in violation of, law does not avoid a policy because death results from suicide.

INSURANCE, LIFE—INCONTESTABLE CLAUSE.—If a policy of insurance provides that it is absolutely incontestable from the date of its delivery and acceptance, except for nonpayment of premiums or misstatements of age, it cannot be avoided on

account of misstatements of the assured respecting his health, or of the grounds upon which he had made an application for a pension.

Action to recover upon a policy insuring the life of Alexander W. Patterson. The defenses were that the assured died by suicide committed while sane, and that he procured the policy by fraud, intending to commit suicide, and that in his application he made misstatements regarding his health and the grounds upon which he had applied for a pension. The application for the policy declared that the applicant had read all the statements and answers in the application, and warranted that no circumstance or information had been withheld or omitted touching the past and present state of health and habits of life of the applicant, and that his statements and answers in the application, as well as those made to the complainant's medical examiner, were true, and should be the basis of the contract applied for. The policy declared that it "is absolutely incontestable from the date of its delivery and acceptance, except for the nonpayment of premiums or misstatement of age; and the latter may be corrected or adjusted if the age of entry was within the limits of ages insured by this company." The trial court directed a verdict in favor of the plaintiffs, and the defendants appealed.

A. R. Bushnell and R. M. La Follette, for the appellant.

Burr W. Jones and E. R. Stevens, for the respondents.

121 WINSLOW, J. There was evidence tending to show that the deceased was sane when he shot himself; hence, the verdict having been directed, it must be assumed upon this appeal that such was the fact. Starting from this basis, the argument for the defendant is, in substance: 1. That intentional self-destruction while sane is not a risk covered by a policy of life insurance, even when there is no clause in the policy specifically exempting the company from liability for such death; 2. The incontestable clause does not cover such a death, and, even if it be held to do so by its terms, such a stipulation would be void, as against public policy; 3. Intentional self-destruction while sane is a crime, and hence the stipulation providing that death in violation of law is not a risk assumed by the company defeats a recovery.

Upon the first proposition reliance is placed upon the recent decision of the supreme court of the United States in the case of *Ritter v. Mutual L. Ins. Co.*, 169 U. S. 139. In this

case it was distinctly held that intentional self-destruction by the assured while sane is not a risk covered by a life insurance policy even when the policy contains no exception as to such a death; and it was further said that such a risk could not be legally covered by a policy, because it would be against public policy to make such a contract. This was ¹²² an action by the executors of the estate of the assured upon a policy payable directly to his executors, administrators, and assigns; and there was much evidence tending to show that the assured deliberately effected this and a large amount of other life insurance with the intention of committing suicide, and thus enriching his estate and paying his debts. Another and perhaps the only other direct adjudication to the same effect is the decision in the case of Supreme Commandery K. G. R. v. Ainsworth, 71 Ala. 436; 46 Am. Rep. 332. The principle upon which these decisions rest is thus well stated in the last-named case: "Death, the risk of life insurance, the event upon which the insurance money is payable, is certain of occurrence. The uncertainty of the time of its occurrence is the material element and consideration of the contract. It cannot be in the contemplation of the parties that the assured by his own criminal act shall deprive the contract of its material element—shall vary and enlarge the risk and hasten the day of payment."

The authorities upon which these decisions are principally based consist of certain expressions of opinion contained in *Hartman v. Keystone Ins. Co.*, 21 Pa. St. 466, *Moore v. Woolsey*, 4 El. & B. 243, and *Amicable Soc. v. Bolland*, 4 Bligh, N. S., 194, in none of which cases, however, was the question directly in issue. Support for the proposition is also drawn from the well-established principle of the law of fire insurance that, if the insured intentionally set fire to the property insured and destroy it, he cannot recover for the loss. It is certainly not to be denied that the reasoning in favor of the proposition is cogent, and, were the question a new one in the law, the argument would be wellnigh irresistible, especially where, as in the *Ritter* case, the policy runs in favor of the estate of the insured, and the proceeds will go to the enrichment of such estate instead of to other beneficiaries. But it is by no means a new question, and there are numerous authorities which directly hold that, ¹²³ where life insurance is effected for the benefit of wife or children, suicide while sane is not a defense, in the absence of a condition or exception to that effect in the policy: *Fitch v. American etc. Ins. Co.*, 59 N. Y. 557; 17 Am. Rep. 372; *Darrow v. Fam-*

ily Fund Soc., 116 N. Y. 537; 15 Am. St. Rep. 430; Patrick v. Excelsior L. Ins. Co., 67 Barb. 202; Mills v. Rebstock, 29 Minn. 380; Kerr v. Minnesota etc. Assn., 39 Minn. 174; 12 Am. St. Rep. 631; North Western etc. Assn. v. Wanner, 24 Ill. App. 357. This principle was stated as the law in McCoy v. North Western etc. Assn., 92 Wis. 577, although it probably was not directly involved in that case. The American text-books which treat of the subject very generally state this to be the law: 1 May on Insurance, sec. 324; Niblack on Benefit Societies, sec. 156; 3 Joyce on Insurance, sec. 2653; 3 Am. & Eng. Ency. of Law, 2d ed., 1016. While these text-book citations may not be considered as very convincing, they certainly tend to show the general impression prevailing among the legal profession upon the subject, and that impression certainly prevailed in the supreme court of the United States when the case of Life Ins. Co. v. Terry, 15 Wall. 580, was decided; for in that case Mr. Justice Hunt refers to the contrary dictum in Hartman v. Keystone Ins. Co., 21 Pa. St. 466, as confessedly unsound. The fact that insurance companies have almost universally deemed it necessary to insert in their policies provisions exempting them from liability in case of suicide, "sane or insane," may perhaps also be considered as showing the general trend of opinion upon the subject in insurance circles; but, whether this deduction is to be properly drawn or not, we think it certain that the fact that life insurance policies universally contain this provision is of weight in determining the construction now to be placed upon a policy which omits all specific reference to suicide, and also ostentatiously contains a clause providing that it shall be absolutely incontestable for any cause save for nonpayment of premiums or misstatement of age. What would an applicant for insurance be entitled to think was the meaning of ¹²⁴ such a policy, when presented to him, garnished with the usual and customary commendations of the average solicitor of insurance? Certainly, he would not think that its legal effect was the same as that of a policy containing the usual provisions against suicide, sane or insane.

The policy before us was originally payable to the administrators, executors, or assigns of Patterson; but within a few days it was assigned, with the consent of the company, to the plaintiffs, his children, and so remained. After this assignment it was no longer a policy in favor of Patterson's estate, but in favor of his children, as beneficiaries, as much as though originally made payable to them. Under the decision of this court in Foster v.

Gile, 50 Wis. 603, such a beneficiary has an actual, subsisting interest in the policy, subject to the right of the insured, who has paid the premiums, to vest it elsewhere; but, until such action by the assured, the interest of the beneficiary is such a vested, subsisting interest as would pass to the administrator of the beneficiary in case of his death. Such being the case, it falls directly within the principle of the New York and Minnesota cases before referred to, which hold that, as against such a beneficiary, suicide of the insured while sane is not a defense, in the absence of a provision in the policy. Nor would the application of that principle to this case necessarily conflict with the Ritter case, where the policy was in favor of the estate of the insured. It may well be in such a case that the intentional suicide of the insured while sane would prevent a recovery by his personal representatives, and yet not prevent a recovery in case of a policy in favor of beneficiaries who had a subsisting, vested interest in the policy at the time of the suicide, and who could not, if they would, prevent the act of the insured.

In determining what rule should be adopted by this court in the present case there are numerous considerations which deserve attention. It must be borne in mind that the suicide ¹²⁸ clause has become so universal in policies that its absence at once attracts attention. It can hardly be otherwise than that the agent soliciting insurance under such a policy as this would at once call attention to its apparent liberality, in that there was no suicide clause, and, further, that there was in addition an "absolutely incontestable" clause; and the average layman (not to say lawyer), in looking it over, would conclude that it was in fact a very favorable policy to the insured. These provisions are all carefully framed by the insurance company, and expressly framed to induce people to insure; and the principle is familiar and just that, when the policy is capable of two meanings, that which is most favorable to the insured is always to be adopted: *Utter v. Travelers' Ins. Co.*, 65 Mich. 545; 8 Am. St. Rep. 913. In at least one state—Missouri—there exists a statute which prohibits the defense of suicide, except when it was contemplated at the time of effecting the insurance, and makes void any contrary stipulation in the policy: Mo. Rev. Stats. 1889, sec. 5855. This statute has been enforced by the courts of Missouri, and by the circuit court of appeals of the United States, without apparent question as to its validity on the ground of public policy: *Keller v. Travelers' Ins. Co.*, 58 Mo. App. 557; *Knights' Templar etc. Co. v. Berry*, 4 U. S. App. 353; 50 Fed. Rep. 511.

Bearing these things in mind, and while conceding the strength of the arguments upon public policy on which the Ritter case is based, we still think, in view of the prior decisions above cited to the contrary of the rule there laid down, and the general apparent acquiescence in those decisions by the courts and by the people, that we ought to hold, in accordance with those decisions, that, in a case where third persons are beneficiaries, intentional suicide of the insured while sane does not avoid the policy, in the absence of any provision in the policy to that effect. Whether the rule would apply to a case where the personal representatives ¹²⁶ of the insured were bringing the action for the benefit of the estate of the insured is not decided, because that case is not before us. In so holding it becomes unnecessary to consider the effect of the incontestable clause upon this branch of the case.

We now come to consider the effect of the clause providing that death "in consequence of or in violation of law" is not a risk covered by the policy. It is truly said that intentional suicide while sane was a felony at common law. It was punished by forfeiture of goods, but, as we do not inflict such punishments, it is now little more than the shadow of a crime. Technically, it is still a crime in this state, because we have retained the common law so far as it is not inconsistent with our laws and general situation, but it is not a crime within the ordinary meaning of the term, or any usual definition, because we have no statute punishing either suicide or attempted suicide. Mr. Bishop's definition of a crime (1 Bishop's New Criminal Law, sec. 32) is "any wrong which the government deems injurious to the public at large, and punishes through a judicial proceeding in its own name." This was approved by this court in *Petition of Bergin*, 31 Wis. 383. Such is undoubtedly the general conception of a criminal offense, namely, a violation of law for which there is a punishment. Words are to be understood in their generally understood and accepted meaning. Now, as before said, the insurance company have deliberately struck out the usual suicide clause from their policy, and put in an "absolutely incontestable" clause. Is it reasonable to say that they have in fact retained the suicide provision, artfully concealed under a form of words which not one person in a hundred would suspect meant to include it? We think not. The rule that in case of doubt or ambiguity the language used (being the company's own language) must be construed most strongly against it again applies. Certainly, if this ¹²⁷ clause were held to include suicide,

the language of the policy would be grossly misleading: *Kerr v. Minnesota etc. Assn.*, 39 Minn. 174; 12 Am. St. Rep. 631. The New York courts have held suicide not a crime, because common-law crimes have been abolished in that state: *Darrow v. Family Fund Soc.*, 116 N. Y. 537; 15 Am. St. Rep. 430.

But it is further claimed by the defendant that the evidence tended to show a fraudulent scheme on the part of Patterson when he took out his policy to obtain insurance on his life for the purpose of thereafter committing suicide, and defrauding the company for the benefit of his children. Doubtless, this would be a good defense, if shown, unless it be cut off by the "incontestable clause." It would be a defense not based on the suicide alone, but on the whole fraud, of which the act of suicide was only the ultimate step. But the difficulty is that we have been unable to find any evidence which would justify the submission of that question to the jury. It is said that he falsely represented his state of health in his application, and concealed some of the grounds upon which he had previously made application for a pension. There does not seem to be much merit in the claim. He submitted himself for examination to the company's medical examiner, who reported that he had dyspepsia and that he was only a second-class risk. The company had full notice that he was not in first-class health, because the insured himself stated in his application that he had dyspepsia and had had malaria, and had applied for a pension on the ground of indigestion brought on by exposure in the army. Besides, the incontestable clause would seem to effectually bar this defense. If this clause be not altogether a glittering generality, put in for no purpose except to induce men to insure, it would seem that it must cover such misstatements or omissions as are here alleged. Such clauses have been upheld by various courts: *Wright v. Mutual B. L. Assn.*, 118 N. Y. 237; 16 Am. St. Rep. 749; *Simpson v. Life Ins. Co.*, 115 N. C. 393; *Goodwin v. Provident etc. Assn.*, 97 Iowa, ¹²⁸ 226; 59 Am. St. Rep. 411; *Kline v. National Ben. Assn.*, 111 Ind. 462; 60 Am. Rep. 703. We see no reason why an insurance company may not take the risk of ascertaining for itself the condition of health of the insured.

By the Court. Judgment affirmed.

INSURANCE, LIFE—SUICIDE AS DEFENSE.—In the law of insurance, suicide is not, as a rule, recognized as a ground of exemption from liability, unless some provision is made therefor in the policy: *Note to Grand Lodge I. O. M. A. v. Wieting*, 61 Am. St.

Rep. 131. Death by suicide is not within the meaning of a provision in a life insurance policy that it shall be void if the assured shall die in the violation of, or an attempt to violate, any criminal law. This is put upon the ground that suicide is not a violation of any criminal law: See monographic note to *Conboy v. Railway Officials etc. Assn.*, 60 Am. St. Rep. 164.

INSURANCE, LIFE—ASSIGNMENT.—A policy on the life of the assured, payable to his legal representatives, may be assigned by him with the assent of the insurers, and the rights of the assignee are paramount to the claims of the heirs or personal representatives of the assured: Note to *Prudential Ins. Co. v. Young*, 56 Am. St. Rep. 322.

INSURANCE, LIFE—INCONTESTABLE CLAUSE.—A provision to the effect that the validity of the policy should not be questioned after the death of the insured and not after two years from the date of its issue, precludes the defense of fraud as well as others: *Wright v. Mutual Benefit Assn.*, 118 N. Y. 237; 16 Am. St. Rep. 740. See *Mareck v. Mutual Reserve etc. Assn.*, 62 Minn. 89; 54 Am. St. Rep. 613; *Goodwin v. Provident Savings etc. Assn.*, 97 Iowa, 226; 59 Am. St. Rep. 411.

SELLECK v. JANESVILLE.

[100 WISCONSIN, 157.]

COURTS—TRIAL TAKING PLACE PARTLY OUT OF THE COURTHOUSE.—If a trial judge and the jurors and attorneys go to the house of one of the parties for the purpose of taking her testimony, against the objection of the other party, and it is accordingly taken in the presence of the judge and jury, but out of the courthouse, it cannot be regarded as taken in open court, although it must be regarded as a proceeding in the action. The course of proceeding is irregular, but the irregularity is not such as to require a reversal or the granting of a new trial, where the statute directs the appellate court to disregard any error in the proceedings which does not affect the substantial rights of the parties.

JURY TRIAL—ACTS AND EXHIBITIONS CALCULATED TO PREJUDICE THE JURY.—The fact that the plaintiff in an action to recover for personal injuries, when testifying in the presence of the jurors, was lying on a lounge attended by her physician, and that her sister was present and wept during the continuance of the evidence, does not show that the jury was improperly prejudiced, or that sympathy was raised in favor of the plaintiff to which she was not entitled.

EVIDENCE—HYPOTHETICAL QUESTIONS.—The fact that a hypothetical question was in part based on the personal examination and knowledge of the witness to whom it was addressed does not make it objectionable.

DAMAGES FOR PERSONAL INJURIES ENHANCED BY TREATMENT OF A PHYSICIAN.—In an action to recover for personal injuries it is not error for the court to instruct the jury that the plaintiff is not held responsible for the errors or mistakes of a physician or surgeon in treating her injury, if she exercised ordinary care in procuring the services of such physician, and that if her damages have not been increased by her own subsequent want of ordinary care, she would be entitled to recover, in consequence of the wrong done, to the full extent of the damage, although a physician

so employed omitted to employ the remedies most approved in similar cases, and by reason thereof the damage of the injured party was not diminished as much as it otherwise would have been.

Horace McElroy, William Ruger, and F. C. Burpee, for the appellant.

Fethers, Jeffris, Fifield & Mouat, for the respondent.

159 CASSODAY, C. J. This is an action to recover damages for personal injuries sustained by reason of an alleged defective sidewalk on the westerly side of South River street, in Janesville, about 1 o'clock in the afternoon of October 18, 1893. Issue being joined and trial had, the jury returned a verdict in favor of the plaintiff, and assessed her damages at five thousand dollars. From the judgment entered thereon the defendant brings this appeal.

It appears from the record that after the cause came on for trial May 17, 1897, and the jury had been sworn, the **160** plaintiff's counsel stated to the court, in substance, that the plaintiff, who resided near Evansville, was unable to attend the trial at the courthouse, and asked leave to take her testimony, and requested that the presiding judge and the jury be present at her home at the taking of her testimony; that the defendant objected to such request and to having any part of the cause tried away from the courthouse, and then offered to waive any objection as to notice and to consent to take her deposition in the ordinary way, and allow it to be read on the trial. The court, however, granted the plaintiff's request, to which the defendant excepted; and thereupon the presiding judge and the jurors sworn in the case were taken to the plaintiff's home, near Evansville, in charge of the sheriff; and the plaintiff was carried into their presence upon a lounge, and was sworn and testified as a witness in her own behalf while so lying upon the lounge and being administered to by her physician. Error is assigned because such testimony of the plaintiff was so taken at her home, in the presence of the jurors and the presiding judge, instead of being taken in the courthouse in Janesville.

The statute provides that: "Each county shall at its own expense provide at the county seat a courthouse, . . . and keep the same in good repair. Until such courthouse be provided or when the courthouse shall from any cause become unsafe, inconvenient, or unfit for holding court, the county board shall appoint some other convenient building at the county seat for that purpose temporarily; and such building shall then be deemed the

courthouse for the time being for all purposes": Sanborn and Berryman's Annotated Statutes, sec. 656. The statute also provides that whenever it shall be deemed unsafe or inexpedient by reason of certain calamities therein mentioned to hold any court at the time and place appointed therefor, the justices or judges of the court may, by an order in writing, appoint any other place within the same county ¹⁶¹ and any other time for holding the same; and the said adjourned session shall be taken as part and continuance of the term, and all proceedings in the court may be continued at the adjourned times and places, and be of the same force and effect as if the court had continued its session at the place it was holden before such adjournment: Sanborn and Berryman's Annotated Statutes, sec. 2574.

This court has held "that a county can only have one county seat, and that the courthouse must be at the county seat, except in the special cases prescribed, when from necessity courts may be temporarily held elsewhere": *Pepin Co. v. Prindle*, 61 Wis. 307. To the same effect, *Board of Commrs. v. Gwin*, 136 Ind. 562. It will be observed that our statute does not expressly require the circuit court to be held at the county seat as in some of the states (*Funk v. Carroll Co.*, 96 Iowa, 158), nor as required of the county courts in this state: Rev. Stats. 1878, sec. 2240. Nevertheless, it would certainly be error to hold a circuit court at a place other than the county seat, except in cases prescribed by statute. We cannot regard the proceeding at the home of the plaintiff as being taken in open court, although it must be regarded as a proceeding in the action. The important question is, whether the irregularity in the manner of taking the plaintiff's testimony was such as should work a reversal. There is no pretense that she was not regularly sworn before giving her testimony, nor that any of the jurors or the presiding judge was absent during any portion of the time her testimony was being taken, nor that the defendant's counsel did not have and exercise the full opportunity to cross-examine her at length. The proceeding was somewhat similar to a view of "the premises or place in question or any property, matter, or thing relating to the controversy between the parties," by the presiding judge and jury, which a trial court, in a proper case, is expressly authorized by statute to order: Rev. Stats. 1878, sec. 2852. While we may not be willing to go to the ¹⁶² extent of some courts in upholding trials and adjudications had outside of the courthouse, yet the authorities are ample to support the proposition that the taking of the plaintiff's testimony in the manner indicated did

not deprive the court of jurisdiction nor nullify the judgment, but was, at most, an irregularity: *Le Grange v. Ward*, 11 Ohio, 257; *Mohon v. Harkreader*, 18 Kan. 383; *State v. Peyton*, 32 Mo. App. 522; *Bates v. Sabin*, 64 Vt. 511; *Reed v. State*, 147 Ind. 41.

Being a mere irregularity, the question recurs whether it is such an error as should work a reversal. The statute expressly requires this court to disregard any error in the proceedings which does not affect the substantial rights of the adverse party, and declares that no judgment shall be reversed or affected by reason of such error: Rev. Stats. 1878, sec. 2829. This court has applied that statute in cases too numerous to mention. In our judgment, the substantial rights of the defendant were not prejudiced or affected by the taking of the plaintiff's testimony in the manner indicated. The theory of counsel seems to be that the plaintiff's appearance upon the lounge, with her attending physician, may have created sympathy on the part of the jury; but that is just as likely to occur in any case where the injured party appears in court as a witness upon the trial. If the condition and appearances of such party are genuine, then there is no good reason for concealing them. If, on the contrary, they are feigned, then the jury are quite likely to detect the pretension; and so the influence is liable to operate against the party, as well as in his favor, according to the facts. We must hold that the taking of the plaintiff's testimony in the manner indicated, although irregular, is not reversible error. We perceive no error in allowing the plaintiff to exhibit her actual condition to the jury nor in allowing her daughter to weep.

Error is assigned by reason of exceptions taken to certain 163 hypothetical questions put to the physicians. These questions are lengthy. It is enough to say that they appear to contain nothing but what is supported by evidence. Upon objection being made, counsel were informed that if there was anything as to the plaintiff's condition not embraced in the question, and the defendant's counsel would point it out, then it might be added, but nothing additional was suggested. The criticism that the question was indefinite is without foundation. The mere fact that the questions were in part based upon the personal examination and knowledge of such physicians did not make them objectionable. The rules of law applicable to such questions have frequently been stated by this court in cases cited by the respective counsel, and need not be restated here: *Quinn v. Higgins*, 63 Wis. 664; 53 Am. Rep. 305; *Kreuziger v.*

Chicago etc. Ry. Co., 73 Wis. 158; Smalley v. Appleton, 75 Wis. 118; Vosburg v. Putney, 80 Wis. 523; 27 Am. St. Rep. 47; Zoldoske v. State, 82 Wis. 580; Louisville etc. Ry. Co. v. Wood, 113 Ind. 544; Louisville etc. Ry. Co. v. Falvey, 104 Ind. 409.

Error is assigned because the court charged the jury that: "The plaintiff is not held responsible for the errors or mistakes of a physician or surgeon in treating an injury received by a defect in the street or sidewalk, providing she exercises ordinary care in procuring the services of such physician. Where one is injured by the negligence of another, or by negligence of a town or city, if her damages have not been increased by her own subsequent want of ordinary care, she will be entitled to recover in consequence of the wrong done and the full extent of damage, although the physician that she employed omitted to employ the remedies most approved in similar cases, and by reason thereof the damage to the injured party was not diminished as much as it otherwise should have been." Such charge is certainly supported by authority as well as reason: Loeser v. Humphrey, 41 Ohio St. 378; 52 Am. Rep. 86; Louisville etc. Ry. Co. v. Falvey, 104 Ind. 104 411, 424; Reed v. Detroit, 108 Mich. 224; Pullman Palace Car Co. v. Bluhm, 109 Ill. 20; 50 Am. Rep. 601; Rice v. Des Moines, 40 Iowa, 638; Stover v. Bluehill, 51 Me. 439; Tuttle v. Farmington, 58 N. H. 13; Boynton v. Somersworth, 58 N. H. 321; Lyons v. Erie Ry. Co., 57 N. Y. 489; Bardwell v. Jamaica, 15 Vt. 438. The wrongdoer may well anticipate that the person injured will employ a physician or surgeon, and in doing so will exercise ordinary care in making the selection; but, where that is done, such person cannot be expected to assume the responsibility of the very highest degree of skill. This court has gone so far as to hold that, "where personal injuries result proximately from negligence or other tort, the wrongdoer is liable for the damages actually sustained, although they are increased by a tendency to disease on the part of the person injured": McNamara v. Clintonville, 62 Wis. 207; 51 Am. Rep. 722.

This disposes of the principal errors assigned. Others are mentioned, but they are not such as require particular consideration. They must be regarded as overruled. Certainly, there is evidence sufficient to sustain the verdict.

By the Court. The judgment of the circuit court is affirmed.

JUDGE BARDEEN DISSENTED, holding that the taking of the testimony of the plaintiff before the jury, but outside of the court-

house, was a substantial irregularity for which the judgment should be reversed. Upon this subject he said: "So far as I can discover, courts have uniformly held that the acts and proceedings of a court outside of the place appointed by law for holding the same are void. The law is so stated in Board of Commissioners of White Co. v. Gwin, 136 Ind. 562; and this conclusion is in harmony with good sense and sound reason: See, also, Williams v. Reutzel, 60 Ark. 155; Funk v. Carroll, 96 Iowa, 158. I desire to emphasize the fact that such proceedings are void, as distinguished from irregularities, because, as I view it, this court has mistakenly treated the procedure of the trial court in this case as a mere irregularity. The theory upon which this branch of the case was disposed of is, that the proceeding of the trial court amounted simply to the taking of the deposition of the plaintiff—an irregularity or error in discretion cured by the beneficent provisions of section 2829 of the Revised Statutes of 1878. The testimony of plaintiff was taken the same as if she were in open court at the proper place, but in fact at a farmhouse more than fifteen miles distant from the county seat. There is no pretense of its having been offered as a deposition. The proceeding was nothing, if not a proceeding in court. If a deposition, it was contrary to every rule of procedure, and inadmissible against defendant's objection. It was a proceeding contrary to every rule of correct practice, prejudicial to defendant's rights, and derogatory to the dignity of the court. It was a complete departure from the ordinary course of legal procedure, and without right or authority. If the proceeding was void, it cannot be cured by resort to the statute. It tainted the whole case with error so plain and palpable as to render the judgment utterly void. Because of its flagrancy, and lest it become a precedent for other departures from correct practice by trial courts, I desire to enter my protest against glossing it over or excusing it as an irregularity."

WITNESSES — EXPERTS — HYPOTHETICAL QUESTIONS— When the testimony of an expert is proper, counsel may assume the existence of any state of facts which the evidence tends to justify and base their questions upon such assumption: Note to Kliegel v. Altken, 59 Am. St. Rep. 905. It is not required that the facts should be conceded, nor is technical accuracy required in framing the questions: Meeker v. Meeker, 74 Iowa, 352; 7 Am. St. Rep. 489. An expert may not only testify to opinions, but also state general facts which are the result of scientific knowledge or professional skill: Emerson v. Lowell Gas Light Co., 6 Allen, 146; 83 Am. Dec. 621.

DAMAGES FOR PERSONAL INJURIES—TREATMENT BY PHYSICIAN.—Where one has been personally injured by the negligence of another, without fault on his own part, and employs a reputable physician, his recovery of actual damages may not be diminished by the physician's mistake or neglect: Loeser v. Humphrey, 41 Ohio St. 378; 52 Am. Rep. 86.

TRUSTEES v. WILLIAMS.

[100 WISCONSIN, 223.]

VOID JUDGMENT—APPEAL.—A void judgment is appealable and reversible on that ground.

CHATTEL MORTGAGES—COTENANTS.—If a chattel mortgage is given to two persons to secure a promissory note due to each separately, they become tenants in common of the chattel mortgage.

COTENANCY.—REPLEVIN cannot be maintained by one tenant in common against another.

COTENANCY—SALE OF PROPERTY BY ONE COTENANT WITHOUT THE CONSENT OF THE OTHER.—One cotenant has no right to sell the common property without the consent of the other, and if he does so, is liable to an action by his cotenant for the latter's interest in the property sold, or the nonconsenting cotenant may still retain his interest and be a cotenant with the vendee.

CHATTEL MORTGAGE FOR SEPARATE DEBTS DUE THE MORTGAGEES.—If a chattel mortgage is made to two persons to secure separate debts due to each, each can sell his undivided interest in the property and no more, and if one sells the whole, he is answerable to the other for the latter's interest, which interest bears the same proportion to the whole property that the indebtedness due him bears to the aggregate indebtedness secured by the mortgage.

Action of replevin for a hack, harness, and span of horses. The property in question in 1894 belonged to the defendant Armstrong, who then gave a mortgage to T. C. Smith and D. A. Williams to secure five hundred and fifty-six dollars and seventy-five cents due to the former and three hundred dollars due to the latter. Smith transferred his note and his interest in the mortgage to the plaintiffs, who thereafter demanded possession of the property of Armstrong. He refused to deliver possession, and afterward delivered the property to Williams, the comortgagee. The plaintiff then discontinued the action against Armstrong and brought the present action against him and Williams. The property was then delivered to the plaintiffs, who, before judgment, sold the whole of it under the mortgage for five hundred and forty dollars. The defendants moved for a nonsuit, which the court denied. It then decided that the plaintiffs were entitled to the possession of the property and the costs of suit, and that the plaintiff and the defendant Williams were entitled to the proceeds of the property, less the costs of the foreclosure suit. An order was entered that the plaintiffs pay into court for the defendant Williams his share of such proceeds. He appealed.

Lamoreux, Shea & Wright and E. E. Brossard, for the appellant.

George P. Rossman, for the respondents.

²²⁶ MARSHALL, J. The judgment appealed from was as directed at the foot of the findings, so, notwithstanding a suggestion by respondents' counsel that there is no valid judgment and the appeal should be dismissed on that ground, no reason is perceived why the case is not properly here for review on the questions presented by appellant. If the statement of expenses incurred by plaintiffs in selling the mortgaged property ought to have been approved by the court before entry of judgment, which was not done, that is a mere irregularity and does not render the judgment void; but if it were otherwise, the appeal cannot be dismissed, for a void judgment is appealable and reversible on that ground: *Kidder v. Fay*, 60 Wis. 218.

Plaintiffs and D. A. Williams were tenants in common of the property in question at the time the action was commenced, as a legal result of each owning a note secured by one chattel mortgage, and both notes being past due. Each was entitled to the possession of the property as much as the other, and neither was entitled to maintain replevin therefor against his cotenant. It follows necessarily that the delivery of the property by the mortgagor to Williams was not a legal wrong to plaintiffs, and that the finding based thereon, that he and Williams colluded together to injure plaintiffs, is without warrant in the evidence; but if it were otherwise, that is not a ground for the maintenance of an action of replevin by one tenant in common against his cotenant.

The principles involved in what has preceded are supposed ²²⁷ to be familiar and elementary; therefore, no further discussion of them will be indulged in; but see *Farwell v. Warren*, 76 Wis. 527; *Jones on Chattel Mortgages*, sec. 49; *Wells on Replevin*, sec. 152; *Alderson v. Schulze*, 64 Wis. 460; *Tallman v. Barnes*, 54 Wis. 181; *Earll v. Stumpf*, 56 Wis. 50.

The mortgagees being tenants in common, Williams was the owner of an undivided interest in the property, plaintiffs the owners of such an interest, and neither had a right to sell the interest of the other therein. The action of plaintiffs in so doing, after they obtain possession in the replevin suit, was wrongful, and rendered them liable as wrongdoers. True, it is suggested in *Earll v. Stumpf*, 56 Wis. 50, that if one tenant in com-

mon, circumstanced as plaintiffs were, sells mortgaged property for the whole debt, fairly and without fraud, it is probable the only remedy the cotenant would have would be an action for his proportion of the proceeds of the sale; but no such question was before the court or decided, though the obiter remark probably guided the learned trial judge in this case in shaping the order for judgment as he did. Certainly, it is not the law that one tenant in common can in any way dispose of his cotenant's interest in the common property without the consent of such cotenant. In case of such a sale, the wrongdoer is answerable to the cotenant for his interest in the property, or the wronged cotenant may still claim such interest as a cotenant with the vendee: Jones on Chattel Mortgages, sec. 49; White v. Osborn, 21 Wend. 76; Tyler v. Taylor, 8 Barb. 585. As stated by Mr. Justice Taylor, in effect, in Farwell v. Warren, 76 Wis. 527, where each of several persons owns a note, secured by a chattel mortgage running to such persons jointly, the legal situation of the parties is the same as if each had a mortgage on an undivided interest in the property corresponding to the amount of his claim. The mere fact that the notes are secured by a single mortgage does not make either holder a trustee or agent for another similarly situated to sell the interest ²²⁸ of such other in the property and account for his proportion of the proceeds. Each can sell his undivided interest in the property and no more.

It follows from what has preceded that defendant's motion for judgment should have been granted, the property having been delivered to plaintiffs in the replevin suit, which we hold was not maintainable, even if they had not, pending the action, wrongfully disposed of such property. Defendant did not claim a return by answer, so was entitled to judgment absolute against plaintiffs and their sureties on the replevin bond, for the value of her interest as found by the jury, with interest thereon from the date of the taking in the action, as damages: Rev. Stats. 1878, secs. 2888, 2889; Lanyon v. Woodward, 65 Wis. 543; Kloety v. Delles, 45 Wis. 484. The value of the whole property was seven hundred dollars, hence the value of Williams' interest was such proportion of seven hundred dollars as the amount due on the note held by defendant bears to the whole amount of the indebtedness secured by the mortgage, or, as we have computed it, two hundred and forty-six dollars and twenty-seven cents; interest on that sum at the rate of six per cent per annum from October 19, 1894, should be added as damages, and judg-

ment therefor rendered against plaintiffs, or plaintiffs and their sureties on the replevin bond, at the option of the defendant, with costs taxed in the trial court according to law.

By the Court. The judgment of the circuit court is reversed and the cause remanded, with directions to render judgment, in favor of defendant as indicated in the opinion.

COTENANCY—REPLEVIN BY ONE COTENANT AGAINST ANOTHER.—An action of replevin cannot be maintained by a part owner of a chattel for his undivided part: *Hart v. Fitzgerald*, 2 Mass. 509; 8 Am. Dec. 75. But where several own cereal grain of the same kind and value, mingled together by their consent, or by reason of circumstances reasonably to be foreseen, each may maintain replevin for his just proportion: *Piazza v. White*, 23 Kan. 621; 83 Am. Rep. 211.

COTENANCY—SALE OF PROPERTY BY ONE COTENANT—RIGHTS OF OTHER.—Where a tenant in common of goods sells the whole, his cotenant may treat it as a conversion and bring trover against his cotenant to recover his share: *Note to Knope v. Nunn*, 56 Am. St. Rep. 645. He may either bring trover or he may assert his rights as cotenant with the vendee: *Rains v. McNairy*, 4 Humph. 356; 40 Am. Dec. 651; for he is not divested of title by the sale, but becomes a cotenant with the purchaser: *Welch v. Clark*, 12 Vt. 681; 86 Am. Dec. 868.

LAND, LOG AND LUMBER COMPANY v. McINTYRE.

[100 WISCONSIN, 245.]

PUBLIC OFFICER—REMEDY AT LAW, WHEN INSUFFICIENT.—A statute giving a person who is aggrieved by an officer's demanding and receiving illegal fees a remedy to recover them back with a penalty, applies only in favor of the person directly aggrieved, and hence does not prevent the maintenance of a suit in equity brought by a private citizen in behalf of the county to charge a public officer as trustee for moneys illegally exacted and received by him.

PUBLIC OFFICER—SUIT TO RECOVER MONEYS RECEIVED BY ON FORBIDDEN CONTRACT.—If a statute forbids a county supervisor from being a party or in any manner interested in a contract with the county for the purchase of any article whatever, and provides that all contracts in violation of the prohibition shall be void, it is as applicable to executed as to executory contracts, and if a supervisor has dealt with the county and has furnished it labor and supplies and received compensation therefor, it has been received without the support of any valid contract, express or implied, and he may be compelled in equity to refund the moneys received without the county's accounting for the value of the labor and supplies actually furnished and retained. One who does an act forbidden by law cannot acquire any rights therefrom.

PUBLIC OFFICERS—CONTRACTS OF, WHEN VOID.—A statute which declares all contracts for furnishing labor or supplies to a county, to which one of its supervisors is a party, or in which he is interested, shall be void, does not make the contracts voidable

only, but absolutely void, and hence, though such contracts are fully executed, he has no right to retain the moneys received thereunder.

COUNTIES—CITIZENS AND TAXPAYERS, WHEN MAY BRING SUITS IN BEHALF OF.—If a county has a plain cause of action for an injury done to it, which should be enforced for the protection of its citizens or taxpayers, and its governing board refuses to assert such cause of action, any citizen, by reason of his indirect interest, may sue, in behalf of himself and others similarly situated, the person against whom the cause of action exists, and thereby enforce the rights of the county.

EQUITY—REMEDY IN FAVOR OF A COUNTY DOES NOT PREVENT ITS CITIZENS FROM RESORTING TO.—Though a county might maintain an action at law to recover moneys to which it was entitled, yet if its governing board refused to act in its behalf, any of its citizens may sue in behalf of himself and the other citizens in a court of equity, and thereby enforce the right to which the county is entitled and which its governing board wrongfully refused to assert.

Action to charge the defendant McIntyre, as trustee of Vilas county, for moneys claimed to have been corruptly drawn by him from its treasury. Three causes of action were asserted by the complaint, the first being that the defendant, while chairman of the board of supervisors, filed numerous bills for illegal claims against the county, knowing them to be such, and illegally and corruptly caused them to be audited, and county orders to be issued to himself therefor and to be paid by the county treasurer. The second cause of action was for moneys alleged to have been drawn for services in excess of those allowed by law and for pretended services not rendered and disbursements not made or legally chargeable. The third was for collecting moneys on a claim for goods, wares, merchandise and labor furnished in constructing an alleged county road that had no existence in fact, and for drawing money on an order which the defendant caused to be issued without any claim being placed on file upon which to base the order. The complainants showed that they were taxpayers of the county; that they had applied to the board of supervisors, and demanded that an action be brought by the board to recover the moneys here sued for; that the board refused to take any action, and therefore that this action was instituted in behalf of the complainants and other taxpayers. A demurrer to the complaint having been presented and overruled, an appeal was taken from the order overruling it.

Ryan, Hurley & Jones and D. E. Riordan, for the appellant.

Curtis & Reid and John Barnes, for the respondents.

248 **MARSHALL, J.** It is suggested by appellant's counsel in

support of the demurrer to the cause of action to recover back illegal compensation for supervisor's services, alleged to have been paid by the county to appellant, that plaintiffs have an adequate remedy at law under sections 2955-2957 of the Revised Statutes of 1878. That gives a person aggrieved by an officer's demanding and receiving of him illegal fees or compensation a remedy at law to recover the same back, with a penalty of twenty-five dollars. True, if plaintiffs have an adequate, or any remedy under such section, it is an objection to the sufficiency of the complaint that may be reached by demurrer; but it is quite clear that no such remedy exists. The sections referred to apply solely ²⁴⁹ to cases where a person has been directly injured by being required to compensate an officer beyond that to which he is legally entitled. This action is to enforce a cause of action in favor of the county. It is the corporation that has been directly injured and has the primary right to proceed. Plaintiffs' interests are wholly indirect, like that of a member of any private corporation under the same circumstances. They could not proceed at law for an injury to the corporation, or in their own names for their own benefit, independent of a statute granting the remedy, and certainly there is none. Illegal acts of corporate officers, whereby its property is misapplied, squandered, or lost, are not injuries to the separate interests of its stockholders or members that can be reached and remedied in a direct action by them. As to them the injury is purely incidental and consequential, the direct injury being to the corporation itself, and must necessarily be redressed by it or for its use for the benefit of all the members thereof: Thompson on Corporations, sec. 4476; Dillon on Municipal Corporations, sec. 915.

The next point made is directed particularly to the cause of action to recover money received by McIntyre for goods, wares, and merchandise, and labor alleged to have been furnished by him to the county while he was a member of its board of supervisors, in violation of section 692 of the Revised Statutes of 1878, which prohibits a person so circumstanced from being a party to or in any way or manner interested, either directly or indirectly, in any contract or agreement whatever with the county, for the purchase of any article whatever required by such county, and provides that all contracts or agreements in violation thereof shall be void, and the offending supervisor, by reason of his offense, be deemed to have thereby vacated his office. The purpose of that section was unmistakably to include contracts, executed as well as executory, between members of a

county board and their county for the purchase of any and all articles for its use. ²⁵⁰ No member of a county board can be interested, directly or indirectly, in any such contract without being guilty of gross violation of public duty, and liable to respond therefor in damages to the corporation to the full extent of any pecuniary benefit received by him in any event, and such further sum as the corporation may have lost by his unfaithful conduct.

But it is said the county received a benefit from the property and labor furnished by appellant, and that the rule is that equity will not interfere with an executed contract under such circumstances, and compel a restitution of the money received on the illegal contract, or any part of it, while the corporation retains the benefit, and many authorities are cited in support of that view, all relating, however, to cases where, though the corporation had power to incur the indebtedness or make the expenditure, there was some violation of law in the manner of doing it. That has often been recognized and applied in this court, as in *Pickett v. School Dist.*, 25 Wis. 551, 3 Am. Rep. 105, but a distinction was there clearly made between such circumstances and those where the manner of doing the thing was not only unlawful, but the doing of the act at all was unlawful as well. The court said in the latter mentioned circumstances: "The parties acquire no rights which can be enforced either in courts of law or equity." But in the former, the thing contracted for being itself lawful and beneficial, it would seem improper to allow the party who may be entitled to avoid it to receive and retain the benefit without any consideration at all. The court was there speaking of a contract voidable as against public policy under common-law principles, as distinguished from those void absolutely as not within the power of the corporation. The same distinction was recognized in *Beyer v. Crandon*, 98 Wis. 306, where it was held by this court that performance of a contract with a town to construct a road that has no legal existence does not create a claim, ²⁵¹ legal or equitable, against such town. That rule applies to the greater part of the sum sought to be recovered by the second cause of action, the same having been paid, as alleged, for property and labor in the construction of a co-called county road that had no legal existence.

Independent of the rule discussed in the foregoing, however, it is quite clear that our statute means what it says in declaring all contracts between a supervisor and the county for the purchase of articles for its use void, and that the offending mem-

ber shall be deemed to have vacated his office by reason of his conduct. True, in *White v. Iselin*, 26 Minn. 487, where the statute of that state which declares that if a guardian, executor, or administrator be interested, directly or indirectly, in a sale of real estate made by him it shall render such sale void, the court held that the word "void" was used, not in the sense of absolutely void, or void at law, but as voidable in equity; but that result was reached by a process of reasoning which, applied to this case, reaches the opposite result. As there said, in effect, the word "void" is sometimes used in the sense of absolutely void, so that no title passes under a contract to which it applies, and sometimes in the restricted sense of voidable in equity, so that oftentimes, under a statute using the term, a question of intention is presented which must be determined by the established rules of statutory interpretation. The general policy of the statute to give stability to titles, taken in connection with same sections of the Minnesota statute declaring that no irregularity in making the sale, after license duly issued, shall render such sale subject to question by a stranger to the title sold, and other sections indicating that a sale and conveyance, though affected by some irregularity that might render it subject to question, unless seasonably challenged, and before innocent parties become interested, will be held to convey a good title, were deemed sufficiently persuasive to warrant the court in holding that the word ²⁵² "void" as there used was not intended to extend the common-law rule on the subject: *Hoffman v. Harrington*, 28 Mich. 90; *Forbes v. Halsey*, 26 N. Y. 53; *Terwilliger v. Brown*, 44 N. Y. 237, and many other cases that might be cited, held to the opposite view in respect to similar statutes, the courts not perceiving circumstances indictating a legislative intent to use the word other than in its ordinary strict sense. Technical accuracy, it is admitted by all courts and text-writers, makes all contracts and acts to which the word applies nullities and of no effect whatever, not even to furnish a groundwork to make a valid contract by confirmation or ratification. This court gave to the word, as used in our statute prohibiting administrators and guardians from buying at their own sales, the same construction as the Minnesota court, in *Melms v. Pabst Brewing Co.*, 93 Wis. 153, 57 Am. St. Rep. 899, and for the same reasons, admitting, however, that entire legal accuracy was thereby invaded to carry out what was deemed to be the real purpose of the statute. In *Woodbury v. Parker*, 19 Vt. 353, 47 Am. Dec. 695, and *Wickliff v. Robinson*, 18 Ill. 145, the word

"void," in a statute prohibiting a sheriff from buying at his own sale was held to have been used by the lawmakers in the strict general sense of void absolutely. In reaching that conclusion the Illinois court was influenced by the obvious policy of the law in which the word occurred to remove all danger of pecuniary gain, causing a departure from official duty.

So it is manifest, as has been remarked often by text-writers and oftener by courts, that few, if any, words are more inaccurately used in the books than the word "void." Sometimes it means void absolutely, and sometimes void conditionally, and the courts are necessarily compelled, in order to carry out the real purpose of the lawmakers, to determine as to each statute where the word occurs what was the thought in the minds of such lawmakers, and that is often not free from difficulty. Some familiar rules of interpretation ²⁵³ must necessarily play an important part in reaching a correct conclusion here, among which are, that where words may be viewed in a comprehensive general sense, or a particular and restrictive sense, the presumption is, in the absence of anything indicating a contrary purpose, that the comprehensive general sense was intended; and that where language is susceptible of two reasonable interpretations, one that will create an absolute forfeiture, and the other not, courts lean toward the latter; but where it will admit of but one reasonable interpretation, courts must hold to that, whatever may be the consequences of it.

So, we start with what must be conceded, that the primary and strictly accurate meaning of the word "void" is that of absolute nullity. Void things are as no things. We look in vain for anything in the statute under consideration, or any circumstances of public policy, to indicate that the legislature, in prohibiting members of boards of supervisors from being pecuniarily interested in county contracts for the purchase of articles for its use, used the word in question in any other than its broad, general sense. On the contrary, it would seem that public policy requires a most rigid adherence to the plain meaning of language wisely designed to prevent such officers from contracting with themselves and speculating off their counties by being either directly or indirectly interested in the sale of material for its use, and that all temptation to do so should be removed by absolutely prohibiting the power to do so. If anything other than such public policy, which we may safely assume influenced the lawmakers, were wanting to show the purpose of the law in question, it is furnished by the penalty of the statute, in that an

official who shall violate its provisions is deemed thereby to have vacated his office. The legislative idea seen in the statute was not only to render absolutely void any contract made in violation of its provisions, but to render an offending official incapable of a further violation thereof. Where a statute ²⁵⁴ declares a contract void and imposes a penalty for making it, such contract is illegal—it is absolutely void, not voidable merely (Endlich on Interpretation of Statutes, sec. 270; Maxwell on Interpretation of Statutes, 3d ed., 297); and where public policy requires a strict construction, the word should always receive its natural force and effect: *Id.*

The foregoing appears to leave no room for reasonable controversy as to the sense in which the word “void” was used in the statute under consideration; and it follows logically that appellant got no title to money he obtained for property furnished for use on the pretended county highway, because it had no legal existence, and there was no power to expend county money thereon; and no title to money obtained by him through sales of material to the county, because such transactions were utterly void and illegal. Therefore, the county has a cause of action against appellant to recover all such money.

The only other contention in favor of the demurrers that need be considered is one that applies to all the causes of action, viz., that if the county has a remedy for the wrongs complained of, it is at law; hence this action in equity cannot be maintained; that the duty of determining when a suit shall be brought being vested in the county board, it cannot be controlled or exercised by a taxpayer. Such contention is based in a misapprehension of the nature of the remedy invoked by plaintiffs, as further discussion will show.

True, the discretionary power is vested in the county board of determining when a suit shall be brought to enforce its rights, but that means legal discretion. Where there is a clear abuse of power in that regard, the body guilty of it is thereby placed outside the protection of the rule stated, and may be compelled to act, or in some cases other remedies may be resorted to. If a county or other corporation has a plain cause of action for an injury done to it, that should be enforced for the protection of its members, ²⁵⁵ and its governing body refuses to perform its plain duty in the premises, our system of jurisprudence is by no means so weak that justice can thereby be defeated. On the contrary, any member of the corporation, by reason of his indirect interest therein, suing in behalf of himself and all simi-

larly situated, may set judicial proceedings in motion, making the corporation a defendant, as trustee for all its members, and thereby enforce the rights of the corporation.

It was the early doctrine in New York that a taxpayer could not prosecute such an action as this. The result was that when the people of the city and county of New York discovered that they had been systematically plundered by trusted officials, and the members of the governing body of the corporations were so interested in the fraudulent schemes by which the people had been defrauded that they would not prosecute to recover the public funds, squandered and lost, such taxpayers were powerless to meet the situation in any effective manner, and the legislature was compelled to provide a remedy. It was not questioned in the early case of *Doolittle v. Supervisors etc.*, 18 N. Y. 155, or in the later case of *People v. Ingersoll*, 58 N. Y. 1, 17 Am. Rep. 178, where the situation referred to developed, but that for malfeasance in office by officers of a public corporation, resulting in squandering public funds, such corporation has a right of action to recover its damages, or the power of a court of equity to reach the mischief at the suit of a taxpayer; but it was deemed inconsistent with wise public policy to permit one or any number of private persons, by reason of their indirect interests, to set themselves up as champions of the community, and thereby compel officers to meet them in the courts and account for their official conduct. Such holding, under the circumstances, amounted to an absolute denial of justice. It is contrary to the administration of equity jurisprudence in most jurisdictions, and contrary to repeated rulings of this court on the subject.

²⁵⁶ The general rule is that where a cause of action exists in favor of a corporation, and its governing body refuses to enforce it, any member thereof may do so by suing in equity in behalf of himself and all others similarly situated: *Thompson on Corporations*, sec. 4479; *Doud v. Wisconsin etc. Ry. Co.*, 65 Wis. 108; 56 Am. Rep. 620; *Hinz v. Van Dusen*, 95 Wis. 503. That applies to public as well as private corporations: *Willard v. Comstock*, 58 Wis. 565, 46 Am. Rep. 657; *Frederick v. Douglas Co.*, 96 Wis. 411; *Quaw v. Paff*, 98 Wis. 586; *Dillon on Municipal Corporations*, sec. 915. And by force of a statute of this state, a creditor of a corporation has sufficient interest therein to entitle him to maintain the action: *South Bend etc. Co. v. George C. Cribb Co.*, 97 Wis. 230; *Gores v. Day*, 99 Wis. 276. The purpose of the remedy in such cases is not to interfere with the exercise

of legal discretion on the part of those charged with the primary duty of enforcing corporate rights, but to furnish relief where there is an unjustifiable neglect or refusal to exercise such discretion. Neither is the remedy confined to the one which the corporation may invoke, whether equitable or legal. The remedy afforded to a member of a corporation is necessarily in equity, for he has no direct interest to be protected by a personal action. He must proceed in equity or not at all, joining the corporation as a party in the capacity of trustee for all its members.

So the test is not whether the corporation can sue in equity, but whether it can sue at all. Whether its remedy, if exercised direct, would be at law or in equity that of the member indirectly interested to enforce its rights, must always be in equity. That is his only remedy. The direct injury to be remedied is to the corporation as a whole. The cause of action belongs to the corporation, but is enforceable, rather than that justice shall utterly fail, by the remedy in equity at the suit of its members. *Bay City Bridge Co. v. Van Etten*, 36 Mich. 210, upon which appellant chiefly relies as authority that this action will not lie because the ²⁵⁷ county could not sue in equity, was a suit by the corporation. Its cause of action was held to be at law because the defendant was no longer an officer, hence could not be charged in equity as a trustee for the corporation. But if the corporation had refused to prosecute for the wrongs done to it, and a member thereof desired to move in the matter, his only remedy would have been in equity, not to enforce his cause of action, but to enforce the cause of action of the corporation by the only remedy open to him for that purpose.

So the rule is firmly established that where a cause of action exists in favor of a corporation, whatever be its proper remedy, if its governing body refuses to proceed, justice cannot thereby be defeated, for those upon whom the injury indirectly falls may obtain redress in equity. It certainly would be a strange situation if unfaithful officials could plunder a county in the manner alleged in the complaint and be free from danger of being compelled to return their ill-gotten gains, or make good the injury caused by their corrupt conduct, because they had retired from office and the corporation, through its proper officers, unjustly refused to prosecute them. The intelligence and wisdom of the lawmakers, and the boasted power of courts of equity to lay hold of situations where legal remedies stop, and prevent a failure of justice flowing from defective legal remedies, are not

rightly subject to such criticism. As well said by Chief Justice Orton, in *Willard v. Comstock*, 58 Wis. 565, 46 Am. Rep. 657, in substance: If, for conduct such as detailed in the complaint, there is no remedy, and there is none unless this be proper, the taxpayers are at the mercy of dishonest officials, and must stand by and see the public treasury plundered, bound helpless by technical rules of law. The idea is simply preposterous, and that is all that need be said about it. No such situation exists, as is sufficiently shown by what has preceded. The powers of courts of equity are broad and absolute enough to fit all situations where justice requires a ²⁵⁸ remedy. While guided by precedents, equity is not bound by them, but may meet new situations as they arise, so that in the race between it and the ingenuity of unfaithful officials, the former will generally prevail, unless defeated by utter insolvency of such officials.

It follows that each of the causes of action set forth in the complaint states facts sufficient to support it, hence the trial court was right in overruling the demurrer.

By the Court. The order of the circuit court is affirmed.

Bardeen, J., took no part.

OFFICERS—COMPENSATION—ILLEGAL EXACTIONS AND CONTRACTS.—Public officers were not permitted at common law to take any fees except such as were expressly allowed to them by statute: *Gibson's Case*, 1 Bland, 138; 17 Am. Dec. 257; *Jones v. Commissioners etc.*, 57 Ohio St. 189; 63 Am. St. Rep. 710. Officers cannot be interested in contracts pertaining to their office. A public officer, as a school director or trustee, will not be allowed, while so acting, to take a contract relating to the matters of his office: *Pickett v. School District*, 25 Wis. 551; 8 Am. Rep. 105; *Spence v. Harvey*, 22 Cal. 836; 83 Am. Dec. 69. It is well settled that where money is exacted by or paid to a public officer in excess of his legal fees, in order to obtain the performance of an official duty, to which the party is entitled without such payment, an action lies to recover back the money as having been involuntarily paid: See monographic note to *Mayor etc. v. Lefferman*, 45 Am. Dec. 167. The absence of corrupt intent is no defense in an action to enforce a statutory penalty for taking illegal fees: *Cobbey v. Burks*, 11 Neb. 157; 88 Am. Rep. 864.

LAND, LOG AND LUMBER COMPANY v. MCINTYRE.

[100 WISCONSIN, 258.]

PUBLIC OFFICERS, SUCH AS SUPERVISORS OF A COUNTY, are personally liable to it for moneys which they have fraudulently misapplied, misappropriated, or lost.

PUBLIC OFFICERS, WHEN LIABLE FOR MISCONDUCT IN THE PERFORMANCE OF QUASI-JUDICIAL DUTIES.—If a member of an auditing board of a county, in passing on a claim which the board has the right to audit, acts negligently or corruptly, for that there is no liability; but if there is fraud in contracting the indebtedness itself, because not authorized by law, or intentionally excessive, or fraudulently contracted for any other cause, liability attaches from the first act of infidelity to the public trust for the actual damage flowing therefrom. Hence, the members of a county board of supervisors cannot shield themselves from liability on the ground that they acted judicially as members of its auditing board in allowing claims and converting to their own use moneys for improving roads having no existence, for fraudulent or excessive charges pursuant to a previously formed fraudulent scheme, for their private expenses, for compensation allowed to officers in excess of that provided by law and in direct violation of the statute, and for claims which the board was prohibited from considering, because not properly made out, verified, and filed. Members of such board are not, however, personally liable for allowing claims which were legitimate county expenses, though in excess of the constitutional limitation, if a tax levy was made and the claims paid therefrom.

Action against McIntyre and O'Malley, former members of the county board of Vilas county, to compel them to account for and pay over to the county for its use moneys alleged to have been misapplied and converted to their own use through fraudulent and illegal practices. The county was also made a defendant. The complaint alleged the demand made on the county board to prosecute an action for the wrongs complained of, a refusal to comply with the demand, and that the plaintiffs, as taxpayers of the county, sued in behalf of themselves and all other taxpayers. It was also alleged that the defendants, McIntyre and O'Malley, while members of the board and as such, entered into contracts, incurred indebtedness, audited bills for claims for the payment of such indebtedness, and issued county orders to cover the claims in excess of the available county funds and tax levies of the year, and that they conspired together to defraud the county and corruptly appropriated moneys to themselves by drawing it from the county treasurer, that they obtained other money from the county by furnishing labor and material at an exorbitant price in building a pretended county road that they knew to have no existence in fact, that they au-

audited bills for their own private expenses, and knowingly audited bills in favor of other officers in excess of the amount allowed by law, by which money was drawn from the treasury. A demurrer to the complaint having been overruled, the defendants appealed.

D. E. Riordan and Ryan, Hurley & Jones, for the appellant.

John Barnes and Curtis, Reid & Smith, for the respondents.

²⁶¹ **MARSHALL, J.** Most of the questions presented on this appeal are ruled against appellant in *Land etc. Co. v. McIntyre*, 100 Wis. 245, ante, p. 915, and so far reference to what is there said is sufficient.

The sole cause of action stated in the complaint is for a recovery from appellant and his associate O'Malley of money for the use of the county, which they, while managing its affairs as members of its board of supervisors, are alleged to have fraudulently misapplied, misappropriated, or lost. That such conduct on the part of the managing officers of a corporation, whether public or private, renders them personally liable for the injury to such corporation, is familiar and not challenged by appellant. Reference for authority on the subject may be had to *Beach on Public Corporations*, sec. 197; *Dillon on Municipal Corporations*, sec. 910, and cases there cited; *Boston v. Simmons*, 150 Mass. 461; 15 Am. St. Rep. 230; *Gores v. Day*, 99 Wis. 276; *People v. Tweed*, 63 N. Y. 194.

The chief objection to the complaint, not covered by the decision in the other case against appellant referred to, is that all the alleged illegal expenditures were made on orders issued pursuant to bills audited by the board, and that their conduct in auditing such bills cannot be called in question, even though corrupt. The duties of auditing boards are generally held to be quasi judicial: *Beach on Public Corporations*, sec. 857. ²⁶² The statutes of this state on the subject (*Rev. Stats. 1878*, secs. 676-683), prescribing the procedure in the making, filing, and auditing of claims, leave little if any room for doubt as to the precise nature of the duties of the board in investigating and passing thereon. Such sections provide that claims shall be made out in writing, be itemized, verified by affidavit, and filed with the county clerk, and prohibit the board from considering or acting on any claim until so made out, verified, and filed. They also provide that the board may take testimony, if deemed necessary to determine the truth of the statements contained in

any claim; and further, that their decision on any claim shall be a bar to any action thereon other than by appeal from such decision to the court within ninety days. The nature of these proceedings, it will be observed, from beginning to end, quite resembles judicial proceedings. The final determination or decision of the board, unless appealed from, has all the conclusiveness of a judgment upon the rights of the parties, and it follows logically that the duties of the board, as a board of audit, are quasi judicial, and that, within their jurisdiction, they are not liable either for mistakes, errors of judgment, or corrupt conduct. The law has been long settled that way upon considerations of public policy deemed sufficient to warrant it. As said, in effect, by this court, in *Steele v. Dunham*, 26 Wis. 393, such rule applies to all officers in the performance of judicial or quasi judicial duties, to judges from the highest to the lowest, to jurors, and to all public officers, whatever name they may bear; and further, in substance, that if it were otherwise, officers, however conscientious and correct in their official life, would be constantly in danger of having their actions challenged in court by disappointed persons, and that independence necessary to the judicial function seriously interfered with. To avoid that danger, judicial officers, high or low, such officers strictly so called and those quasi judicial as well, and all in the performance of duties of a judicial nature, ²⁶³ within their jurisdiction, have complete immunity from actions for damages on account of their official acts.

This rule was stated in *Wilson v. Mayor etc. of New York*, 1 Denio, 595, 43 Am. Dec. 719, by Beardsley, C. J., which is often referred to by courts and text-writers, in substance thus: No action lies in any case for misconduct or delinquency, however gross, in the performance of judicial duties, and although the officer may not in strictness be a judge, still, if his powers are discretionary, to be exerted or withheld according to his view of what is necessary and proper, they are in their nature judicial, and he is exempt from all responsibility by action for the motives which influence him, and the manner in which such duties are performed; if corrupt, he may be impeached or removed, but the law will not tolerate an action to redress any individual wrong which may be done. But such immunity from liability, incident to the judicial function, goes no further than the result of the judicial act; so if a member of an auditing board, in passing on a claim which such board has a right to audit, acts negligently or corruptly, for that alone there is no lia-

bility; but if the mischief goes back further, and there is fraud in contracting the indebtedness itself, either because not authorized by law, although for some legitimate public purpose, or intentionally excessive or fraudulently contracted from any other cause, liability attaches from the first act of infidelity to the public trust, if actual damage flows therefrom. The mere auditing of the claim in such a case is but a step in the scheme of fraudulently plundering the public treasury, and behind it the unfaithful officer cannot successfully hide and rely on his judicial character for protection. If such were not the case, members of auditing boards of public corporations, who are also the managers of the general corporate business, as in case of a county, town, or village board, or city council, might easily fraudulently empty the public treasury by corruptly auditing claims based on previously incurred fraudulent indebtedness ²⁶⁴ with which they were culpably connected, and defy prosecution for the public injury because the final act, consummating the fraud, was in form judicial. No such wide-open door for the escape of dishonest officials exists. In the celebrated case of *People v. Tweed*, 63 N. Y. 194, every possible avenue of escape was sought by the eminent counsel for the members of the board of audit of the county of New York, who had systematically plundered its treasury by auditing fraudulent claims which such board were instrumental in creating, yet it does not appear to have occurred to such counsel that the judicial act of auditing such claims could be set up as a defense to the action to compel restoration of the public money dishonestly appropriated and lost.

From the foregoing, though it must be conceded that no action lies against appellant for damages to the corporation growing out of his action as a member of the auditing board, as to claims the board had a right to audit, that does not apply where the subject matter acted upon was outside its jurisdiction, such as claims in which the appellant had a pecuniary interest, they being excluded according to the most familiar principles: 12 Am. & Eng. Ency. of Law, 46, 47; claims for work and material furnished for objects not within the power of the board, such as the construction of a pretended county road having no legal existence; claims allowed to officers in excess of the legal compensation provided by law and in direct violation of the statute on the subject; claims for work and material corruptly contracted for by appellant and his associate; claims which the

board were prohibited from considering because not properly made out, verified, and filed; and claims for indebtedness contracted in excess of the constitutional limitation, but does apply to claims which the board were authorized to audit, though in excess of taxes levied, the issuing of orders on such claims being what is prohibited by statute, not the incurring of indebtedness or the auditing of claims therefor.

²⁰⁵ It follows from what has preceded, and what was decided in the other case against appellant, to which we have referred, that on the facts alleged he is liable to account in this action for money appropriated to himself and associate, O'Malley, to expend in the improvement of roads and converted to their own use, money paid for work and labor on roads that had no legal existence, money paid out to appellant and his associate for material furnished by them to the county, money paid for fraudulent or excessive charges pursuant to a previously formed fraudulent scheme to thus obtain county money for the use of appellant and his associate or others, money paid officers for their private expenses, and losses, if any, through auditing claims not filed in the manner provided by law. It is considered that though the auditing of claims for indebtedness in excess of the constitutional limitation was outside the jurisdiction of the auditing board, inasmuch as a tax levy appears by the complaint to have been made and the claims paid, so far as they were for legitimate county expenses the county has no claim against the appellant; and the same is true of the issue of county orders in advance of the tax levy. This is said in order to furnish to the trial court a complete guide for further proceedings in the case.

There are a multitude of matters alleged upon which an account is demanded, some of which are alleged so generally that we cannot readily refer to them particularly. Enough has been said to enable the trial court to dispose of the case without further difficulty.

By the Court. The order of the circuit court is affirmed.

Bardeen, J., took no part.

OFFICERS—LIABILITIES—ALLOWANCE OF CLAIMS BY COUNTY COMMISSIONERS.—County commissioners in hearing and allowing claims against the county do not act in their judicial capacity, and a county may maintain an action to recover money paid to a public officer, though his claim was allowed by the county

commissioners, whenever in equity and good conscience he ought not to retain such money: Commissioners v. Heaston, 144 Ind. 583; 55 Am. St. Rep. 192, and monographic note discussing this matter. See, also, Jones v. Commissioners, 57 Ohio St. 189; 63 Am. St. Rep. 710, and note.

DOUGLAS v. CHICAGO, MILWAUKEE AND ST. PAUL RAILWAY COMPANY.

[100 WISCONSIN, 405.]

RAILWAYS—NEGLIGENCE IN ENTERING UPON TRACK OF.—When gates across the approach of a railway track are down, this is notice that the tracks are presently to be used for the passage of a train, and one who, notwithstanding such notice, enters upon and undertakes to cross the track, assumes the risk of doing so, and, if injured by a passing train, is precluded from recovering by his own contributory negligence, though other persons have been in the habit of taking the same risk.

NEGLIGENCE—ORDINARY CARE—WHAT OTHERS MAY BE ACCUSTOMED TO DO.—What persons customarily do under certain circumstances is usually a test of ordinary care, but to this rule there is the familiar exception, that where the doing of an act is so obviously dangerous as to constitute negligence as a matter of law, as going upon railway tracks, or walking thereon without looking and listening, or jumping off of a moving train, or the doing of any other of the many things dangerous in themselves, then it must be deemed inconsistent with ordinary care, regardless of custom.

Action to recover for injuries claimed to have been suffered from the defendant's negligence. These injuries were received by the plaintiff in attempting to cross the track of the defendant's railway at a crossing where were six railway tracks and a gate on each side of the right of way. When the plaintiff approached the track, the gates were down, but he, notwithstanding this and the darkness of night, passed around the gates, and proceeded to cross the right of way. Before he crossed all the tracks, he was injured by a train which was coming up without any light or man in the rear to signal its approach. On motion of the defendant, a nonsuit was entered. The plaintiff appealed.

W. J. Turner, J. J. McDonnell and L. S. Pease, for the appellant.

C. H. Van Alstine, for the respondent.

407 MARSHALL, J. Where there is a reasonable dispute as to the evidentiary facts tending to establish negligence, or to the reasonable inferences which a jury may rightfully draw therefrom, the ultimate fact as to whether the party charged

with negligence is guilty is for the jury; but where the facts are undisputed and the inferences therefrom all one way, the controversy turns on a question of law and must be decided by the court. Testing this case by that familiar rule, the trial court nonsuited the plaintiff. Whether contributory negligence on the part of the plaintiff was conclusively established so as to raise but a question of law is the sole question on this appeal.

Some things in the law of negligence are settled and so firmly established by judicial authority, as to be binding on the courts as rules of unwritten law, and among those things is, that if a person enters upon a railway track after receiving timely warning that it is about to be used for the passage of trains, he does so at his peril, and if a personal injury results by his being struck by a train, such result is attributable to his contributory negligence, and neither he nor his personal representatives can recover therefor. There are some exceptions to this rule, growing out of special circumstances in particular cases, but the facts of this case bring it clearly within the rule. At a railway crossing of a public street in a populous city, especially where there are several side and spur tracks, as well as main tracks, in frequent use by night and day, the maintenance of crossing gates is one ⁴⁰⁸ of the most common and most effectual methods of guarding the personal safety, not only of travelers on the street, but of the employes of the railway company as well. Where gates are so maintained, it is the duty of travelers, on approaching the right of way and observing that the gates are down or about to be let down, to stop till they are raised before proceeding. The presence of a gate across the approach to the railway tracks says to the traveler, in a manner not to be misunderstood, that such tracks are presently to be used for the passage of trains. The track, itself, is a general notice of danger, calling upon the traveler to look and listen for approaching trains, but the presence of the gate across the highway is more. It is a specific notice that the danger of going upon the right of way is immediate, and that no person of ordinary care should assume it without expecting to take all risks upon himself of what may result so far as relates to his personal safety. It is no excuse for disregarding such a warning that persons are accustomed to cross at that place when the crossing gates are down. True, what persons customarily do under similar circumstances is usually the test of ordinary care, but to that is the familiar exception that where the doing of an act is so obviously dangerous as to constitute negligence as a matter of law, as going upon

railway tracks, or walking upon the tracks without looking or listening, or persons, not employ  s of a railway company, jumping on and off from moving cars, or the doing of any other of the many things that might be mentioned, that are dangerous in themselves, it is inconsistent with ordinary care, regardless of custom: *Flynn v. Eastern Ry. Co.*, 83 Wis. 238; *Glover v. Scotten*, 82 Mich. 369; *Warden v. Louisville etc. R. R. Co.*, 94 Ala. 277; *George v. Mobile etc. R. R. Co.*, 109 Ala. 245; *Wherry v. Duluth etc. Ry. Co.*, 64 Minn. 415.

The adjudicated cases on the questions raised here are substantially all one way and on the line indicated. *Cleary v. Philadelphia etc. R. R. Co.*, 140 Pa. St. 19, is directly in point. There plaintiff entered within the limits of the crossing, disregarding the gates, and, while looking at one train with a view of avoiding it, was struck by another. Her view of the train that did the injury was interfered with by the one she had in mind to avoid. There was no bell rung or whistle sounded, nor any brakeman or flagman on the car that did the mischief to warn persons upon the crossing of its approach. In deciding the case the court said, in effect: Crossing gates are a warning to all persons approaching the tracks, whether traveling on foot or otherwise, the only difference being that though a vehicle cannot pass them, a footman may, if sufficiently foolhardy to attempt it, and if successful in escaping the danger. The gates are a warning, not for a particular train, but for all trains that may be about to pass or be passing while they are down. To the same effect are *Sheehan v. Philadelphia etc. R. R. Co.*, 166 Pa. St. 354; *Peck v. New York etc. R. R. Co.*, 50 Conn. 379; *Granger v. Boston etc. R. R. Co.*, 146 Mass. 276; *Duvall v. Michigan Cent. R. R. Co.*, 105 Mich. 386; and *Baltimore etc. Ry. Co. v. Colvin*, 118 Pa. St. 230.

In *Sheehan v. Philadelphia etc. R. R. Co.*, 166 Pa. St. 354, the court said, in substance, that if a person goes upon a railway track regardless of the warning to him by the presence of the gates across the approach, and is injured by placing himself in the pathway of an approaching train, without wanton negligence on the part of the railway company's servants, he cannot recover, whatever he may say about looking and listening. Though the court treated the failure to observe the approaching train as a distinct act of negligence, precluding a recovery, the act of being on the right of way at all, under the circumstances, was also deemed fatal, *Cleary v. Philadelphia etc. R. R. Co.*, 140

Pa. St. 19, being cited as controlling, and the effect of the opinion and decision said to be as stated.

In *Granger v. Boston etc. R. R. Co.*, 146 Mass. 276, the circumstances were that it was dark and misty, so that the lights had already ⁴¹⁰ been set for the night; that there were four tracks, and crossing gates let down so as to bar the approach thereto for the entire width of the street, including the sidewalks; that a train had entered upon the crossing on the first track and another was approaching on the third track and only a short distance away. The person injured, disregarding the warning by the gates being down, passed under or around them and successfully avoided the first train, but was struck by the second, about seventeen feet further on, and killed. The court below sent the case to the jury, with the result that there was a verdict and judgment for plaintiff. On appeal, the judgment was reversed, the court saying that the presence of the gates sufficiently warned the intestate that it was dangerous to cross the tracks, not that the gates were down for the first train only, which was in plain view, but for any train that might be about to pass the crossing; that the scope of the warning was that the defendant required for the present the exclusive use of the entire crossing for its business, and it was negligent for the deceased to pass the gates and go upon the crossing at all under the circumstances.

Perhaps a still stronger case than any before cited is *Deb- bins v. Old Colony R. R. Co.*, 154 Mass. 402. There a person went upon the railway tracks regardless of the crossing gates being down, in order to board a train that was standing on one of the tracks. There was another train approaching and in dangerous proximity, but obscured from view by the first train mentioned. It was dark, and there was no headlight or other means of warning of the approach of the moving train, other than the position of the gates and the noise. Plaintiff was struck by the latter train and severely injured. The court held that he was guilty of gross negligence; that if he had been a mere traveler and undertaken to cross the tracks while the gates were down, knowing that fact, he would have taken the risk and could not have recovered for ⁴¹¹ any injury received from a passing train; that if the fact that he desired to board the train excused him from passing the gates at all under the circumstances, he was yet bound, as he proceeded, to use all the caution which the nature of the case would permit, and that such

precaution required more than a glance in the direction of the approaching train.

The reasoning of the cases to which special attention has been called, and of others cited, applies to the facts of this case, and meets with unqualified approval. They are in accordance with well-settled principles of law of negligence, and must control here in favor of the affirmance of the judgment appealed from.

By the Court. Judgment affirmed.

RAILROAD COMPANIES—INJURIES AT CROSSINGS—CONTRIBUTORY NEGLIGENCE.—Contributory negligence, to defeat a recovery by an injured person, must be a want of ordinary or reasonable care contributing to the injury. By "ordinary care" is meant that degree of care that is exercised by the great mass of mankind, or by ordinarily prudent men in matters affecting their own interests: See monographic note to *Freer v. Cameron*, 55 Am. Dec. 670, 672. Trying to cross a railroad track in full view of an approaching train is negligence per se: See monographic note to *Ernst v. Hudson River R. R. Co.*, 90 Am. Dec. 786; *State v. Maine Cent. R. R. Co.*, 76 Me. 357; 49 Am. Rep. 622; *Marland v. Pittsburgh etc. R. R. Co.*, 128 Pa. St. 487; 10 Am. St. Rep. 541. When a traveler ventures upon a railroad track when proper signals are given, and miscalculates as to the chances of crossing, the risk is his, unless some negligence can be imputed to the company which has directly caused the injury: *Hinkle v. Richmond etc. R. R. Co.*, 109 N. C. 472; 26 Am. St. Rep. 581.

PENINSULAR LEAD AND COLOR WORKS v. UNION OIL AND PAINT COMPANY.

[100 WISCONSIN, 488.]

CONSTITUTIONAL LAW.—A STATUTE TAKING AWAY THE REMEDY BY ATTACHMENT CANNOT BE APPLIED TO PRE-EXISTING DEBTS. Hence a statute providing that if the property of an insolvent debtor is attached or levied upon by virtue of any process in favor of a creditor, such debtor may within ten days thereafter, make an assignment of his property for the benefit of his creditors, and thereupon the levy shall be dissolved, and the property turned over to his assignee, is void as against pre-existing creditors.

CONSTITUTIONAL LAW.—REMEDIES MAY BE CHANGED, but they cannot be so changed as to affect pre-existing contract obligations.

D. S. Rose and Bloodgood, Kemper & Bloodgood, for the appellants.

Miller, Noyes, Miller & Wahl, for the respondent.

489 **MARSHALL J.** When the contract was made on which the writ of attachment issued, the creditor had the absolute

right, on the facts set forth in the affidavit, to that remedy to secure the payment of the indebtedness. In case of a resort to such remedy and the acquirement of a lien on the ⁴⁹⁰ debtor's property thereby, there was nothing in the law of assignments for the benefit of creditors whereby the creditor's right of preference over all other creditors as to such property, to the extent of the attachment lien, could be taken away, though such laws had all the elements of a bankrupt law, even to the absolute discharge of all debts of the debtor on his conveying his property not exempt from attachment or execution for the benefit of his creditors, and complying with the prescribed procedure in such cases. All assignments containing preferences, all preferences given or secured by the act of the debtor by confession of judgment within sixty days of the making of an assignment, or by giving security upon or parting with his property in any manner whatever, in contemplation of insolvency within such time, were declared void, provided the person benefited thereby knew, or had reasonable cause to believe, the debtor to be insolvent. There was still left to creditors, however, the remedy of securing, by attachment or garnishment proceedings conducted in good faith, a preference over other creditors of the debtor, which could not be disturbed by a subsequent assignment.

With that condition of things existing, chapter 334 of the Laws of 1897 was passed for the purpose of taking away the opportunity for obtaining a preference by attachment, which purpose was effectually accomplished as to all contracts, whether then existing or subsequently made, if it is valid as to such prior contracts. It provides in section 3, that, "whenever the property of an insolvent debtor is attached or levied upon by virtue of any process in favor of a creditor, or a garnishment is made against such a debtor, such debtor may, within ten days thereafter, make an assignment of all his property and estate not exempt by law, for the equal benefit of all his creditors as provided by law, whereupon all such attachments, levies, garnishments, or other process shall be dissolved and the property attached or levied upon shall be ⁴⁹¹ turned over to such assignee or receiver." Prior to that enactment, no assignment could in any way defeat a debtor's prior attachment. The act not only took away the remedy by attachment, but left none whatever to the creditor for the collection of his claim, except that of participating in the assignment proceedings and taking his distributive share of the debtor's property equally with all other creditors in

proportion to their respective claims, in full settlement and discharge thereof. The proceedings in this case raise the single question of whether the act referred to, so far as it attempts to take from creditors rights existing when it took effect, is void because prohibited by section 10 of article 1 of the constitution of the United States, which provides that "no state shall . . . pass any law impairing the obligation of contracts."

The case is ruled by *Second Ward Sav. Bank v. Schranck*, 97 Wis. 250. The law governing the subject was there so fully discussed and clearly declared in the exhaustive opinion written by Mr. Justice Pinney, that little, if anything, can be added to it or said without danger of repeating in substance what was there said. The decision of the court, as stated in unmistakable language, was that a statute affecting the relations between debtor and creditor as to existing contracts, so as to impair materially their value by acting on the remedy alone, in effect substantially impairs the obligations of such contracts, and is void on that account the same as though such legislation acted directly on the contracts themselves. That was but reiterating what has been said by this court frequently before, and by the highest court in the land, whose judgments as to the meaning of the federal constitution are binding on this and all courts.

The question really seems hardly open to discussion at all at this late day. Courts can draw no distinction between the right and the remedy where the latter affects materially the value of the contract obligation, and say the former is, ⁴⁹² and the latter not, within the scope of the constitutional inhibition upon the states. The debates in the constitutional convention show most clearly that legislative interference with the rights of creditors by operating upon the remedy for the enforcement of contracts by means of exemption laws, stay laws, unreasonable limitation laws, laws bearing on the value of the medium of payment, tender laws, and other like ways, were the very mischiefs which it was intended to prevent under the new order of things, by conferring upon the general government exclusive power to coin money and fix the value thereof, and by prohibiting the states from issuing paper money or making anything but gold and silver a tender in the payment of debts, or making any law impairing the obligation of contracts. Mr. Madison, replying to objections to the latter prohibition, in that it would prevent legislation as to remedies to recover debts, and to observations that circumstances might arise rendering such interferences proper and essential, said, in substance, that the inconvenience

would be overbalanced by the utility of it, and that, without an absolute prohibition, evasions might and would be devised by the ingenuity of legislatures. The truth of that observation, and the wisdom of adopting a safeguard against the dangers it pointed out, are evidenced by the repeated attempts to overcome such safeguard, some of which attempts, it may be claimed with reason, have successfully passed the scrutiny of the court which is the special guardian of the constitution; but no attempt such as the one under consideration, it is believed, has been successful, though it was early insisted that a law acting merely upon the remedy was not within the constitutional prohibition.

In *Green v. Biddle*, 8 Wheat. 1, it was insisted that the law there considered was valid because it acted merely upon the remedy, not upon the right, and in deciding the point the court said: "It is no answer to the law to say it is a regulation ⁴⁹³ of the remedy, not the right. If the act so changes the nature and extent of existing remedies as to materially impair the right, it is just as much a violation of the contract as if it directly overturned the right." That language was approved in *Bronson v. Kinzie*, 1 How. 311, the court speaking by Chief Justice Taney to the effect that it is manifest that the obligations of contracts and the rights of parties under them may be effectually destroyed by acting on the remedy, and that no one can rightfully claim any difference in the result between retrospective laws declaring contracts void, and such laws so affecting the remedy for their enforcement as to materially impair their value. In *Gunn v. Barry*, 15 Wall. 610, the question of whether an act changing the law in relation to exemptions from execution injuriously to creditors was invalid as to existing debts, was presented and the decision was in the affirmative, Mr. Justice Swayne, who delivered the opinion, saying: "The legal remedies for the enforcement of a contract, which belong to it at the time and place where it is made, are a part of its obligation. A state may change them, provided the change involves no impairment of a substantial right. If the provision of the constitution or the legislative act of a state fall within the category last mentioned, they are to that extent utterly void. They are, for all the purposes of the contract which they impair, as if they had never existed." In *Edwards v. Kearzey*, 96 U. S. 595, the validity of a law increasing the amount of property exempt from execution, as to then existing contract obligations, was the point at issue, and in support of the law it was argued that remedies existing when the contract is made do not become a part of its

obligations, therefore a change in that regard does not deny the creditor's rights, but merely regulates the manner of enforcing them. To that contention the court, by Mr. Justice Swayne, answered that the obligations of a contract include everything within its obligatory scope, and among such elements nothing ⁴⁹⁴ is more important than the means of enforcement; they are the breath of its vital existence, without which the contract, as such, in the view of the law, ceases to be; rights and remedies are so inseparably connected that neither can exist without the other. All laws which subsist when the contract is made enter into it and form a part of it as if they were expressly incorporated in its terms. Such rule comprises those that affect its validity, construction, and discharge, and its enforcement as well, and one of the tests of whether a contract has been impaired by legislation is that its value has been by that means diminished; for it is not, by the constitution, to be impaired at all in any manner or for any cause.

Applying the foregoing to the situation presented by this case, there can be but one answer to the legal issue before us. Not that remedies cannot be changed at all, but that they cannot be changed at all so as to affect materially the value of existing contract obligations. Certainly, if a law changing the legal exemptions of property from the payment of debts comes within that rule, a law placing all the property of the debtor beyond the right of adversary proceedings for the collection of debts, leaving only the remedy of taking a distributive share in insolvency proceedings, however small, in full discharge of the indebtedness, must be within the rule. As well said by District Judge Seaman of the United States circuit court for the eastern district of Wisconsin, in *Heath & Milligan Mfg. Co. v. Union etc. Co.*, 83 Fed. Rep. 776, involving the same question: "We cannot entertain any reasonable doubt that the inhibition applies in this case." When the contract was made it became a valuable part of it that if the debt were fraudulently contracted the creditor might secure his claim by attaching the debtor's property. The contingency arose. The valuable remedy, without which, under the circumstances, the value of the contract was materially ⁴⁹⁵ lessened if not wholly destroyed, was resorted to, and then the creditor was confronted with the fact that in the meantime the legislature had attempted to empower the debtor to destroy that remedy, leaving the creditor no way of effectually securing his claim.

A specific reference to authorities on the subject discussed would not be at all complete without the following: *Louisiana v. New Orleans*, 102 U. S. 203; *Denny v. Bennett*, 128 U. S. 489; *Barnitz v. Beverly*, 163 U. S. 118; *Sloane v. Chiniquy*, 22 Fed. Rep. 213; *Seibert v. Lewis*, 122 U. S. 284; *Shapleigh v. San Angelo*, 167 U. S. 646. In the last case cited it was held that the owner of an obligation for the payment of money is entitled not merely to the contract of payment expressed therein, but to the remedies existing when the contract was made, by implication of law. To the same effect, said Mr. Justice Field in *Louisiana v. New Orleans*, 102 U. S. 203, the obligation of a contract in a constitutional sense is the means provided for its enforcement; that which lessens such means impairs the obligation. And again, said Mr. Justice Miller in *Sloane v. Chiniquy*, 22 Fed. Rep. 213, as regards previously existing debts, a law which takes away the right of a creditor to attach the property of his debtor, as such law existed at the time the debt was contracted, is void.

True, as often suggested in support of retrospective laws that affect contract obligations by acting merely upon the remedy, laws abolishing imprisonment for debt and changing the statutory period for the commencement of actions to enforce contract obligations have been sustained; but as to the former they were sustained because imprisonment for debt was not, strictly so called, a remedy for the collection of debts, but a punishment, as regards the mere collection of debts the very opposite of a remedy; and as to laws changing the statutory period of limitation upon the enforcement of contracts, they have only been sustained ⁴⁰⁶ when the change left ample opportunity for such enforcement, so as not to materially impair the value of pre-existing contracts: *Edwards v. Kearzey*, 96 U. S. 595.

The conclusion reached here has been the settled law of this court since first the question was presented to it for determination. Going back to the able opinion of Chief Justice Dixon in *Von Baumbach v. Bade*, 9 Wis. 559, 76 Am. Dec. 283, we find the court quoting and following closely *Bronson v. Kinzie*, 1 How. 311, to the effect that a contract includes, by implication, the law for its enforcement as the same existed at its inception, and any change materially impairing the rights or interests of the parties, so it may be said the contract obligation is impaired, is within the constitutional inhibition and void.

True, as contended by counsel for appellants, there is language in *Freiberg v. Singer*, 90 Wis. 608, which, when read apart from

the questions there raised and decided, appears to be in conflict with earlier cases in this court and the law as here stated, but it must be remembered that nothing is deemed decided in any case, for the purposes of future cases, but the questions upon which the decision turns. A validating act had been passed affecting assignments for the benefit of creditors after a garnishee creditor had obtained a lien on the property of his debtor by garnishee proceedings. After such act went into effect, the trial court held that the assignment related back to the attempted making of it, and dismissed the garnishee proceedings. The question raised on that situation was whether the act was retroactive and, if so, whether it was void as an exercise of judicial power. As to whether it was within the condemnation of the constitutional inhibition against state legislation impairing the obligation of contracts was not suggested in the briefs of counsel or on the oral argument or considered by the court. If it had been, whether the decision of the case would have been the same may be left, for the present at least, to be assumed ⁴⁹⁷ from the reasoning of this opinion and others in this court to which we have referred. The language of Mr. Justice Pinney, to the effect that the remedy was given by statute, and until the action had proceeded to judgment the legislature might change it or take away the right of action altogether, was an answer solely to the claim that such legislation was an attempt to exercise judicial power, not by any means a declaration that the legislature may act at will before judgment on the remedy for the enforcement of contract obligations, regardless of whether it impairs such obligations.

By the Court. The order is affirmed.

CASSODAY, C. J. The decision of this case appears to be within the scope of the opinion filed on behalf of the majority of the court in *Second Ward Sav. Bank v. Schranck*, 97 Wis. 250-268. I filed a dissenting opinion in that case. For the reasons given in that opinion I am compelled to dissent in this case. To my mind, the obligations of the contract were not impaired by the mere modification of the statutory remedy so far as to dissolve the attachment if made within ten days prior to the debtor's assignment for the benefit of his creditors. In fact, it is less objectionable in that respect than it was to absolutely abolish the remedy by imprisonment for debt, which existed before the federal constitution was adopted. As this case turns

upon a question which can only be authoritatively decided by the supreme court of the United States, I do not feel bound by the former decision mentioned.

STATUTES — RETROSPECTIVE — AFFECTING REMEDY.—The remedy provided by law for the enforcement of a contract is no part of its obligation, and whatever pertains merely to the remedy may be changed, modified, or abrogated by the legislature in its discretion and to any extent, provided a substantial remedy be still left to the creditor, and such changes may constitutionally apply to existing contracts: *Beverly v. Barnitz*, 55 Kan. 466; 49 Am. St. Rep. 257, and note. Whenever a statute so far alters a remedy as to impair, destroy, change, or render the right scarcely worth pursuing, it necessarily impairs the obligation of the contract upon which such right is founded, and must be denied effect: *Teralta Land etc. Co. v. Shaffer*, 116 Cal. 518; 58 Am. St. Rep. 194; *Swinburne v. Mills*, 17 Wash. 611; 61 Am. St. Rep. 932, and note; *Skinner v. Holt*, 9 S. Dak. 427; 62 Am. St. Rep. 878, and note.

MARTIN v. REMINGTON.

[100 WISCONSIN, 540.]

MARRIED WOMAN—BURDEN OF PROOF.—In a contest between a wife and the creditors of her husband wherein she claims that property is her separate estate, and therefore not subject to a writ in favor of such creditor, she has the burden of showing by clear and satisfactory evidence that she paid for the property out of her separate estate.

EXECUTION — CONVEYANCE OF PROPERTY IN ACCORDANCE WITH NONENFORCEABLE TRUST, WHETHER CREDITORS MAY COMPLAIN OF.—If a husband purchases property with the separate funds of his wife, taking title in his own favor, a resulting trust arises in her favor, which has been made nonenforceable by the statutes of Wisconsin. If, however, he chooses to respect the trust and to convey the property to her in pursuance thereof, the conveyance is valid as against his creditors, and not tainted with fraud.

HUSBAND AND WIFE—EXECUTIONS.—That a wife's property has been increased largely and rapidly through the sagacity and industry of her husband does not give his creditors any right to reach such increment.

Creditors' suit to set aside conveyances of real estate made by the defendant, Alvah Remington, to his wife, on the ground that such conveyances were a fraud upon his creditors. There was no doubt that, at the time of the making of the conveyances, the husband was insolvent, but it was found that the wife had, at the marriage, separate estate; that with it the husband bought real property; that this was sold and various investments and reinvestments made, resulting finally in the acquisition of the property in controversy; that the conveyances

were taken in the name of the husband, and that he made the conveyances in question to his wife, because of the resulting trust arising in her favor by virtue of the use of her separate estate.

Nathaniel Pereles & Sons, C. F. Hunter, and Guy D. Goff, for the appellant.

H. K. Curtis and C. A. Fowler, for the respondents.

§45 WINSLOW, J. This is a contest between the wife and a creditor of the husband as to property conveyed by the husband to the wife at the time of the commencement of an action by the creditor to recover his debt. In such case, the principle is well established that the wife has the burden of showing, by clear and satisfactory evidence, that she paid for the property out of her separate estate: *Le Saulnier v. Krueger*, 85 Wis. 214. The reasons for this rule are well **§46** stated in *Hoxie v. Price*, 31 Wis. 82, and the authorities in support of it are cited in *Horton v. Dewey*, 53 Wis. 410.

It is not claimed in the present case that the wife paid anything at the time of the conveyance to her of all the property standing in her husband's name, but it is claimed that the original property out of which these parcels grew was bought with her money, and that thereby there arose a resulting trust in her favor in all the property to which her husband had record title, which trust, though not enforceable under our statutes, has now been fully executed by the husband without fraud, and forms a good consideration for the conveyances: Citing *Hyde v. Chapman*, 33 Wis. 391; *Karr v. Washburn*, 56 Wis. 303; and *Begole v. Hazzard*, 81 Wis. 274.

The facts found by the court seem to bring the case within this doctrine. The court found that the money with which the first parcel of real estate was bought was advanced and paid by Mrs. Remington, or (which amounts to the same thing) by Mrs. Connolly for her daughter's benefit; that subsequently Mrs. Remington put five hundred dollars additional of her own money into the building of the house upon the property, thus paying all the money which was put into this place out of her separate estate; that she afterward (acting through her husband as agent) traded this property for other property, receiving some cash, and invested this cash with four hundred dollars received from her father's estate in the speculative purchases which afterward followed, and which resulted in rapid and handsome profits; and

that Mr. Remington invested no money of his own in these transactions, but simply took the titles of the property thus paid for by his wife's money, or its increment, in his own name for convenience in the handling thereof. There was undoubtedly sufficient evidence to support these findings of the court, and these facts clearly bring the case within the ancient rule in equity that where, ⁵⁴⁷ on the purchase of property, title is taken in the name of one person while the consideration is paid by another, not by way of loan to the grantee, a trust results in favor of the person paying the consideration: *Dyer v. Dyer*, 1 White, & T. L. Cas. *203, and notes. And this doctrine applies where the purchase is made by the husband with the wife's separate estate as well as where the parties are strangers: *Perry on Trusts*, sec. 127, and cases cited. This trust arose by implication of law from the fact of the advancing of the purchase money, and not by virtue of any agreement of the parties: *Bartlett v. Pickersgill*, 1 Eden, 515; *Bigley v. Jones*, 114 Pa. St. 510; *Boyer v. Libey*, 88 Ind. 235.

True, it may be shown by parol that the money was advanced by way of a loan or as a gift, and the supposed trust thereby defeated; but we have found no evidence in the present case that would warrant us in overruling the conclusions of the trial court on this question.

Therefore, there seems no escape from the conclusion, upon the facts found by the trial court, that there would have existed, prior to the passage of section 2077 of the Revised Statutes of 1878, a valid resulting trust in the wife in the various parcels of land to which the husband held title during the progress of the real estate transactions shown by the evidence, and which finally merged into the two parcels of land which were conveyed by Remington to his wife, June 5, 1895. It is true that such trusts are abolished by section 2077 of the Revised Statutes of 1878; but it is still held that if the trustee voluntarily carries out and executes the voidable trust by conveying the property, as he is morally bound to do, such conveyance will be founded upon a sufficient consideration, and, in the absence of fraud, will be valid even as against creditors of the trustee: *Hyde v. Chapman*, 33 Wis. 391; *Begole v. Hazzard*, 81 Wis. 274. See, also, *Strong v. Gordan*, 96 Wis. 476.

The trial court has affirmatively found that the conveyances in this case were made in good faith and without ⁵⁴⁸ fraudulent intent. The evidence is voluminous, and we shall not rehearse it here. While there were circumstances which have a

suspicious appearance, and would, perhaps, have justified a different conclusion, we cannot say that the findings are against the weight of the evidence. Nor can it be claimed that there was a mixture or confusion of property of the husband and wife, so as to make the whole liable for the husband's debts. The findings affirmatively show that it was all the property of the wife, though managed through the agency of her husband, and there is sufficient evidence in support of this conclusion. It is certainly true in this case that the wife's property has increased very largely and rapidly, apparently through the sagacity and industry of the husband, but this court has not adopted the rule that such increment can be reached by the creditors of the husband: *Mayers v. Kaiser*, 85 Wis. 382; 39 Am. St. Rep. 849; *Anson v. Barth*, 88 Wis. 553; 43 Am. St. Rep. 928.

The final claim made by appellant is that the plaintiff purchased the note on the faith of Remington's guaranty, relying on his apparent ownership of the seven thousand five hundred dollar mortgage and the Lawndale property, thus raising an estoppel against the wife, as held in *Hopkins v. Joyce*, 78 Wis. 443. The difficulty with this contention is that the court has found, upon what seems to be sufficient evidence, that the plaintiff did not rely upon such apparent ownership.

There are no other questions raised which seems important enough to require attention.

By the Court. Judgment affirmed.

HUSBAND AND WIFE—WIFE'S SEPARATE ESTATE—PRESUMPTION.—The presumption is, that property conveyed to the wife for a money consideration is common property; but this presumption may be rebutted by showing that it was purchased with money belonging to her separate estate: *Ramsdell v. Fuller*, 28 Cal. 87; 87 Am. Dec. 103, and note.

HUSBAND AND WIFE.—A resulting trust in favor of a wife is presumed from the purchase of property by her husband with her moneys and the taking of the title in his name: *Smith v. Whitard*, 174 Ill. 538; 66 Am. St. Rep. 313, and note.

HUSBAND AND WIFE—WIFE'S SEPARATE ESTATE AUGMENTED BY HUSBAND'S SKILL—EXECUTIONS.—A husband who is skilled in any particular branch of labor has the right in law to bestow all his time, labor, and skill to the increase of the wife's separate estate, and allow his just obligations to go unpaid: *Boggess v. Richards*, 39 W. Va. 567; 45 Am. St. Rep. 938, and note. Nor may her separate estate for that reason be reached by his creditors: *Taylor v. Wanda*, 55 N. J. L. 491; 62 Am. St. Rep. 818, and note.

LEAHY v. NATIONAL BUILDING & LOAN ASSOCIATION.

[100 WISCONSIN, 555.]

BUILDING AND LOAN ASSOCIATIONS — RIGHTS OF MEMBERS OF.—A member of a building and loan association has no claim to, or property in, any specific fund of the association. Each member shares in the common gains and must bear a proportionate share of the losses.

BUILDING AND LOAN ASSOCIATIONS—ESTOPPEL TO CONTEST CONTRACTS OF.—Whether a building and loan association has or has not power to make a contract with its members to pay them a definite amount at a designated time, regardless of whether the anticipated profit has been earned or not, those who become members and assent to a contract of that character are estopped to deny its validity.

BUILDING AND LOAN ASSOCIATIONS.—THE INSOLVENCY OF A BUILDING AND LOAN ASSOCIATION stops all liability for further payments upon stock and creates an immediate liability against members who have borrowed from the association or been advanced moneys by it, to repay the loan or advances, irrespective of the time within which such repayment was stipulated to be made. The insolvency terminates all contracts between the members and the association.

BUILDING AND LOAN ASSOCIATIONS—INSOLVENCY—STOCK CERTIFICATES LIMITING LIABILITY OF MEMBERS. Though a certificate of stock issued by a building and loan association contains a provision limiting the liability of the stockholder to the payment of his monthly installments and exempting him from liability for losses or expenses, such provisions, if otherwise valid, become inoperative on the insolvency of the association.

BUILDING AND LOAN ASSOCIATION—LIABILITY OF BORROWING MEMBER.—A borrowing member of a building and loan association who has transferred or pledged his stock as security remains liable to pay his ratable share of the losses of the association. Such a member is not entitled, in adjusting the amount due on his loan, to be credited with all payments made to the association with legal interest, for to so credit him is to relieve him from his share of the losses of the association and to impose all of them on the nonborrowing members. He should be charged with the amount of his loan with legal interest, and credited with all interest payments made by him on the principle of partial payments, and upon the payment of the balance thus ascertained to be released from his mortgage. The amount due to him on account of his stock cannot be known until the affairs of the corporation are wound up and a final distribution made.

BUILDING AND LOAN ASSOCIATION—INSOLVENCY OF, EFFECT OF ON DIFFERENT CLASSES OF STOCK.—No matter how many different classes of stock are issued by a building and loan association, nor in how many ways, nor at what times the members are to be paid, nor whether the stock stipulates that they shall be paid a sum certain or merely their share of the income or profits, nor whether their stock was obtained by payment of monthly installments or by a gross sum at one time, the rights of the members, on insolvency, are the same, and neither can be paid to the exclusion of others, nor exempted from sharing ratably in the losses and liabilities of the association.

BUILDING AND LOAN ASSOCIATIONS—MEMBERS WHO ARE HOLDERS OF FULL PAID STOCK.—One who, on the payment at one time of a gross sum, receives a certificate of stock of a building and loan association, reciting that he is the owner of a specified number of shares of stock of a par value of one hundred dollars, and that the association will pay him that amount for each share after the expiration of a time specified, becomes a member of the association, and hence subject to his share of its losses, and not entitled on its insolvency, to the performance of the contract expressed in the certificate.

BUILDING AND LOAN ASSOCIATIONS.—THE DEATH OF A BORROWING MEMBER and the fact that his title to the property covered by a mortgage given to secure his loan has vested in a third person do not change the relation of the association to the debt and the mortgage, and the amount due on the mortgage must be computed in the same manner as if the borrower survived and the property still belonged to him.

Suit by a stockholder and creditor of the defendant corporation to wind up its affairs. A receiver of the association was appointed on March 11, 1897. He afterward filed a petition for instructions respecting various transactions of the association which were disclosed in his petition. The association had issued various classes of stock certificates; some were called hundred-month stock, and by their terms the member was to pay monthly installments of seventy cents each for one hundred months, whereupon the association agreed to pay him one hundred dollars per share; other stock was called ninety-six months' stock, and was to mature in that time; still another class was designated as full-paid stock. The members of it paid ninety-six installments of seventy cents each in advance, less a rebate of nine dollars, and at the expiration of ninety-six months the association agreed to pay one hundred dollars per share. Catherine Langworthy also petitioned, showing that on April 7, 1890, she made a written application for twenty-six shares of the ninety-six-month stock, which was soon afterward issued to her; that she also applied for a loan of two thousand dollars, which was granted to her, and she executed a bond and mortgage conditioned to pay the association two thousand dollars in monthly installments of fourteen dollars, with ten per cent interest, payable monthly from May 1, 1890, to May, 1898, and that she assigned her certificate of stock to the association as security; that she paid the monthly installments, eighty-two in number, until the appointment of the receiver; that under the contract of membership the association agreed that if she would pay the installments and all fines, fees, and charges for ninety-six months, it would pay her one hundred dollars for each share of the stock held by her, which would include a profit of thirty-

two dollars and eighty cents on each share; that the association did not earn any profit, but sustained losses and incurred expenses, by reason of which her investment earned much less than the anticipated profit; that article 22 of the by-laws declared that if any shareholder under the ninety-six months' contract desired to withdraw from the association, he might do so by giving thirty days' notice to the secretary, and should thereupon receive the amount paid in by him, with legal interest thereon, less entrance fees and other charges due the association. After the petitioner became a member, the association amended its articles of organization and became a mutual building and loan association, and subsequently acquired a large number of members, many of whom did not obtain loans. The court found the contract between the association and the petitioner to be valid and enforceable, and that, upon the appointment of the receiver, the bond and mortgage executed by her became due and payable, and directed the receiver to charge her with the amount of the bond with legal interest from its date to the appointment of the receiver, and to credit her with the amount of each payment made by her during that period, with legal interest thereon to such appointment, and upon the payment of the balance to be thus ascertained, the receiver was to release the bond and mortgage. From this order he appealed. Sarah A. Eggleston also petitioned, and upon the issues made by her petition it was found by the court that she was the owner of nineteen shares of stock of the association of the maturity value of one hundred dollars on each share, and that the association had agreed to pay her one hundred dollars for each of her shares at the end of eight years from the date thereof. Her certificate of stock stipulated that the shareholder should not have any claim or interest in the affairs, assets, or funds of the association except as above set forth, and should be under no other liability than that stated above; that the shares might be surrendered at any time after two years from their issue upon ninety days' notice, and the owner should receive the sum actually paid with six per cent interest; that the certificate of stock should not be assignable as against the association, unless the assignment was approved by the secretary. The court found that this petitioner had never become a member of the association, and was not chargeable with any of its losses or expenses, that the contract with her was not a valid certificate of stock, but was a valid obligation to repay her the sum of money paid by her with six per cent interest, and

that she was entitled to be paid in preference to the claims of stockholders and in common with other creditors. From this order the receiver appealed. Upon the petition of F. H. White and Sarah Van Pelt it was found that George C. White, Jr., in July, 1889, made a written application for ten shares of ninety-six-months' stock, which were issued to him in the month following; that in May, 1892, he applied for a loan of one thousand dollars, which was granted to him on the 1st day of July of the same year, and he executed a bond and mortgage on certain real estate and received the amount of the loan; that he paid all installments up to the appointment of the receiver; that the stock issued to him was a definite contract to mature at the end of ninety-six months, and would include a profit of thirty-two dollars and eighty cents per share; that his stock had not matured when the receiver was appointed; that White died in March, 1893, and the real estate mortgaged and the ten shares of stock were assigned to Sarah M. White as his only heir-at-law, and subsequently the petitioners became the owners of the mortgaged premises subject to the mortgage, and continued to make monthly payments until the receiver was appointed, and that White and the petitioners together had paid ninety installments on the stock and fifty-five installments of interest on the mortgage. The court concluded that this contract was valid and legal; that the petitioners had complied with the terms thereof up to the time of the appointment of a receiver; that there remained six monthly payments unpaid, and upon the payment of which the petitioners were entitled to a release of the mortgage. From this order the receiver appealed.

David S. Rose and Hugh Ryan, for the appellant.

Charles G. Woolcock and Winkler, Flanders, Smith, Bottum & Vilas, Edwin F. Van Vechten, and Elliott & Hickox, for the respondents.

504 BARDEEN, J. It would be practically impossible, within reasonable limits, to trace out the chrysalis character of the defendant corporation. It was first organized in 1887, its ostensible purpose being the accumulation of funds by monthly contributions of its members, making loans to its members and stockholders, and making such other investments as it might deem proper, the buying, selling, and holding of real estate, and the holding and selling of real estate or other

property taken on foreclosure. Its capital stock was five million dollars, divided into ten series of five hundred thousand dollars each, the par value of each share being one hundred dollars; and the shares were made payable in monthly installments of seventy cents on each share. From time to time during its existence its articles of organization were changed, until at the time of its decease it was presumably a genuine building and loan association. During the period of its existence it adopted by-laws and issued stock on the different schemes and plans as set out in the statements of facts, and upon other plans not material to this decision. During all of its mutations its paramount theory ^{was} was akin to that of the ordinary building and loan association, although it did not conform to the law of this state in manner of dealing with its members or in the character of the stock issued. It finally crystallized itself into a regular building and loan association under the provisions of the law of this state, and it is upon that status we must define and determine the rights and relations of its members and stockholders. What we say in this opinion must be deemed to apply to all the petitioners alike, unless a contrary purpose is evident from the language used.

The fundamental idea of a building and loan association is mutual profit-sharing. Its business necessarily is confined to its own members. Its object is to raise a fund to be loaned to its members. Each shareholder, whether a borrower or non-borrower, participates alike in all profits earned, and alike must assist in bearing the burden of expenses and losses. Such associations are the only ones that can issue their capital stock before it is paid for. The member makes his application, receives his stock, and agrees to pay for it in monthly installments at a fixed rate. In case of default, he is subject to fine, which goes into the general profit fund for all alike. When the aggregate dues he has paid, with the credited earnings, equal the face value of his stock, he can no longer share in the earnings, and his stock is retired, and his membership in the corporation ceases. But the member has no claim to, or property in, any specific fund of the association: *Atwood v. Dumas*, 149 Mass. 167. The theory of our statutes and the law of all the cases is to the effect that such associations are purely mutual in their character, and that the members share in the common gains, and, from the very necessity of their relations, must bear a proportionate share of the losses. Probably, under our law, such an association would have no right to issue what is

called "definite contract stock." Such stock is opposed to the fundamental principle of such associations. The members themselves constitute ⁵⁶⁶ the corporation. It has no capital except such as it receives from its members in monthly installments and its interest earnings. When the corporation aggregate agrees with all its members to pay them a definite amount at a given time, regardless of whether the anticipated profit has been earned or not, unless the requisite profit has been earned it is quite evident that some one must suffer. The principle of equality and mutuality would thereby be destroyed.

But in the present case it is unnecessary to determine whether such stock would be ultra vires or not. The parties before the court all stand on the same footing in this respect. They were all bound to take notice of the limitations on the powers of the association; and when they became members and assented to the contract in that form they became foreclosed from contesting it. They must all stand or fall together, and our chief concern is to see that justice and equity is done between them. It is insisted, however, that this association was not organized as a mutual company, and therefore the right of the members must be determined according to the strict letter of their contracts. The impossibility of performance of these contracts has been determined by the judgment of insolvency. It is admitted on all sides that the company cannot carry out its plans as originally intended. But who constitute the corporation, if not its members? Each member has a contract with every other member. The non-borrowers hold on agreement that, if they make certain payments for a given length of time, the corporation will pay them a definite sum at the expiration of that period. The borrowers have the same contract to begin with, but which has been modified to the extent that the corporation has advanced to them an amount equivalent to the face value of their stock, upon which the borrower agrees to pay, in addition to the monthly payments on his stock, certain fixed interest charges. Both agreements were made in contemplation of a profit of thirty-two dollars and eighty cents per share. Under the plan of ⁵⁶⁷ organization this profit was to come from interest earnings, fines, et cetera, and from no other source. This fact, taken in connection with the charter and by-laws, leads to no other conclusion than that this was a mutual profit-sharing institution.

We must now determine the status of these several members, and their relations to each other, the corporation being insolvent. In other words, what effect has the insolvency of the association upon the membership contract and upon the loan contract? The authorities are not entirely in accord upon that subject. Substantially all agree that the insolvency of the association has the effect at once to stop all liability for stock payments: Endlich on Building Associations, 2d ed., sec. 523; Strohen v. Franklin etc. Assn., 115 Pa. St. 273. And this applies equally whether such members be merely investors or also borrowers. "The liability to pay monthly dues or fines, or interest on the amount advanced, cannot extend beyond the existence of the association": Cook v. Kent, 105 Mass. 246. The dissolution of the association necessarily puts an end, not only to its capacity to receive, from time to time, the small payments due from its members, but also to the possibility of their being turned to account, for their benefit, by means of the system of investment and reinvestment peculiar to the building association. The member's duty to make regular stock payments—a duty incident to his membership only—ceases, for the stock itself is destroyed, and the membership dies with the corporation. Not only is this so, but the further fact is established, almost without dissent, that upon the premature dissolution of such an association the advanced members may be compelled to pay forthwith the balances due from them on their securities, although the latter be given in terms only for the payment of installments: Endlich on Building Associations, sec. 523; Weir v. Granite State etc. Assn., 56 N. J. Eq. 234; Curtis v. Granite State etc. Assn., 69 Conn. 6; 61 Am. St. Rep. 17; Waverly ⁵⁶⁸ Mutual etc. Assn. v. Buck, 64 Md. 338; Low Street etc. Assn. v. Zucker, 48 Md. 448; Buist v. Bryan, 44 S. C. 121; 51 Am. St. Rep. 787.

Thus it seems that, as the corporation is defunct, membership ceases, and all contracts must, therefore, of necessity be set aside. It is upon the theory of the rescission and abrogation of the contracts that equity steps in and winds up its affairs, and makes a ratable distribution of assets.

In this connection it may be well to refer to a clause on each certificate of membership issued prior to 1895. After certifying that the member is the holder of so many shares of stock of a certain maturity value, and in consideration of the first payment, together with the agreements contained in the application for membership, et cetera, the association will pay

the member the maturity value of the stock upon the expiration of the period therein limited, the stock certificate further says: "This certificate is issued to and accepted by the holder upon the following express terms and conditions: 1. The said shareholder shall not have any claim or interest in the affairs, assets, or funds of this association, nor the control of them, except as above specifically set forth, and assumes no liability of any kind whatsoever except as hereinbefore described." It is urged that under this contract the shareholder had no liability except the payment of his monthly installments, and it follows as a necessary corollary that he is not liable for any losses or expenses. It is doubtful if this would be the legal effect of the contract when we come to consult the by-laws, which are printed on the back of all stock except prepaid certificates. But, whether it would or not, the insolvency of the association is alike fatal to this as well as to the other terms of the contract. If this were not so, it would lead to endless confusion and complication. If this claim is good for one, it is good for all. If these borrowers are exempted from liability for losses, then every nonborrower may claim the same privilege, and each stockholder would, in legal effect, become a preferred creditor ⁵⁶⁹ in the order in which he took membership—a proposition utterly at variance with the scheme of the organization, and in violation of the plainest principles of equity.

This leads us to a consideration of the status of the borrowing members with reference to the corporation, and their liability to sustain their ratable share of the losses of the association. Does the borrowing member still remain a member of the corporation? Under the charter and by-laws there can be no reasonable doubt but that he does. He is not in the position of an ordinary borrower of money. He remains a member of the association, subject to its charter and by-laws, and in taking the advance on his shares he is only allowed to anticipate the final redemption of all shares. His assignment of his stock as collateral to his loan does not cancel his membership. By the very terms of his loan he agrees to pay the dues on his stock until maturity. He participates in the earnings which are to go toward discharging the obligations on his loan, and to shorten the time when he will be fully discharged therefrom: *Eversmann v. Schmitt*, 53 Ohio St. 174; 53 Am. St. Rep. 632; *Endlich on Building Associations*, secs. 122-124; *Mechanics' etc. Assn. v. Conover*, 14 N. J. Eq. 219; *Parker v. Fulton etc. Assn.*, 46 Ga. 166. Hence, being equally entitled with

all the others, in the direct ratio of his interest in the society, to share in the common gains of the enterprise, he is liable to contribute, in the same proportion in which he expects to profit, to the losses and expenses incident to the management: Endlich on Building Associations, secs. 77-79, 518; McGrath v. Hamilton etc. Assn., 44 Pa. St. 383.

The association being insolvent, nothing remains to be done but to wind up its affairs so as to do equity between the creditors and between the members themselves. As regards the latter, care should be taken to adjust the burdens equally, and not to throw upon either borrowers or nonborrowers more than their respective shares. Just how to reach this result has given rise to a great contrariety of decisions.

⁵⁷⁰ The learned judge of the superior court held, as to the Langworthy petition, that the mortgagor should be charged with the amount of her mortgage, with legal interest, and credited her with all payments made to the association, with legal interest. This ruling, in effect, gave her, not only the benefit of all interest payments, but also all payments made on her stock, in reducing the amount of her mortgage debt. This could only be justified on the theory that when she obtained a loan she ceased to be a member of the association. As we have already seen, he was not justified in such a conclusion. Her rights should have been ascertained and defined on the basis that she remained a member, notwithstanding her loan. To allow Mrs. Langworthy to credit upon her mortgage her payments on her stock, would enable her to escape responsibility for her share of losses, and throw them wholly upon the nonborrowers; in other words, the borrowers would escape without loss. So palpable an injustice cannot be sanctioned. While the mortgage may secure the payment of both stock dues and interest, they stand upon an entirely different footing. Interest is not paid as a stockholder, but as a borrower. Stock dues are paid by all members, and the funds accumulated by their payments belong to all the members alike. If by maladministration of the affairs of the association the fund is diminished, the losses should fall evenly upon all. As we view it, the equitable rule would be to charge the petitioner with the amount of her loan at legal interest, and credit her with all interest payments made by her, on the principle of partial payments, as stated in Hill v. Durand, 58 Wis. 160, and upon payment of the balance found due, then to release her mortgage. This is the rule adopted in Pennsylvania, the mother

of building and loan associations in this country, and finds ready support in other jurisdictions: *Strohen v. Franklin etc. Assn.*, 115 Pa. St. 273; *Rogers v. Hargo*, 92 Tenn. 35; *Weir v. Granite State etc. Assn.*, 56 N. J. Eq. 234. ⁵⁷¹ Whatever may be due her upon her stock can be readily ascertained when the affairs of the corporation are wound up and final distribution made.

The same rule must be applied to the order made on the White and Van Pelt petition. White became a member in his lifetime, and afterward secured a loan. His status as a member became fixed at that time. The contract became no more sacred or inviolable because of his death. Neither did the fact that these petitioners afterward became the owners of the mortgaged premises change the situation. They can secure no greater rights than White could have had had he lived. In equity they might possibly be subrogated to the right to claim whatever may be found due on stock, but that is not now available in reduction of the mortgage debt.

As to the Eggleston petition, a somewhat different question has arisen. The court below found that she never became a member of the association, but was a creditor thereof, and entitled to be paid the amount she had paid in with interest, in common with other creditors, and in preference to the claims of stockholders; in other words, that her transaction with the association was, in legal effect, but a loan of so much money. We need not concern ourselves over the question of whether, under its articles, the corporation had authority to issue this class of stock or not. The stock was issued and accepted by the petitioner, and we cannot permit either the receiver or the holder to question its validity. It is certainly valid as between the parties, so long as it does not contravene public policy and was not issued in defiance of any statutory prohibition. We are not advised of the precise ground upon which the court based its decision. Probably it was upon that clause in the certificate before quoted, to the effect that the holder should have no claim or interest in the affairs of the association, et cetera. The certificate under which the petitioner makes claim recites that she ⁵⁷² is "the owner of nineteen shares of stock" in the association, of the par value of one hundred dollars; that she has paid therefor eleven hundred and five dollars and eighty cents, being ninety-six payments of seventy cents each, less a rebate of nine dollars on each share. In consideration thereof the association agrees to pay her one hundred dollars for

each share at the end of ninety-six months. This includes a profit of thirty-two dollars and eighty cents on each share, besides the rebate, and is the same profit that was to be paid to other stockholders. Article 29 of the by-laws provided that the board of directors might offer for sale "prepaid stock, or stock upon which installments may be fully paid in advance." There can be no doubt but that Mrs. Eggleston made her investment under this by-law, and it is equally clear that she thereby became a member of the association. The fact that her relations with the company were somewhat limited did not prevent her becoming a member. Such construction must be given the certificate as will effectuate the intention of the parties. The first part of the certificate deals with both parties on the basis of petitioner's membership in the association. To construe the limiting clause mentioned to divest her of membership in the association, is to render the other part of the certificate entirely nugatory. This would be contrary to the evident intention of the parties, and contrary to the rules of construction laid down in *Wisconsin etc. Ins. Co. Bank v. Wilkin*, 95 Wis. 111; 60 Am. St. Rep. 86.

On the basis that the petitioner became and is a member of the association, the contract between them became impossible of performance because of the insolvency of the company. Upon that basis her counsel argues that her stock became preferred, and entitled her to payment in full, in preference to holders of other kinds of stock. Just why this is so is not at all evident. There is nothing in the stock contract or in the charter or by-laws that would give it this distinctive character. All classes of stock are equally meritorious, and in marshaling the assets no stockholder, in the ⁵⁷⁸ absence of some provisions in the charter or by-laws of the association, should be given preference over another: *Hohenshell v. Home etc. Assn.*, 140 Mo. 566.

The case of *Gibson v. Safety etc. Assn.*, 170 Ill. 44, seems to me to be especially applicable to the matter under consideration. The court says: "Each of these certificates was issued upon the payment to this association of fifty dollars. The holders now say that the association had no authority under the law to issue them. In other words, they contend that a building and loan association, under the statutes of this state, cannot lawfully issue paid-up stock; and from that premise they conclude that they themselves may repudiate the validity of the stock, and, to the extent of the money paid therefor,

they should be treated as preferred creditors of the association. If it be true that the association had no authority of law to issue the stock, it is equally true that the holders of the stock had no right or authority of law to accept it; and, if they were claiming any benefit therefrom, other stockholders might, with propriety, question the legality of the transaction. But the holders of the stock are in the anomalous position of themselves repudiating its validity, and thereby seek to obtain an advantage over those who are the legal stockholders of the association. It seems to us unreasonable to say that these stockholders may be allowed to assert the illegality of the action of the building association, to which they themselves were parties, and at the same time, by reason of that illegality, place themselves in a better position than they would have been had their stock been valid. They bought paid-up stock. They paid for it. No one is questioning their right to the benefit of that stock, and, clearly, they cannot be heard to do so." This leaves very little more that needs to be said. The failure of the association is a calamity both to the prepaid and deferred payment stockholders. In their tribulation, when they appealed to the court of conscience, they must be content ⁵⁷⁴ to be put on as nearly an equal footing with other stockholders as human judgment can place them. This will be done by allowing the petitioner's claim as a stockholder, and giving her a just share of the assets, after all losses and expenses have been adjusted and paid.

By the Court. As to the appeal from each of the three orders mentioned, the orders of the superior court of Milwaukee county are reversed and the cause is remanded for further proceedings according to this opinion.

BUILDING AND LOAN ASSOCIATIONS—EFFECT OF INSOLVENCY.—If the affairs of an incorporated building and loan association show that there is a deficiency of assets, that the stock can never be matured, and that the purposes for which it was organized have wholly failed, a court of equity has jurisdiction to wind up the corporation, and such a proceeding puts an end to the contract between it and its members, at least so far as future performance is concerned: *Kuntson v. Northwestern etc. Assn.*, 67 Minn. 201; 64 Am. St. Rep. 410. Upon the appointment of a receiver of a building and loan association on the ground of its insolvency, the loans made by it to its members and mortgage notes given by them to it become immediately due, regardless of the time of payment specified therein: *Curtis v. Granite etc. Assn.*, 69 Conn. 6; 61 Am. St. Rep. 17, and monographic note thereto discussing the entire question of the effect of insolvency: *Strauss v. Carolina etc. Assn.*,

117 N. C. 308; 53 Am. St. Rep. 585. See *Barton v. Enterprise etc. Assn.*, 114 Ind. 226; 5 Am. St. Rep. 608.

BUILDING AND LOAN ASSOCIATIONS—RIGHTS OF MEMBERS—LIABILITIES OF DIFFERENT CLASSES OF MEMBERS.—The members of a building and loan association are equally entitled to share in its gains; and it would seem to be a consequence that each member is under an obligation to contribute his share of its necessary losses and expenses: See monographic note to *Robertson v. Homestead Assn.*, 69 Am. Dec. 154. In the settlement of the affairs of an insolvent building and loan society, each borrowing member indebted to it must be charged with the amount received by him, with legal interest from the time of the loan, and must be credited with all payments made by him, whether as fines, penalties, dues, or otherwise; and each nonborrowing member must be credited with the sums paid in by him, with legal interest from the date of payment: *Strauss v. Carolina etc. Assn.*, 117 N. C. 308; 53 Am. St. Rep. 585. See, also, *Bulst v. Bryan*, 44 S. C. 121; 51 Am. St. Rep. 787; *Curtis v. Granite etc. Assn.*, 69 Conn. 6; 61 Am. St. Rep. 17, and monographic note thereto; *Rabbitt v. Wilcoxon*, 103 Iowa, 85; 64 Am. St. Rep. 152.

SEYMOUR v. CUSHWAY.

[100 WISCONSIN, 580.]

PARTNERSHIP TO DEAL IN REAL ESTATE — PAROL AGREEMENT FOR.—A parol agreement that the parties thereto will purchase specified real estate as partners is void, and constitutes no impediment to the purchase of the same realty by one or more of such parties to the exclusion of the others, nor can they, on making such purchase, be required to account for the profits thereof.

REAL ESTATE.—STANDING TIMBER is a part of the land on which it is, and a contract to purchase it is a contract for the purchase of land within the statute of frauds.

STATUTE OF FRAUDS.—No fraud is committed by a person in refusing to perform a contract void by the statute of frauds.

Suit to have a trust declared in favor of the plaintiffs in the title to certain standing timber, and to have an accounting of the profits derived by the defendants from the purchase of such timber and its manufacture into lumber. The defendants, Cushway and Herrick, entered into an agreement to purchase the standing timber on an Indian reservation. To the sale of this timber by the Indians it was necessary that the consent of the president of the United States and of other officials thereof be obtained, and the financial standing of Cushway and Herrick being questioned, they interested the plaintiffs in the scheme by agreeing to form a partnership, of which the plaintiffs should be members, to purchase the timber, and the terms of the partnership, the moneys to be contributed thereto, and the division of the profits were fully agreed upon by parol.

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The authorities were satisfied with the financial standing of the plaintiffs, and the approval of the sale and purchase of the timber was obtained. Thereafter Herrick and Cushway, in disregard of their agreement with the plaintiffs, entered into a similar agreement with one Stearns, and contracts for the purchase of the timber were entered into with the new partnership, and the plaintiffs were denied all participation therein. Hence the present suit. Decree for the defendants. Plaintiffs appealed.

Elliott & Hickox, for the appellants.

Winkler, Flanders, Smith, Bottum & Vilas, for the respondents.

⁵⁸⁹ PINNEY, J. The agreement of partnership between the defendants Herrick and Cushway and the plaintiffs, entered into prior to November 22, 1892, was entirely verbal. It provided for and contemplated the purchase of growing timber upon lands upon the Lac du Flambeau reservation. The purchase of this timber was the main object and central purpose of the agreement, whether of partnership or to form a partnership. The claims of the plaintiffs to relief, it is apparent, rest wholly upon this alleged parol agreement to form a partnership with the defendants Herrick and Cushway to purchase the standing timber on the reservation and ⁵⁹⁰ manufacture it into lumber. Before any interest whatever had been acquired by the plaintiffs or any of the defendants, and before anything had been done by the plaintiffs in the way of performing said agreement, the defendant Herrick expressly repudiated the same, and proceeded, openly and entirely independent of the plaintiffs, to form a new partnership, in which neither of the plaintiffs had or acquired any interest or control, and to acquire the timber for himself and his new associates. The claim of the plaintiffs to relief is met by the contention on the part of the defendants that the agreement upon which it rests is within the statute of frauds, and hence absolutely void, so that no rights, legal or equitable, can be founded on it; that, even if the agreement were valid, the only remedy of the plaintiffs would be an action at law for damages for the breach.

It is, and has for a long time been, settled in this state, beyond all controversy, that standing timber is a part of the land whereon it is standing, so that a contract for its purchase is a contract for the purchase of an interest in lands, within the

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statute of frauds: *Lillie v. Dunbar*, 62 Wis. 198, 202; *Daniels v. Bailey*, 43 Wis. 569; *Strasson v. Montgomery*, 32 Wis. 52; *Warner v. Trow*, 36 Wis. 196; *Young v. Lego*, 36 Wis. 394. And it has also been quite generally understood in this state that an agreement to form a partnership to purchase lands since 1860, when the case of *Bird v. Morrison*, 12 Wis. 138, was decided, is within the statute of frauds. So that, whatever views may prevail in other jurisdictions, the rule in this state may fairly be considered as settled, and not open to discussion: *McMillen v. Pratt*, 89 Wis. 612; *Clarke v. McAuliffe*, 81 Wis. 106. And it would seem that the construction of the statute thus announced and so long acted upon fairly falls within the doctrine *stare decisis*, and is no longer open for discussion at this day, after the very able and full discussion of the question by Mr. Justice Paine in *Bird v. Morrison*, 12 Wis. 138.

⁵⁹¹ In speaking of the effects of a verbal contract where a part of the purchase money had been paid but there was no part performance, it was held, in *Brandeis v. Neustadt*, 13 Wis. 142, after an elaborate discussion, that "under the statute which declares that every contract 'for the sale of any lands or interest in lands shall be void unless the contract, or some note or memorandum thereof, et cetera, be in writing,' a verbal contract for the sale of land is in all respects a nullity, unless there has been a part performance of it within the old equity rule upon the subject, and specific performance of it could not be decreed." The court, in speaking of such contracts, say: "The defect consists in the failure or neglect of the parties to go far enough in the performance of that which they may legally do, instead of their attempting to perform what the law forbids. The parol bargain itself is not only innocent but serviceable, as it must precede the written consummation of almost all transactions of the kind. But where they stop with the parol bargain, the statute declares the contract void, not because it is illegal, immoral, or fraudulent, but because they omitted to take another step, made necessary to its validity in law. . . . The purchaser can derive no benefit from the supposed contract. Nothing passes to him by virtue of it; he obtains no interest in the land, and no promise or agreement on the part of the seller to convey him any; and he can never derive any advantage from what has transpired, except it be as a matter of favor on the seller's part. The latter suffers no damage by what has happened. He has lost or parted with nothing. His interest, control, and ownership of the land remain

the same, and he is at liberty to do with it just as he might have done before." To a similar effect and application is another section of the statute of frauds, namely, section 2302, which declares that "no estate or interest in lands, . . . nor any trust or power over or concerning lands, or in any manner relating thereto, shall be created, ⁵⁹² granted, assigned, surrendered, or declared unless by act or operation of law, or by deed or conveyance in writing, subscribed by the party creating, granting, assigning, surrendering, or declaring the same."

Here there appears to have been no fraud; nothing, in fact, but a mere breach of the verbal contract to enter into and perfect the proposed purchase and partnership. The trial court found, and the evidence seems quite conclusive, that the conveyance of the timber to the defendants, rather than the plaintiffs jointly with Herrick and Cushway, was procured without any fraud, concealment, or misrepresentation whatever, unless the breach of the verbal contract on the part of Herrick to enter into the projected partnership and purchase can be considered such. The mere breach of a promise to convey is not enough: *Hoge v. Hoge*, 1 Watts, 213, 26 Am. Dec. 52; 2 *Pomeroy's Equity Jurisprudence*, 1056; *Dunphy v. Ryan*, 116 U. S. 491; *Lantry v. Lantry*, 51 Ill. 458; 2 Am. Rep. 310. And a party in no legal sense commits a fraud by refusing to perform a contract void by the provisions of the statute of frauds. He has not, in a legal sense, made a contract, and has a perfect right, both at law and in equity, to refuse to perform. He may stand upon the law and refuse. As said in *Brandeis v. Neustadt*, 13 Wis. 150: "All that the parties may say or do, short of reducing their agreement to writing, expressing the consideration, and causing it to be subscribed by the party making the sale, affords the court no solid ground, or colorable pretext even, for noticing it or knowing that anything of the kind has ever transpired."

The plaintiffs have, so far as appears, wholly failed to show that they had any interest, legal or equitable, upon or in aid of which they could make any claim for protection or relief consistent with or under these statutory provisions. They were mere volunteers, without any interest or estate in these lands, legal or equitable; and as strangers to the title they have no standing in a court of equity to ask it to ⁵⁹³ interfere in their behalf. They had and have no interest in the timber. A mere stranger to the title, no matter how much fraud and deceit may have been practiced upon him by the party who has

procured the title, cannot complain. The plaintiffs coming into court asserting a title to the timber, it is incumbent on them to maintain it by competent legal proof. Before a party can have a deed set aside and a trust declared in his favor, he must, by proper evidence, show that he has an equitable interest in the land, which a court of equity will recognize or enforce: *Dunn v. Schneider*, 20 Wis. 509; *Lawson v. Lawson*, 117 Ill. 98; *Conant v. Riseborough*, 139 Ill. 391. Whether the agreement was one of copartnership, or to form a partnership at some time in the future, in either case it was only an agreement. The business of the proposed partnership does not appear to have been entered upon, or any partnership accounts created. There was nothing in the case, then, but the bare agreement and its alleged breach. For this the remedy provided in the courts of law was adequate and complete, where the parties might have, as a matter of right, a trial by jury: *Hill v. Palmer*, 56 Wis. 123, 43 Am. Rep. 703, quoted and approved in *Hyer v. Richmond Traction Co.*, 168 U. S. 484; *Treat v. Hiles*, 68 Wis. 344; 60 Am. Rep. 858; *Doyle v. Bailey*, 75 Ill. 418. The court found that the Indians knew, when they signed the contracts, that they were conveying the timber to the defendants and not to the plaintiffs; and also that the several government officials who indorsed the contracts each knew at the time of his indorsement that the defendants were the grantees in such contracts, and that the plaintiffs had no interest therein; in short, that the conveyances were made to the defendants by the Indians knowingly and understandingly, and sanctioned by the government authorities, with full knowledge of their purport, and that the consideration therefor was paid entirely by the defendants.

The claim that there were writings in evidence sufficient ⁵⁹⁴ to satisfy the requirements of the statute is clearly not maintainable. No such writing is pointed out that can serve the necessary purpose. The written agreement between Cushway and Herrick to form a partnership is manifestly of no avail. The plaintiffs were not parties to it, and it was not sufficient in form or substance. To satisfy the statute, the memorandum must contain all the essential terms of the contract, either by its terms or by reference to other writings, so that it will not be necessary to resort to parol evidence to explain it. It must be definite in respect to the intention of the parties, who they are, their relation one to the other—who is the seller, who the

buyer—the property, the price, and terms of payment. This is too well established to need authorities in support of it. The real agreement, being entirely verbal and within the statute of frauds, is absolutely void, and cannot give rise to any right of action, legal or equitable. The court found: “That the agreement of partnership between the defendant Fred Herrick, Joseph H. Cushway, and the plaintiffs, entered into prior to November 22, 1892, and hereinbefore mentioned, was entirely verbal; that said agreement of copartnership provided for and contemplated the purchase of growing timber upon said Lac du Flambeau reservation as a condition precedent to and as a foundation of the entry upon any other business, and that the purchase of said timber was the main and central purpose of said partnership agreement; that the partnership business contemplated by said agreement was never actually begun or entered upon, and that nothing, or substantially nothing, had ever been done by the plaintiffs, or any of them, in the way of performing said agreement.”

The argument urged by counsel, that equity will not allow the statute of frauds to be made an instrument of fraud, has no application, we think, to the facts of the case. A similar argument was pressed in the case of *Levy v. Brush*, 45 N. Y. 589. The court there said (page 596): “The position, rightly ⁵⁹⁵ understood, is correct. This is the basis upon which the doctrine of specific performance of verbal contracts for the purchase of real estate by courts of equity in cases of part performance rests. . . . But no case can be found where a contract has been taken out of the statute in favor of a party who had no existing interest in the property, who had done no act of part performance, who had parted with nothing under the contract; simply upon the ground that the other party was guilty of a fraud in refusing to perform his verbal agreement.”

It was also found that the plaintiffs paid no consideration for the timber in question, and contributed nothing whatever, either of time, labor, or money, to the business of the said Cushway & Co.; and they had not, so far as appeared, altered their position on the faith of any promise made to them by any of the defendants. It is not perceived that the facts and circumstances give rise to any trust in favor of the plaintiffs. Admitting that prior to the conveyance to the defendants they had an agreement of copartnership with Herrick and Cushway to purchase the same timber, this would not prevent Herrick

and Cushway from breaking such agreement, making themselves liable for damages, and forming a new partnership to procure, if they could, the conveyance of the timber to the new firm.

Upon the pleadings and facts contained in the record and findings of the court, we do not perceive any ground upon which it can be maintained that the facts and circumstances give rise to any trust in favor of the plaintiffs. For the reasons above stated we hold that the circuit court rightly gave judgment dismissing the plaintiffs' complaint.

By the Court. The judgment of the circuit court is affirmed.

PARTNERSHIP TO DEAL IN REAL ESTATE—PAROL AGREEMENT.—It seems to be the general rule that a partnership may be formed by parol to deal in real estate: *Fountain v. Menard*, 53 Minn. 443; 39 Am. St. Rep. 617; *Bates v. Babcock*, 95 Cal. 479; 29 Am. St. Rep. 133. There is, however, a conflict of authority on the question, and the doctrine of the principal case is sustained by respectable authority: See the note to *McCormick's Appeal*, 98 Am. Dec. 201. A distinction has been drawn between an agreement between two or more persons to purchase real estate for their joint benefit, which is deemed within the statute of frauds, and a partnership for buying and selling lands, which may be created by parol and does not fall within the statute of frauds: *Speyer v. Desjardins*, 144 Ill. 641; 36 Am. St. Rep. 473.

STATUTE OF FRAUDS—SALE OF TIMBER.—A sale of growing timber to be presently cut and removed from the land is a contract concerning the land, and is within the statute of frauds, and inoperative, unless evidenced by a writing: *Hirth v. Graham*, 50 Ohio St. 57; 40 Am. St. Rep. 641, and note. The authorities, however, are divided upon this question: See note to *Kingsley v. Holbrook*, 86 Am. Dec. 182. And it has been held that while trees growing on land so far partake of realty that any contract for their sale is within the statute of frauds; yet, if the contract is in contemplation of their severance from the land, whereby they become personalty, the same rule in respect to the identification of personal property is applicable: *Carpenter v. Medford*, 99 N. C. 495; 6 Am. St. Rep. 535.

GEORGE v. BENJAMIN.

[100 WISCONSIN, 622.]

PRACTICE—SUIT BY ONE PERSON FOR THE BENEFIT OF MANY.—Where thirty-one persons enter into a written agreement to purchase and sell a contract of land, and for that purpose to contribute certain sums at times specified, one of them cannot sue for the benefit of all to recover a sum due from one of the members under the agreement, under a statute declaring that when the question is one of common or general interest of many persons, or when the parties are very numerous, and it may be impracticable to bring all before the court, one or more may sue or defend for the benefit

of the whole. The parties do not have a common or general interest, and the contract is personal to each of the subscribers to it.

PARTNERSHIP—SUIT BY ONE MEMBER FOR THE BENEFIT OF ALL.—However numerous the members of a partnership, all must be parties to a suit to enforce a contract made with the firm. No private agreement between the parties can authorize one to sue for all.

PARTNERSHIP, WHEN MAY SUE A MEMBER.—If several persons agree to purchase and sell a tract of land and to share the profits of the transaction, and that each will contribute his share of the sum which may be required to complete the purchase, and one of them, after the purchase, refuses to so contribute, an action may be sustained against him by the others. It is true they are partners, but one partner may maintain an action against his co-partner upon any agreement, whether it be to advance moneys to be used in launching the partnership or to perform some act after the partnership has commenced.

Action by the plaintiff in behalf of himself and others to recover a sum claimed to be due under a contract entered into by the defendant, the plaintiff, and twenty-nine others to the effect that they would purchase a tract of land and organize an association, and would contribute a sum specified at the making of the agreement to perfect the organization, and in future, from time to time, such sums as might be needed. It was agreed that one of the parties should, as trustee, receive the title to the land, which he did, and thereafter declared a trust in favor of each of the parties to the extent of one-thirty-first interest in the land. Afterward, as installments of purchase price became due, assessments were made on each member for his share thereof, and the defendant having failed to pay certain of these assessments, the present action was brought to enforce them. It was claimed in the complaint that the question involved was one of common or general interest to many persons, that the parties interested and associated were numerous, that some of them were not residents of the state, that it was impracticable to bring all before the court, and that this action was hence brought in the name of the plaintiff at the instance and for the benefit of the whole. A demurrer was interposed on the ground: 1. That the plaintiff had not the legal capacity to sue; 2. That there was a defect of parties plaintiff and defendant; and 3. That the complaint did not state facts sufficient to constitute a cause of action. The demurrer was overruled and the defendant appealed.

Timlin & Glicksman, for the appellant.

Rogers & Mann and Orren T. Williams, for the respondent.

BARDEEN, J. Two questions are involved on this appeal: 1. Is there a defect of parties plaintiff? 2. Does the complaint state a cause of action?

1. The plaintiff seeks to justify the maintenance of this action by himself and on behalf of others under section 2604 of the Revised Statutes of 1878. This section reads as follows: "Of the parties to the action, those united in interest must be joined as plaintiffs or defendants; but if the consent of anyone who should be joined as plaintiff cannot be obtained, he may be made a defendant, the reason thereof being stated in the complaint; and when the question is one of a common or general interest of many persons, or when the parties are very numerous, and it may be impracticable to bring them all before the court, one or more may sue or defend for the benefit of the whole."

As a reason why this action is brought in the name of the plaintiff alone, the complaint alleges that "the question involved in this action is one of a common or general interest to many persons, and that the parties interested and associated herein are very numerous, and that many of the persons interested herein are not residents of the state of Wisconsin, but that they are residents of other states; that it is impracticable to bring all of said persons before the court." He seeks to sustain his right to maintain this action on the ~~two~~ two grounds mentioned in the statute—that the question involved is one of common and general interest of many persons, and that the parties are very numerous, and it is impracticable to bring them all before the court. As stated in *Day v. Buckingham*, 87 Wis. 215, and repeated in *Frederick v. Douglas Co.*, 96 Wis. 411, this statute has been construed as merely re-enacting the rules which prevailed in equity, and which otherwise might have been held to be abolished by the code. So, also, it has been held that, when the question is one of common or general interest, the action may be brought by one or more for the benefit of all who have such common or general interest, without showing that the parties are even numerous, or that it would be impracticable to bring them all before the court: *McKenzie v. L'Amoureux*, 11 Barb. 516; *Barbour on Parties*, 50, 51. *Bliss on Code Pleadings*, sec. 79, says: "This rule is in harmony with the requirement that all the parties plaintiff must have a joint or common interest, and the interest of the parties represented must appear to be such as to entitle them, were they all before the court, to maintain the action in their own names. It is therefore

simply a rule of convenience, and, though pertaining, like other general rules, to all cases to which it is applicable, yet in practice it will seldom be appealed to except in actions heretofore called equitable." It requires but a mere inspection of the complaint to show that the claim that the question involved in this action is "one of common or general interest to many persons" is not justified by the facts alleged. On the contrary, the complaint shows that the question involved arises out of contract, personal to each one of the subscribers to it. It shows positively and definitely that all are united in interest. Each subscriber to the contract agrees with every other subscriber that he will "pay such sum or sums as shall be needed for future payments on said property, as the same are demanded and required by the parties in interest herein." *McKenzie v. L'Amoureux*, 11 Barb. 516, is ⁶³⁰ an instructive case on this point: Bliss on Code Pleadings, secs. 80, 81; Pomeroy on Code Remedies, sec. 390, et seq. It would seem too plain for argument that the complaint fails to state any fact which shows that the parties to this contract have a common or general interest which would enable each to maintain an action in his own name if he was before the court.

As to the second ground relied on, the statute does not require any question of common or general interest to this great number. It is based upon the fact that the parties are so numerous that it is really impracticable to make them all actual plaintiffs. It is perhaps difficult to say just where the line should be drawn; just how few or how numerous the parties must be to get within the lines of the statute. Under the rule in equity, it was held that twenty creditors interested in real estate, the subject of litigation, was not so large a number as that the court would allow a few to represent the others: *Harrison v. Stewardson*, 2 Hare, 530. In New York it was held that the number thirty-five was not sufficiently great to allow a few to represent the many: *Kirk v. Young*, 2 Abb. Pr. 453. Clerke, J., said: "But this is not a case in which it is impracticable to bring all the plaintiffs before the court. Their number is thirty-five, and although perhaps too numerous not to make it somewhat inconvenient to the pleader to recount their names, it is certainly not impracticable to do so; and without a very obvious necessity the court should always require that all the persons in the action should appear by their individual and real names." The fact that all the parties to the contract are united in interest affords a sufficient reason for holding that they are

necessary parties to the action. Dicey on Parties, rule 13, page 104, says: "All the persons with whom a contract is made must join in an action for a breach of it." But in this case the parties sustain such relations to each other as in legal effect makes them partners. No other construction can be given to the contract, and their acts under ⁶³¹ it, without doing violence to the plainest legal principles. 1 Chitty on Pleading, 13, says: "It is a general rule that, in the case of partners, all the members of the firm should be plaintiffs in an action upon a contract made with the firm; nor can any private arrangement by the firm that one only of the parties shall bring the action, give him the right to sue alone." And Dicey on Parties, page 149, says that this holds good even though the company consist of a hundred persons. Neither can the action be sustained on the ground that the alleged syndicate is an "unincorporated company" or a "voluntary association." It does not appear that they have done anything to give it the characteristics of such organizations, except to elect officers. So, in whatever view we consider the case, we are unable to see how the plaintiff can maintain this action alone.

2. Had there not been a defect of parties plaintiff, we feel quite well satisfied that this action is properly founded. The contract set out in the complaint and their proceedings under it make the parties thereto partners in legal effect. But it is said one partner cannot sue another upon a demand arising out of partnership transactions. Unquestionably that is the law, but the difficulty is that it has no application to the facts of this case. The cause of action stated is not one growing out of the transactions of the syndicate. It is based upon a direct and positive promise of defendant with all his associates to pay money for a given object. Relying upon these mutual promises, over one hundred and twenty-five thousand dollars has been paid in and devoted to the purpose agreed upon. Defendant has received and retained his interest in the company. Surely, he is in no position to say there must be a dissolution and an accounting before he will pay his just share toward carrying on the proposed enterprise. The books are full of cases sustaining the defendant's liability, and the right of the other parties to compel payment of the amount in default. Cowen, J., in *Glover v. Tuck*, 24 Wend. 153, ⁶³² says: "When, as in the case before us, the covenant is to make specific advances for the purpose of launching a partnership, I presume the right to an action was

never questioned." "The objection that the articles of agreement between plaintiff and defendants constituted a partnership, in consequence of which the plaintiff's remedy lies in a court of equity only, is thus answered by Collyer on Partnership, 132, Perkins' edition, section 245: 'One partner may maintain an action of covenant against his copartner, whether the covenant be to pay any sum or do any act for the purpose of only launching the partnership, or whether it be to perform any of the articles after the partnership has commenced. An action of covenant will lie, although there may be accounts between the parties which require unraveling in equity.'" Bates on Partnership lays down a similar rule at section 876: *George v. Harris*, 4 N. H. 533; 17 Am. Dec. 446; *Pillsbury v. Pillsbury*, 20 N. H. 90; *Collamer v. Foster*, 26 Vt. 754; *Williams v. Henshaw*, 11 Pick. 79; 22 Am. Dec. 366; *Sprout v. Crowley*, 30 Wis. 187; *Lathrop v. Knapp*, 27 Wis. 214. This latter case was one in which the facts were quite parallel with the case at bar, and is directly in point on the question of compelling the defendant to contribute as he agreed to. The case of *McMahon v. Rauhr*, 47 N. Y. 67, so much relied upon by defendant, is really a world wide from the case under consideration. The facts which distinguish it from this case will become apparent from a mere inspection of the case, and it is not necessary to mention them here.

The other objections urged to the complaint are purely technical, and cannot be reached by demurrer. If the defendant desires further information as to the times when the installments become due on the land contracts held by the trustee, he can secure it by motion.

By the Court. The order of the circuit court is reversed and the case is remanded for further proceedings according to law.

PRACTICE—SUIT BY ONE PERSON FOR THE BENEFIT OF MANY.—When suit may be brought by one for the benefit of many: *Dewey v. St. Albans Trust Co.*, 60 Vt. 1; 6 Am. St. Rep. 84; *Mannix v. Purcell*, 46 Ohio St. 102; 15 Am. St. Rep. 562. When one partner may sue another without making the other partners parties to the action: *Vance v. Blair*, 18 Ohio, 532; 51 Am. Dec. 467.

PARTNERSHIP—WHEN MAY SUE A MEMBER.—An action at law will lie upon a covenant in partnership articles: *Duncan v. Lyon*, 8 Johns. Ch. 351; 8 Am. Dec. 513; *Dana v. Gill*, 5 J. J. Marsh. 242; 20 Am. Dec. 255. One partner may sue the other for his share of the profits, during the continuance of the partnership, if the articles thereof provide for a division of profits before its determination: *Rondeau v. Pedesclaux*, 3 La. 510; 23 Am. Dec. 468. See note to

Course v. Prince, 12 Am. Dec. 650. In Kennedy v. McFaddon, 8 Harr. & J. 194, 5 Am. Dec. 434, however, it was held that one partner had no right to sue his copartner at law, to pay his portion of a contribution. One partner cannot recover of another an unliquidated and unsettled balance: Beede v. Fraser, 68 Vt. 114; 44 Am. St. Rep. 824.

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ACTIONS.

1. ELECTION BETWEEN INCONSISTENT REMEDIES.—A party cannot be held to have made an election between two inconsistent remedies, when it does not appear that he was entitled to pursue both. Hence, one who commences an action of ejectment against his tenant is not thereby precluded from maintaining an action of unlawful detainer against the same tenant, though the action of ejectment has not been dismissed, if it does not appear that such action could have been maintained. (*Agar v. Winslow*, 84.)

2. CRIMINAL PROSECUTION—JUDGMENT IN—EFFECT OF IN A CIVIL ACTION.—One prosecuted and convicted of a criminal charge is not thereby estopped from maintaining a civil action and proving therein that he was innocent of the offense of which he was convicted. (*Palmer v. Maine Cent. R. R. Co.*, 513.)

3. CRIMINAL PROSECUTION—WHEN NOT A BAR TO A CIVIL ACTION.—One who is prosecuted for fraudulently evading the payment of his fare on a railway train, and who thereupon pays his fare and the costs of prosecution, is not thereby estopped from maintaining an action for false imprisonment and from proving therein that he was not guilty of the offense charged. (*Palmer v. Maine Cent. R. R. Co.*, 513.)

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ADMIRALTY.

ADMIRALTY JURISDICTION — EXCLUSIVENESS.—The jurisdiction of admiralty courts to administer relief by proceedings in rem is exclusive; but such proceedings are against the property only, and not against persons. (*Knapp etc. Co. v. McCaffrey*, 290.)

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ADOPTION.

1. **ADOPTED CHILDREN — LAPSE OF LEGACY BEQUEATHED TO THE ADOPTING PARENT.**—An adopted child is not entitled, on the death of his adopting parent, to a legacy bequeathed to him, under a statute providing that when a devise of real or personal property is made to any child or other relative of the testator, and such child or other relative shall die leaving issue surviving the testator, such issue shall take the estate. (Phillips v. McConica, 753.)

2. **AN ADOPTED CHILD MAY INHERIT FROM ITS ADOPTER,** but not through him. It is not an heir of the ancestor of its adopter. (Phillips v. McConica, 753.)

3. **ADOPTED CHILDREN ARE NOT ISSUE OF THEIR ADOPTING PARENTS** within the meaning of a statute providing that, upon the death of a legatee before the testator, the issue of the legatee shall take the legacy, although the statute declares that such adopted child shall be to all intents and purposes the child and lawful heir of the person adopting him, entitled to all the rights and privileges, and subject to all the obligations of a child of such person begotten in lawful wedlock. (Phillips v. McConica, 753.)

ADVANCEMENTS.

1. **ADVANCEMENTS.—A VESTED REMAINDER** in real estate is the subject of an advancement. (Cain v. Cain, 863.)

2. **ADVANCEMENTS — PURCHASE MONEY AS AFFECTING.**—Although a tenant for life furnishes part of the purchase money of a tract of land agreed to be conveyed to such life tenant with remainder to his heirs, this fact cannot affect the question of advancement to such heirs of the remainder of the value of the land. (Cain v. Cain, 863.)

ADVERSE POSSESSION.

ADVERSE POSSESSION—PLEADING—EVIDENCE.—Title by adverse possession may be shown under a bill to set aside a mortgage averring a purchase of the property at execution sale, and the taking of immediate possession more than the statutory period before the commencement of the action, and averring that complainant and his grantors have ever since been in the actual, continuous, and uninterrupted possession of the premises. (Rogers v. Day, 593.)

AGENCY.

1. **AGENCY — RIGHTS OF UNDISCLOSED PRINCIPAL — LIMITATION UPON.**—One who gives an order for goods to A cannot have it transferred by A to B without the buyer's knowledge and consent. And even if it turns out that A was all the time only agent for B, as an undisclosed principal, yet B's rights under the contract will be limited by the rights which the buyer has in good faith acquired against A while dealing with him as principal. (Belfield v. National Supply Co., 799.)

2. **AGENCY—UNDISCLOSED PRINCIPAL—NOTICE OF TITLE—QUESTIONS FOR THE JURY.**—If an order for goods is given to a firm, which it turns over to another, with instructions to ship and charge directly to the purchaser, and before the consummation of the transaction, the purchaser is notified of the shipper's title, the question, in an action by the shipper against the purchaser,

as to what goods were delivered before notice, and what ones after notice, as well as whether there was any ratification of the order as coming directly from the purchaser to the shipper, should be submitted to the jury. (*Belfield v. National Supply Co.*, 799.)

3. **AGENCY — UNDISCLOSED PRINCIPAL—PURCHASER'S LIABILITY BEFORE AND AFTER NOTICE OF TITLE—SET-OFF.**—If an order for goods is given to a firm, which it turns over to another, with instructions to ship and charge directly to the purchaser, and, before the consummation of the transaction, the purchaser is notified of the shipper's title, the buyer is bound to refuse all goods delivered after such notice, or account for them to the shipper; but as to goods delivered to the buyer before such notice he may, in an action against him by the shipper, set off a claim of his against the firm, for the purchaser is not answerable to an undisclosed principal before knowledge of any other title than that of the firm. (*Belfield v. National Supply Co.*, 799.)

4. **AGENCY—UNDISCLOSED PRINCIPAL—RISK OF—SET-OFF.**—Every undisclosed principal, as against those who deal with his agent as the real owner, runs the risk of having his claim met by the setoff of a demand due from the agent to a purchaser, and the only way of obviating this is by giving notice of his title. (*Belfield v. National Supply Co.*, 799.)

5. **AGENCY—NEGLIGENCE.**—A principal cannot take advantage of the wrong of his agent by pleading his negligence as a defense. (*New York Life Ins. Co. v. Babcock*, 134.)

6. **AGENCY—CONTRACT TO ACT FOR BOTH PARTIES.**—An agreement to act as agent for both of the parties to a transaction requires the consent of both of the principals, otherwise it is void as against public policy. (*Ramspeck v. Pattillo*, 197.)

7. **PRINCIPAL AND AGENT.**—An undisclosed principal may sue upon a contract made in the name of his agent. Where a contract is in writing and otherwise sufficient to satisfy the statute of frauds, parol evidence is admissible to prove that one of the parties named therein contracted as agent of an undisclosed principal, and such evidence being adduced, he may sue upon a contract in his own name. (*Kingsley v. Siebrecht*, 486.)

See Evidence, 2, 8; Insurance, 11, 12, 14, 15, 16; Schools.

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APPEAL.

1. **APPELLATE PROCEDURE—PRESUMPTION OF HARM FROM ERROR.**—It is only when the court can see that an error of the trial court in a criminal prosecution in rejecting evidence works no injury that it can be treated as harmless on appeal. (*State v. Bowles*, 598.)

2. **APPEAL BONDS—JUDGMENT AGAINST SURETY.**—The district court, on the rendition of a judgment by it against an appellant from a justice's judgment, has no jurisdiction to render a like judgment against the surety on the appeal bond. (*Drummond Carriage Co. v. Mills*, 719.)

3. **APPELLATE PROCEDURE—HARMLESS ERROR.**—The failure to make a specific finding respecting an issue is not a ground for the reversal of a judgment, when it clearly appears that such failure can have injured no one. (*Hall v. Glass*, 77.)

4. **APPELLATE PROCEDURE.—A GENERAL OBJECTION** that each and every ruling of the trial court which was made the object of objection and exception was erroneous is not a proper or sufficient mode of presenting errors to the consideration of the appellate court, and may be ignored by it. (*Whyte v. Rosencrantz*, 90.)

5. **APPELLATE PRACTICE—EVIDENCE TO SUSTAIN VERDICT—NEW TRIAL.**—If the evidence is sufficient to sustain the verdict, the supreme court cannot, on appeal, interfere with the discretion of the trial court in overruling a motion for a new trial. (*Savannah etc. Ry. Co. v. Godkin*, 187.)

6. **APPELLATE PRACTICE.**—An appellate court cannot weigh and determine, from conflicting testimony, what the truth is, in passing upon the question of law presented by an instruction directing a verdict. (*McGregor v. Reid*, 332.)

7. **APPEAL—JURISDICTION—AMOUNT.**—The supreme court of Louisiana has jurisdiction of a case, on appeal, which involves a right to the possession of certain premises, where the plaintiff makes oath that such right is worth more than two thousand dollars, and that he will be damaged in an amount exceeding that sum if the defendant is not enjoined from interfering with such right. (*Newell v. Leathers*, 395.)

8. **APPELLATE PRACTICE—ERROR IN NOT DIRECTING VERDICT.**—If an action on an accident insurance policy is tried upon the theory that the question as to whether the insured voluntarily exposed himself to unnecessary danger belonged exclusively to the jury to decide, the insurer cannot complain on appeal that the trial court erred in not directing a verdict in his favor. (*Johnson v. London Guaranty etc. Co.*, 549.)

9. **APPELLATE PRACTICE—NEW TRIAL.**—The failure of the trial court to file reasons for the denial of a motion for a new trial is not reversible error, if no request for such reasons is made at the time the motion is denied. (*People v. Tice*, 560.)

10. **APPELLATE PRACTICE.—A GENERAL ASSIGNMENT OF ERROR** that the facts found do not support the judgment, may be based upon the record without any bill of exceptions, and all of the assignments of error may, in a proper case, be amended to that end, on appeal. (*Hubbard v. Garner*, 580.)

11. **APPELLATE PRACTICE—ASSIGNMENT OF ERROR—BILL OF EXCEPTIONS.**—An objection that the assignments of error do not accompany the bill of exceptions is not available on appeal, if the appellee has stipulated for a settlement of such bill. (*Hubbard v. Garner*, 580.)

See Homicide, 1; Judgment, 16.

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See Insurance, 8, 9.

ARREST.

1. **ARREST, UNLAWFUL—RIGHT TO RESIST.**—A person has the same right to resist an unlawful arrest as he has to resist a threatened injury to life or limb. (State v. Davis, 845.)

2. **ARREST, UNLAWFUL—RIGHT TO RESIST.**—A person resisting an unlawful arrest has the right to use as much force as may be necessary to regain his liberty, even to the actual taking of life. (State v. Davis, 845.)

3. **ARREST FOR MISDEMEANOR WITHOUT A WARRANT—LIABILITY FOR.**—A private individual who procures the arrest of an innocent person for a misdemeanor by an officer without a warrant cannot justify, in an action for false imprisonment, by proof that he acted in good faith, without malice, and upon belief of guilt founded upon reasonable grounds. (Palmer v. Maine Cent. R. R. Co., 513.)

4. **ARREST BY PRIVATE INDIVIDUAL WITHOUT WARRANT—WHEN JUSTIFIABLE.**—A private person arresting for a felony does so at his peril, and to justify himself must, at least, prove that he had reasonable ground for believing the person arrested to be guilty. He may arrest for an affray or breach of the peace committed in his presence and while it is continuing, but not for a misdemeanor on suspicion, no matter how well grounded, unless the person arrested is in fact guilty. (Palmer v. Maine Cent. R. R. Co., 513.)

5. **ARREST—RIGHT OF SEARCH—RETENTION OF MONEY.** An arresting officer has no authority to take money from the person of the party arrested, and retain it, unless it constitutes evidence against him which can be used on the trial of criminal proceedings instituted by his arrest. (Hubbard v. Garner, 580.)

See Damages, 9; False Imprisonment.

ASSAULT.

See Criminal Law, 11.

ASSESSMENTS.

See Taxation, 1.

ASSIGNMENT.

ASSIGNMENT—WHEN ASSIGNEE SHOULD SUE IN HIS OWN NAME.—Under a law requiring all suits to be brought in the name of the real party in interest a suit to revive a judgment should be brought in the name of the assignee thereof. (Haupt v. Burton, 698.)

See Contracts, 12, 13; Corporations, 13, 14; Damages, 11; Insurance, 4; Mortgages, 4, 5; Negotiable Instruments, 16; Sales, 4.

ASSOCIATIONS.

1. **ASSOCIATIONS — MUTUAL BENEFIT SOCIETIES—EXPULSION—NOTICE TO APPEAR AND DEFEND CHARGES—SUFFICIENCY OF.**—If charges have been made against a member of a mutual benefit association, such as a musical protective union, having in view his expulsion, a notice to appear and defend such charges is insufficient if it contains no copy of the accusations. (Weiss v. Musical etc. Union, 820.)

2. ASSOCIATIONS—MUTUAL BENEFIT SOCIETIES—PASSAGE OF ILLEGAL RESOLUTION—ESTOPPEL UPON MEMBERS.—The passage of an illegal resolution at a meeting of a mutual benefit association, such as a musical protective union, which resolution purports to amend the by-laws of the union, does not, if the illegality of the resolution is subsequently raised, bind members who were present at the time it was passed, although they did not then object thereto. (*Weiss v. Musical etc. Union*, 820.)

3. ASSOCIATIONS—MUTUAL BENEFIT SOCIETIES—ILLEGAL EXPULSION—RESORT TO COURTS—EXHAUSTING REMEDY WITHIN SOCIETY.—A member of an incorporated mutual benefit association, such as a musical protective union, who has been illegally expelled therefrom, is not required, before resorting to the courts, to first exhaust his remedy, by appeal, within the organization itself, where the by-laws do not provide for an appeal, and the only provision for an appeal rests upon the adoption of an illegal resolution. (*Weiss v. Musical etc. Union*, 820.)

4. ASSOCIATIONS—MUSICAL BENEFIT SOCIETIES—EXPULSION OF MEMBER—ACT NOT AUTHORIZING.—The fact that a member of a mutual benefit association, such as a musical protective union, issued a manifesto criticising the management of the union, and inviting other members thereof to participate in a meeting at which matters affecting the interest of the union would be discussed, is no ground for expelling him, and depriving him of his interest in the funds of the union, where there is nothing to show that the manifesto tended to disrupt or destroy the association, or to cause the withdrawal of any of its members. (*Weiss v. Musical etc. Union*, 820.)

5. ASSOCIATIONS—MUTUAL BENEFIT SOCIETIES—POWER OF EXPULSION—LIMIT UPON EXERCISE OF.—If the charter of an incorporated mutual benefit association, such as a musical protective union, contains no power of expulsion, that power can only be exercised by the association when the member has been guilty of some infamous offense, or has done some act tending to the destruction of the society. (*Weiss v. Musical etc. Union*, 820.)

See Building and Loan Associations; Mandamus; Religious Societies.

ASSUMPSIT.

See Infants, 1, 2.

ATTACHMENT.

1. GARNISHMENT—SITUS OF DEBT.—A FOREIGN CORPORATION cannot be summoned as garnishee in one state, to reach a debt payable by it in another state. (*National Bank v. Furtick*, 99.)

2. CORPORATIONS—SERVICE OF PROCESS ON LOCAL AGENT.—Under a statute authorizing garnishment of a foreign corporation by service on certain of its officers, service of process on its local agent, who is not one of the designated officers, does not confer jurisdiction. (*National Bank v. Furtick*, 99.)

3. CORPORATIONS—GARNISHEE.—SERVICE OF PROCESS upon a corporation summoned as garnishee must be made upon one of the officers designated in the statute relating to attachments, to wit, upon the president, treasurer, cashier, or paying clerk of the corporation. (*National Bank v. Furtick*, 99.)

4. GARNISHMENT—PAYMENT TO WRONG PARTY.—A defendant in garnishment proceedings cannot escape liability by reason of a payment of the fund in dispute, after service of the gar-

nishment, to one who is not entitled to such money. (Sykes v. City Sav. Bank, 562.)

5. GARNISHMENT—MONEY TAKEN FROM PRISONER.—Money wrongfully taken from the person of a party arrested, and retained, is not subject to garnishment. (Hubbard v. Garner, 580.)

See Statutes, 8.

BAILMENT.

1. BAILMENTS—BAILEE'S LIEN—WAIVER.—A bailee's lien for towing a lumber raft is not waived by the fact that the bailee has not insisted upon the payment of towing charges before delivering other rafts under the same contract, which is silent as to when such charges should be paid; nor is such lien waived by merely filing a written claim for such charges against the insolvent owner of the raft when such claim expressly asserts the bailee's right to the lien and reserves the right to enforce it. (Knapp etc. Co. v. McCaffrey, 290.)

2. BAILMENTS—BAILEE'S LIEN—EQUITY JURISDICTION TO ENFORCE.—A bill may be maintained in equity to establish and enforce a bailee's lien on property in his possession when both his possession and his right to a lien are denied by the purchaser from the original owner, who threatens to take forcible possession. (Knapp etc. Co. v. McCaffrey, 290.)

3. BAILMENTS—BAILEE'S LIEN—EQUITY JURISDICTION—ESTOPPEL TO DENY.—If a bill in equity is filed to enforce a bailee's lien, and the defendant therein obtains an order giving him possession of the property upon his giving bond, he is thereby estopped from subsequently denying the jurisdiction of the court, although such order expressly stipulates that it is not to be construed as an admission of jurisdiction. (Knapp etc. Co. v. McCaffrey, 290.)

4. BAILMENTS.—A BAILEE'S LIEN EXTENDS to all goods delivered under one contract, although they may be delivered in different parcels and at different times, and the bailee may detain any portion of them as a lien upon the whole, even if he has delivered a part. (Knapp etc. Co. v. McCaffrey, 290.)

5. BAILMENTS—LIEN OF BAILEE—COMMON LAW AND STATUTORY LIENS.—In the absence of specific agreement, a person who has bestowed labor and skill on a chattel bailed to him for that purpose, and thereby improved it, has a lien on it for the reasonable value of his labor, or the right to retain it until paid therefor, and such common-law lien may, under special circumstances, be superior to prior existing contractual or statutory liens on the same property. (Drummond Carriage Co. v. Mills, 719.)

See Shipping.

BANKS AND BANKING.

1. NATIONAL BANKS—TAXATION OF BY THE STATES.—Personal property of a national bank cannot be assessed to it by the state for the purposes of taxation. (People v. National Bank, 82.)

2. TAXATION.—DEPOSITS IN A NATIONAL BANK, whether general or special, are assessable to the depositors, but not to the bank. (People v. National Bank, 82.)

3. BANKING—FORGED CHECK—ONE INNOCENT INDORSEE, WHEN NOT LIABLE TO ANOTHER.—If an innocent indorsee of a forged check indorses it to another, who receives pay-

ment thereon from the bank on which the check purported to be drawn by one of its depositors, and, on the demand of the bank, refunds the money received, he cannot maintain an action against his innocent indorsee, because the payment was voluntary and without liability to the bank. (Neal v. Coburn, 495.)

4. **BANKING—PAYMENT OF FORGED CHECK TO AN INNOCENT HOLDER FOR VALUE.**—A bank paying a forged check purporting to be signed by one of its depositors to an innocent indorsee for value cannot recover from him the amount so paid on discovering the forgery. (Neal v. Coburn, 495.)

5. **BANKING—RECOVERY OF MONEY PAID TO UNDER A MISAPPREHENSION OF LAW.**—If a bank pays to an innocent indorsee for value a check purporting to be drawn by one of its depositors, but which is proved to be forged, and such innocent indorsee repays to the bank the moneys so paid under a misapprehension of law, believing himself to be liable, he may, in an action of assumpsit, recover the moneys so paid by him. (Neal v. Coburn, 495.)

BASTARDS.

See Parent and Child; Seduction, 5.

BOARD OF EDUCATION.

See Schools.

BONDS.

See Appeal, 2; Guardian and Ward, 3; Municipal Corporations, 26.

BUILDING AND LOAN ASSOCIATIONS.

1. **BUILDING AND LOAN ASSOCIATIONS—RIGHTS OF MEMBERS OF.**—A member of a building and loan association has no claim to, or property in, any specific fund of the association. Each member shares in the common gains and must bear a proportionate share of the losses. (Leahy v. National Building etc. Assn., 945.)

2. **BUILDING AND LOAN ASSOCIATIONS—ESTOPPEL TO CONTEST CONTRACTS OF.**—Whether a building and loan association has or has not power to make a contract with its members to pay them a definite amount at a designated time, regardless of whether the anticipated profit has been earned or not, those who become members and assent to a contract of that character are estopped to deny its validity. (Leahy v. National Building etc. Assn., 945.)

3. **BUILDING AND LOAN ASSOCIATIONS.—THE INSOLVENCY OF A BUILDING AND LOAN ASSOCIATION** stops all liability for further payments upon stock and creates an immediate liability against members who have borrowed from the association or been advanced moneys by it, to repay the loan or advances, irrespective of the time within which such repayment was stipulated to be made. The insolvency terminates all contracts between the members and the association. (Leahy v. National Building etc. Assn., 945.)

4. **BUILDING AND LOAN ASSOCIATIONS—INSOLVENCY—STOCK CERTIFICATES LIMITING LIABILITY OF MEMBERS.** Though a certificate of stock issued by a building and loan association contains a provision limiting the liability of the stockholder to the payment of his monthly installments and exempting him from liability for losses or expenses, such provisions, if otherwise valid, become inoperative on the insolvency of the association. (Leahy v. National Building etc. Assn., 945.)

5. BUILDING AND LOAN ASSOCIATION—LIABILITY OF BORROWING MEMBER.—A borrowing member of a building and loan association who has transferred or pledged his stock as security remains liable to pay his ratable share of the losses of the association. Such a member is not entitled, in adjusting the amount due on his loan, to be credited with all payments made to the association with legal interest, for to so credit him is to relieve him from his share of the losses of the association and to impose all of them on the nonborrowing members. He should be charged with the amount of his loan with legal interest, and credited with all interest payments made by him on the principle of partial payments, and upon the payment of the balance thus ascertained to be released from his mortgage. The amount due to him on account of his stock cannot be known until the affairs of the corporation are wound up and a final distribution made. (*Leahy v. National Building etc. Assn.*, 945.)

6. BUILDING AND LOAN ASSOCIATION—INSOLVENCY OF, EFFECT OF ON DIFFERENT CLASSES OF STOCK.—No matter how many different classes of stock are issued by a building and loan association, nor in how many ways, nor at what times the members are to be paid, nor whether the stock stipulates that they shall be paid a sum certain or merely their share of the income or profits, nor whether their stock was obtained by payment of monthly installments or by a gross sum at one time, the rights of the members, on insolvency, are the same, and neither can be paid to the exclusion of others, nor exempted from sharing ratably in the losses and liabilities of the association. (*Leahy v. National Building etc. Assn.*, 945.)

7. BUILDING AND LOAN ASSOCIATIONS—MEMBERS WHO ARE HOLDERS OF FULL PAID STOCK.—One who, on the payment at one time of a gross sum, receives a certificate of stock of a building and loan association, reciting that he is the owner of a specified number of shares of stock of a par value of one hundred dollars, and that the association will pay him that amount for each share after the expiration of a time specified, becomes a member of the association, and hence subject to his share of its losses, and not entitled, on its insolvency, to the performance of the contract expressed in the certificate. (*Leahy v. National Building etc. Assn.*, 945.)

8. BUILDING AND LOAN ASSOCIATIONS.—THE DEATH OF A BORROWING MEMBER and the fact that his title to the property covered by a mortgage given to secure his loan has vested in a third person do not change the relation of the association to the debt and the mortgage, and the amount due on the mortgage must be computed in the same manner as if the borrower survived and the property still belonged to him. (*Leahy v. National Building etc. Assn.*, 945.)

BURDEN OF PROOF.

DEATH—BURDEN OF PROOF IN ACTIONS FOR CAUSING.—An administrator suing under the death liability act of Maine for the benefit of the parents of a deceased person has the same burden of proof, and may be met by the same defenses, as in an action by the deceased himself for his injuries had he survived. (*Jones v. Mfg. and Investment Co.*, 535.)

See Carriers, 1; Elections, 10; Husband and Wife, 2.

CARRIERS.

1. COMMON CARRIERS — NEGLIGENCE — BURDEN OF PROOF.—It is presumed that one injured while being transported

by a common carrier is injured in consequence of the latter's negligence. To escape liability it must show that it has discharged the full measure of its legal duty, and is in no way to blame for the accident; but, to acquit itself, it need not prove in addition that the plaintiff was guilty of gross contributory negligence. (*Lincoln Street Ry. Co. v. McClellan*, 736.)

2. CARRIERS—BUSINESS OF TOWING.—The owner of a steamboat engaged in the business of towing is not a common carrier, and has no specific lien as such for transportation charges upon the goods carried. (*Knapp etc. Co. v. McCaffrey*, 290.)

See Railroad Companies, 13, 17, 19; Shipping, 3.

CHATTEL MORTGAGES.

1. MORTGAGES OF CHATTELS.—THE TITLE to mortgaged chattels remains in the mortgagor until foreclosure of the mortgage. (*Drummond Carriage Co. v. Mills*, 719.)

2. MORTGAGES OF CHATTELS—LIEN FOR REPAIRS—PRIORITY.—If a mortgagor of chattels retains possession and can be said to have an express or implied authority from the mortgagee to procure repairs to be made on the mortgaged property, the common-law lien thereon for such repairs and the right to enforce it is superior to the lien of the mortgage. (*Drummond Carriage Co. v. Mills*, 719.)

3. CHATTEL MORTGAGE FOR SEPARATE DEBTS DUE THE MORTGAGEES.—If a chattel mortgage is made to two persons to secure separate debts due to each, each can sell his undivided interest in the property and no more, and if one sells the whole, he is answerable to the other for the latter's interest, which interest bears the same proportion to the whole property that the indebtedness due him bears to the aggregate indebtedness secured by the mortgage. (*Trustees v. Williams*, 912.)

4. CHATTEL MORTGAGES—COTENANTS.—If a chattel mortgage is given to two persons to secure a promissory note due to each separately, they become tenants in common of the chattel mortgage. (*Trustees v. Williams*, 912.)

5. CHATTEL MORTGAGE—WHEN NOT A CONTRACT FOR CONTINUING PERSONAL SERVICES.—A covenant in a chattel mortgage that crops growing and to be grown, that the mortgagor will tend, protect, and take care of the crop, and deliver it to the mortgagee, is not a contract for continuing personal services, but is merely collateral to the real indebtedness and for the proper enforcement of the lien. (*Hall v. Glass*, 77.)

6. A CHATTEL MORTGAGE MAY COVER UNPLANTED CROPS. (*Hall v. Glass*, 77.)

7. A CHATTEL MORTGAGE ON ALL CROPS AND PRODUCTS which are standing or growing, or which may thereafter during the continuance of the mortgage be sown, planted, cut, or harvested on designated land, sufficiently describes the crops which are to be subject thereto, and includes all crops planted during the life of the mortgage debt, though in the meantime the mortgagor has been declared an insolvent debtor, and the real property described in the mortgage and upon which the crops have been grown has been dedicated as a homestead. (*Hall v. Glass*, 77.)

See Execution, 14; Homestead, 1; Insolvency.

CHECKS.

BANKING.—A check is in the nature of a bill of exchange, and is, pro tanto, governed by the same rules. (*Neal v. Coburn*, 495.)

See Banks and Banking, 3, 4, 5; Payment, 1, 2.

CITIZENSHIP.

1. CITIZENSHIP — NATURALIZATION — UNITED STATES STATUTE—CONSTRUCTION OF.—The statutes of the United States giving citizenship to the foreign-born wife of a citizen of the United States do not violate that provision of the federal constitution which requires a uniform rule of naturalization, for they operate upon a general class of persons, and extend to all of that class who are in the same situation or circumstances. (Dorsey v. Brigham, 228.)

2. NATURALIZATION — UNIFORMITY OF LAWS AS TO. That provision of the federal constitution that Congress shall have power to enact a uniform rule of naturalization requires only that the mode or manner of naturalization prescribed by Congress should have uniform operation in all of the states. (Dorsey v. Brigham, 228.)

3. NATURALIZATION—EFFECT OF—MINORS—FEMALES—CITIZENS ARE NOT NECESSARILY VOTERS.—Naturalization, under the laws of the United States, whether the person naturalized is male or female, confers only civil rights, and the right to vote is not a right belonging to citizenship. One may be a citizen and still have no right to vote. Minors and female may be citizens and yet not legal voters. Naturalization is provided for by the federal government, but the right to vote depends wholly upon the enactments of the law-making bodies of the respective states. The federal government has never attempted to declare the qualifications of voters. (Dorsey v. Brigham, 228.)

4. CITIZENSHIP—NATURALIZATION OF FATHER DURING MINORITY OF CHILD—WIFE OF SON.—Citizenship may be conferred upon foreign persons, male or female, through the naturalization of the father during their minority, and, as the wife of a citizen of the United States, not being an alien enemy, is a citizen of the United States, the wives of sons so made citizens become citizens by virtue of their wifehood. (Dorsey v. Brigham, 228.)

5. CITIZENSHIP—NATURALIZATION—ALIEN WIFE OF CITIZEN.—The proper construction of section 1994 of the Revised Statutes of the United States, concerning citizenship, is, that every woman who might lawfully be naturalized by a judicial tribunal, and who lives in a state of marriage with a husband who is a citizen, becomes herself a citizen by force of the existence of the marriage relation. (Dorsey v. Brigham, 228.)

See Counties.

COLLATERAL ATTACK.

See Guardian and Ward, 1; Judgment, 8; Justice of the Peace; Receivers, 6.

COMMON LAW.

See Waters and Watercourses, 4, 6.

CONNECTING CARRIERS.

See Railroad Companies, 18.

CONSIDERATION.

See Contracts, 4, 10, 15, 18, 20; Gifts, 1, 2; Negotiable Instruments, 9, 10.

CONSTITUTIONS.

1. CONSTITUTIONS — PROVISIONS OF NEW CONSTITUTION AS TO TRIAL OF CRIME ARE NOT INVALID AS EX POST FACTO LAWS.—If a new constitution is adopted, under whose provisions a person is indicted for the past crime of burglary and larceny, by a grand jury composed of twelve persons, and is tried and convicted by a petit jury of twelve, nine of whom may find a verdict, while under the old constitution the defendant could be indicted only by a grand jury composed of sixteen, and convicted only by a concurrence of all twelve of the petit jury, the changes created by the new constitution affect methods of procedure only, relate to the remedy, and are not ex post facto. The new law is, therefore, applicable to the trial of the offense, for it does not impair any substantial right of the accused. (*State v. Caldwell*, 465.)

2. A CONSTITUTIONAL PROVISION IS SELF-OPERATIVE where no legislation is necessary, or could add to or take from it. (*State v. Caldwell*, 465.)

3. CONSTITUTIONS—INVALIDITY OF EX POST FACTO PROVISION OF NEW CONSTITUTION DEPRIVING A DEFENDANT OF A JURY TRIAL FOR A PAST OFFENSE.—The adoption of a new constitution does not, as to past offenses, have the effect of repealing the old one. Hence, if a new state constitution is adopted, making a past offense triable by the court, without a jury, which offense was triable under the old constitution by a jury, the law is void as ex post facto in its application to such offense; and a defendant, charged with a past offense, but tried after the adoption of the new constitution, cannot be deprived, by virtue of its provisions, of his substantial right to a jury trial. (*State v. Baker*, 472.)

CONTEMPT.

1. CONTEMPT — DISOBEDIENCE OF VOID ORDER APPOINTING RECEIVER.—A stranger to all parties, who disobeys an order appointing a receiver, is not guilty of contempt, where the court made such order without authority of law. (*State v. District Court*, 645.)

2. CONTEMPT OF COURT IN NONPAYMENT OF MONEY.—An order of court directing the imprisonment of a defendant until he shall have paid a certain sum awarded as alimony pendente lite must show that he has been found able to comply with such order. (*Ex parte Sylvia*, 58.)

CONTRACTS.

1. REAL ESTATE—STANDING TIMBER is a part of the land on which it is, and a contract to purchase it is a contract for the purchase of land within the statute of frauds. (*Seymour v. Cushway*, 957.)

2. STATUTE OF FRAUDS.—No fraud is committed by a person in refusing to perform a contract void by the statute of frauds. (*Seymour v. Cushway*, 957.)

3. TIME—EFFECT OF DECLARING IT TO BE OF THE ESSENCE OF A CONTRACT.—Equity, where time is expressly made of the essence of a contract, will not ignore the provision, for equity follows the law, and will neither make a new contract for the parties nor violate that which they have freely and advisedly entered into. (*Glock v. Howard etc. Co.*, 17.)

4. CONTRACTS — RESTRAINT OF TRADE — CONSIDERATION.—A contract must be upheld if the restraint imposed thereby is not unreasonable, is founded upon a valuable consideration, and

is reasonably necessary to protect the interest of the party in whose favor it is imposed, and does not unduly prejudice the interests of the public. (*Rakestraw v. Lanier*, 154.)

5. **CONTRACTS — RESTRAINT OF TRADE—LIMITATIONS AS TO TIME.**—A contract in restraint of trade unlimited as to time, the enforcement of which as made would needlessly oppress one of the parties without casting any corresponding benefit or protection on the other, is unreasonable and void. (*Rakestraw v. Lanier*, 154.)

6. **CONTRACTS—RESTRAINT OF TRADE—LIMITATIONS.** A contract in restraint of trade, reasonable and valid in other respects, may be rendered void for want of limitations as to time and territory. (*Rakestraw v. Lanier*, 154.)

7. **CONTRACTS—RESTRAINT OF TRADE—LIMITATION AS TO TIME.**—A distinction exists between a contract binding one to refrain from the practice of a learned profession, and one which binds a person who has sold out a mercantile business and the goodwill thereof not to again engage in such business. In the former case, there must be a reasonable limit as to time, while in the latter case a time limit is not essential to the validity of the contract. (*Rakestraw v. Lanier*, 154.)

8. **CONTRACTS—RESTRAINT ON PRACTICE OF PROFESSION.**—A contract which prohibits one party from at any time in the future practicing his profession as a physician at a given place, without regard to the fact that the other party shall not be engaged in such profession, or that the latter may have removed from the prohibited territory, or have been rendered unable from age or physical infirmity to continue his practice, is unreasonable, not necessary for the protection of the party in whose favor the restraint is imposed, oppressive to the party restrained, opposed to the interests of the public, and void (*Rakestraw v. Lanier*, 154.)

9. **CONTRACTS RESTRICTING EMPLOYMENT OR COMPETITION AS TO WORK ON PUBLIC BUILDINGS, OR CREATING A MONOPOLY, ARE VOID.**—An agreement between the representatives of a labor or trade union and a board of education that the latter shall insert, in all contracts for work upon school buildings, a provision that none but union labor shall be employed in such work and that none but union workmen shall be employed and placed upon the pay-rolls of the board is void, not only because the board has no power or discretion to make such a contract, though it conceives its action to be for the public good, but because such a contract tends to create a monopoly and to restrict competition in bidding for work. (*Adams v. Brennan*, 222.)

10. **CONTRACTS.—IF VALID AND ILLEGAL CONSIDERATIONS** in the same contract are susceptible of division, that part of the consideration which is legal may be enforced. (*Emshwiler v. Tyner*, 360.)

11. **STATUTE OF FRAUDS.**—A memorandum sufficient to satisfy the statute of frauds must contain within itself, or a reference to other written evidence, the names of the vendor and vendee and the essential terms and conditions of the contract expressed with such reasonable certainty as may be understood from the memoranda and other written evidence referred to without any aid from parol testimony. (*Kingsley v. Siebrecht*, 486.)

12. **STATUTE OF FRAUDS—ASSIGNMENT OF LEASE.**—A contract for the transfer of a lease is a contract for an interest in or concerning land, and hence within the statute of frauds. (*Kingsley v. Siebrecht*, 486.)

13. STATUTE OF FRAUDS—LEASE—WHEN SO REFERRED TO AS TO BECOME PART OF A WRITTEN CONTRACT.—Where it is claimed that a contract was made for the assignment of a lease, and the letters relied upon as constituting sufficient memoranda of the contract refer to a lease of property, stating its dimensions and the street on which it fronted, that the lease was for ten years, and naming the monthly rental, if a lease is produced of that property and for that rental and duration, it must be regarded as so referred to as to make it part of the memoranda, and if it is so treated, it supplies the missing elements, and the contract is complete and perfect. (*Kingsley v. Siebrecht*, 486.)

14. STATUTE OF FRAUDS—SUFFICIENCY OF MEMORANDA.—If a writing relied upon as a sufficient memorandum of a contract for the assignment of a lease did not state when the leasehold term began or was to end, it is fatally defective, and the defect cannot be supplied by parol evidence and by producing a lease in writing and testifying that it was the one referred to by the parties. (*Kingsley v. Siebrecht*, 486.)

15. CONSIDERATION.—A verbal promise to refund made under a misapprehension of law is without consideration, and hence not binding. (*Neal v. Coburn*, 495.)

16. STATUTE OF FRAUDS.—Parol evidence is admissible to identify a person named in a contract, though his full name is not disclosed, as where he is designated as "Friend George." (*Haskell v. Tukesbury*, 529.)

17. STATUTE OF FRAUDS.—The subject matter of a contract named in a writing may be identified by reference to an external standard. Hence, if a promise is made to see paid the bill which A owes B, parol evidence may be admitted to identify such bill by showing its nature and amount. (*Haskell v. Tukesbury*, 529.)

18. CONSIDERATION FOR A PROMISE TO ANSWER FOR THE DEBT OF ANOTHER.—A promise to forbear and give further time for the payment of a debt, though no definite time be named, if followed by an actual forbearance for a reasonable time, is a valid and sufficient consideration for a promise guaranteeing payment. (*Haskell v. Tukesbury*, 529.)

19. STATUTE OF FRAUDS—PARTIES—WHAT A SUFFICIENT NAMING OF IN THE CONTRACT OR MEMORANDUM. A letter addressed to the agent of a firm saying that if his concern will give P. D. time on a bill he owes it, the writer will see that the bill is paid with interest, is sufficient to satisfy the statute of frauds, and if the firm gives time for such payment, the writer becomes answerable for the bill. (*Haskell v. Tukesbury*, 529.)

20. STATUTE OF FRAUDS.—The consideration for an agreement to answer for the debt of another need not be expressed in writing, but may be proved by parol. (*Haskell v. Tukesbury*, 529.)

21. CONTRACTS—TERMINATION—DESTRUCTION OF SUBJECT OF.—A contract between the owners of three steamboats used as one line to pay an agent a specified salary for securing freight for such boats for the season, one-third to be paid by each owner, is not terminated as to the owner of one of the boats by its destruction before the end of the term specified in such contract. Such agent, upon the performance of his part of the contract, may recover the stipulated proportion of his salary from the owner of the vessel destroyed. (*Nicol v. Fitch*, 542.)

See Agency, 6; Building and Loan Associations, 2; Chattel Mortgages, 5; Damages, 5, 11; Injunctions, 3; Insurance, 10, 17; Limitation of Actions: Municipal Corporations, 10, 12, 14; Officers, 5, 6; Parties; Partnership, 6; Sales, 1; Seduction, 1, 2, 8; Specific Performance; Statutes, 7; Usury, 1; Vendor and Purchaser.

CONVEYANCES.

See Deeds, 8, 5.

CORPORATIONS.

1. CORPORATIONS—LIABILITY ON UNPAID STOCK FOR TORTS OF.—A holder of unpaid stock in a corporation is answerable for the torts of the company under a statute which makes all stockholders individually liable to the amount of their unpaid stock "for all acts of" of the company until the whole amount of stock subscribed for shall have been paid. Liability for "acts of" the corporation plainly includes liability for claims for damages consequent upon torts. (Kelly v. Clark, 668.)

2. CORPORATIONS — CREDITOR'S CAUSE OF ACTION AGAINST SHAREHOLDER ACCRUES, WHEN.—No cause of action accrues in favor of a creditor of a corporation against a shareholder thereof, who is liable on unpaid stock for a tort of the corporation, until the creditor has liquidated his claim, or reduced it to judgment, and has, except where it appears useless to proceed against the company, failed to make the amount of his ascertained claim, or judgment, out of the assets of the corporation. (Kelly v. Clark, 668.)

3. CORPORATIONS—UNPAID STOCK—ENFORCEMENT OF SHAREHOLDER'S INDIVIDUAL LIABILITY — RESORT TO EQUITY.—If a statute making stockholders of a corporation individually liable to its creditors to the amount of their unpaid stock for all acts of the company until the whole amount of stock subscribed for shall have been paid in does not prescribe any remedy, a judgment creditor whose execution against the corporation has been returned nulla bona, may obtain adequate relief in equity against the stockholders. (Kelly v. Clark, 668.)

4. CORPORATIONS—UNPAID STOCK—ENFORCEMENT OF SHAREHOLDER'S INDIVIDUAL LIABILITY—PROOF OF LEGAL FRAUD.—All that is necessary to establish legal fraud, in an action to enforce the statutory, individual liability of a stockholder of a corporation, who has taken stock for property, and to take the stock out of the immunity assured to stock honestly issued, is to prove two facts: 1. That the stock issued exceeded in amount the value of the property, in exchange for which it was issued; 2. That the officers of the corporation, deliberately and with knowledge of the real value of the property, over-valued it, and paid in stock for it an amount which they knew was in excess of its actual value. (Kelly v. Clark, 668.)

5. CORPORATIONS—UNPAID STOCK—ENFORCEMENT OF SHAREHOLDER'S INDIVIDUAL LIABILITY—PROOF OF ACTUAL FRAUD.—The plaintiff, in an action to enforce the statutory, individual liability of a stockholder of a corporation for unpaid stock need not prove actual fraud, where the shareholder, with full knowledge of the facts, has taken stock for property, the par value of which stock was known, at the time of its issuance, to be grossly in excess of the fair value of the property acquired by the company, but can recover upon allegations sufficient to admit such proof, though he fails to prove other allegations in his pleading charging actual, intentional fraud on the part of the shareholder sued. All that he is required to prove is a fraud upon the law, and a deliberate and advised overvaluation of the property so taken is such a fraud. (Kelly v. Clark, 668.)

6. CORPORATIONS—ACTIONS AGAINST—PLEADINGS.—In an action against a private corporation created by public act, the designation of the corporation by its corporate name in the plead-

ings is a sufficient allegation of its corporate existence. (Parker v. Carolina Sav. Bank, 888.)

7. CORPORATIONS — INSOLVENCY — CREDITORS' BILL — JURISDICTION.—A court of equity has jurisdiction of an action by a creditor on behalf of himself and all other creditors of an insolvent corporation to compel its stockholders to account for its assets and to enforce their statutory liability for its debts. In such case a return of nulla bona against the corporation need not be pleaded or proved if its insolvency is otherwise shown. (Parker v. Carolina Sav. Bank, 888.)

8. CORPORATIONS — INSOLVENCY — CREDITORS' BILL — LIMITATION OF ACTION.—The statutory liability of a stockholder in an insolvency corporation to a creditor is not barred, under the South Carolina statutes, until the expiration of six years from the maturity of the corporate debt. (Parker v. Carolina Sav. Bank, 888.)

9. CORPORATIONS—INSOLVENCY—LIABILITY OF STOCKHOLDERS.—Stockholders in an insolvent corporation are liable to its creditors, under the constitution and statutes of South Carolina, for a sum equal to the amount of their respective shares and five per cent in addition thereto. (Parker v. Carolina Sav. Bank, 888.)

10. CORPORATIONS—INSOLVENCY—LIABILITY OF STOCKHOLDERS—SETOFF.—A stockholder in an insolvent corporation cannot set off a debt due him by the corporation against his statutory liability to its creditors. (Parker v. Carolina Sav. Bank, 888.)

11. CORPORATIONS—INSOLVENCY—STOCKHOLDERS' LIABILITY—TRANSFER OF STOCK.—A stockholder in an insolvent corporation at the time when a debt sued on was contracted and when an assignment for the benefit of creditors was made cannot escape his statutory liability to the corporate creditors by a subsequent assignment of his stock not transferred on the books of the corporation as directed by statute. (Parker v. Carolina Sav. Bank, 888.)

12. CORPORATIONS—INSOLVENCY.—STATUTORY LIABILITY of the shareholders in an insolvent corporation, is exclusively for its creditors' benefit, and is enforceable by them alone, and not by the corporation, and the creditors must sue in their own right and not by or through the corporation. (Parker v. Carolina Sav. Bank, 888.)

13. CORPORATIONS—INSOLVENCY—ASSIGNMENT.—An insolvent corporation may make an assignment for the benefit of creditors, the same as a natural person, by virtue of its general power to contract, acquire, and transfer property. (Parker v. Carolina Sav. Bank, 888.)

14. CORPORATIONS — INSOLVENCY—ASSIGNMENT.—An assignment by an insolvent corporation for the benefit of creditors executed by the proper corporate officers by authority of the directors, is valid, without a vote of the stockholders. (Parker v. Carolina Sav. Bank, 888.)

15. CORPORATIONS—MORTGAGES.—A mortgage of the property of a corporation executed by its president without authority conferred by the corporate stockholders as required by statute, is ultra vires and void. (Parker v. Carolina Sav. Bank, 888.)

16. CORPORATIONS—EFFECT OF GENERAL INCORPORATION LAW.—If a general incorporation law reserves to the legislature the power to prescribe such regulations and provisions as it may deem advisable, a corporation organized under such law thereby agrees to submit itself to, and to be bound by such regulations

and provisions as the legislature shall thereafter enact. (Danville v. Danville Water Co., 304.)

17. CORPORATIONS—CHARTER.—The provisions of a general incorporation statute enter into and form a part of the charters of all corporations organized under it. (Danville v. Danville Water Co., 304.)

See Attachment, 1, 2, 3; Mines and Mining; Receivers, 1-4; Religious Societies; Waterworks and Water Companies.

COTENANCY.

1. COTENANCY—RENTS AND PROFITS—ACCOUNTING—PEACEABLE POSSESSION.—If the possession of the occupying cotenant is not tortious, it is essential that he take or receive more than his just share of the proceeds or products of the common property, in order to render him liable to account to his cotenant, in the absence of agreement, express or implied. (Cain v. Cain, 863.)

2. COTENANCY—RENTS AND PROFITS—ACCOUNTING.—An occupying cotenant may limit his accountability for rents and profits by showing the amount actually received, but if he fails to do this, it may be shown by speculative testimony what he has probably received, and evidence of the fair rental value of the premises is admissible for this purpose. (Cain v. Cain, 863.)

3. COTENANCY—ACCOUNTING—SETOFF.—In an equitable accounting between cotenants for rents and profits received by the tenant in possession he may set off against such rents and profits the increased value of the premises resulting from improvements put thereon by him. (Cain v. Cain, 863.)

4. COTENANCY—RENTS AND PROFITS—ACCOUNTING—PARENT AND CHILDREN AS COTENANTS.—In an equitable accounting between cotenants for rents and profits, the father, as occupying cotenant, is not required to account for rents and profits used in maintaining his minor children, who reside on the common property and are his cotenants. (Cain v. Cain, 863.)

5. COTENANCY—RENTS AND PROFITS—ACCOUNTING.—In case the cotenant in possession cultivates or uses the common property in excess of his share, and takes or appropriates the proceeds or use, he is accountable to his cotenant for the net profits arising from such use. (Cain v. Cain, 863.)

6. COTENANCY—RENTS AND PROFITS—ACCOUNTING—TORTIOUS POSSESSION.—When the possession of the occupying cotenant is tortious, he is chargeable, not with what rents and profits he actually received or took, but with what he ought to have received, namely, the rental value. (Cain v. Cain, 863.)

7. COTENANCY.—REPLEVIN cannot be maintained by one tenant in common against another. (Trustees v. Williams, 912.)

8. COTENANCY—SALE OF PROPERTY BY ONE COTENANT WITHOUT THE CONSENT OF THE OTHER.—One cotenant has no right to sell the common property without the consent of the other, and if he does so, is liable to an action by his cotenant for the latter's interest in the property sold, or the nonconsenting cotenant may still retain his interest and be a cotenant with the vendee. (Trustees v. Williams, 912.)

9. COTENANCY—GROWING CROPS—ACCOUNTING.—A person who has put in a crop on land held in cotenancy, under a contract with the tenant in possession, is chargeable with notice of the other cotenant's interest in the use of the premises. (Moreland v. Strong, 553.)

10. COTENANCY — PRIORITY BETWEEN MORTGAGES — RIGHT TO GROWING CROPS.—A chattel mortgage on crops on land owned in cotenancy, given by the tenant in possession after the commencement of foreclosure proceedings on the interest of his cotenant in the land, and after notice of his pendens is filed, does not affect the rights of the mortgagee of the land, and a purchaser at foreclosure sale of the land mortgaged is entitled to a cotenant's undivided interest in such crops free from the lien of the mortgage thereon. (Moreland v. Strong, 553.)

11. COTENANCY—GROWING CROPS—ACCOUNTING.—A cotenant in possession is not entitled to the exclusive use of the premises, after entry and demand of possession by his cotenant, until the crop growing at the time shall mature. As to such crops the cotenant last to enter may be permitted to share the proceeds upon an accounting in equity upon a bill filed for partition, if justice requires it, and in such case the cost of production should first be deducted. (Moreland v. Strong, 553.)

12. COTENANCY.—ONE COTENANT CANNOT MAKE A VALID LEASE of the entire premises without the consent of the other. (Moreland v. Strong, 553.)

13. COTENANCY—RIGHT OF COTENANT UNDER FORECLOSURE SALE.—A purchaser of the undivided interest of a cotenant at foreclosure sale is at once entitled to enter and enjoy the premises, and his cotenant cannot thereafter lawfully monopolize the use of the land, either directly or indirectly. (Moreland v. Strong, 553.)

See Chattel Mortgages, 4; Suretyship, 2, 3.

COUNTIES.

COUNTIES—CITIZENS AND TAXPAYERS, WHEN MAY BRING SUITS IN BEHALF OF.—If a county has a plain cause of action for an injury done to it, which should be enforced for the protection of its citizens or taxpayers, and its governing board refuses to assert such cause of action, any citizen, by reason of his indirect interest, may sue, in behalf of himself and others similarly situated, the person against whom the cause of action exists, and thereby enforce the rights of the county. (Land, Log etc. Co. v. McIntyre, 915.)

COURTHOUSES.

See Courts.

COURTS.

COURTS—TRIAL TAKING PLACE PARTLY OUT OF THE COURTHOUSE.—If a trial judge and the jurors and attorneys go to the house of one of the parties for the purpose of taking her testimony, against the objection of the other party, and it is accordingly taken in the presence of the judge and jury, but out of the courthouse, it cannot be regarded as taken in open court, although it must be regarded as a proceeding in the action. The course of proceeding is irregular, but the irregularity is not such as to require a reversal or the granting of a new trial, where the statute directs the appellate court to disregard any error in the proceedings which does not affect the substantial rights of the parties. (Selleck v. Janesville, 906.)

See Criminal Law, 5, 6; Jurisdiction, 2, 3; Municipal Corporations, 22; Specific Performance, 3.

COVENANTS

See Deeds, 6.

CREDITORS' BILL.

See Corporations, 7, 8.

CRIMINAL LAW.

1. **JURY TRIAL IN A CRIMINAL CASE—REFUSAL OF UNNECESSARY INSTRUCTION.**—The refusal of a court on a trial for murder to instruct the jurors that they could not consider anything said at the time of the difficulty, by another person there present, as bearing on the conduct of the defendant, cannot constitute reversible error, when the indictment does not charge a joint offense or conspiracy, and there is no effort to connect such third person with the crime for which the defendant was being tried. (State v. Bowles, 598.)

2. **CRIMINAL LAW.—MALICE WAS IMPLIED** by the common law from the unlawful killing of a human being, and the burden of proving extenuating circumstances, unless they were disclosed by the evidence against the defendant, lay on him. (State v. Bowles, 598.)

3. **CRIMINAL LAW.—A DEADLY WEAPON IS** any weapon or instrument by which death would ordinarily be produced. That a weapon was deadly may be inferred, though there is no evidence of its dimensions, from the fact that it produced death. (State v. Bowles, 598.)

4. **A CRIME IS ANY WRONG** which the state deems injurious to the public at large, and punishes through a judicial proceeding in its name. Though an act is criminal by the common law, it cannot be regarded as a crime in a state by whose laws no judicial proceedings can be maintained for its punishment. (Patterson v. Natural etc. Ins. Co., 899.)

5. **COURTS—INDEFINITE SUSPENSION OF IMPOSED SENTENCE.**—A court having criminal jurisdiction has no inherent power to indefinitely suspend the execution of a sentence which it has imposed in a criminal case. Such power belongs to the executive or pardoning power. (Neal v. State, 175.)

6. **COURTS—POWER TO SUSPEND SENTENCE.**—A court may temporarily postpone the execution of a sentence which it has imposed in a criminal case only as incident to the obtaining of a new trial or a review of the judgment. (Neal v. State, 175.)

7. **CRIMINAL LAW—SENTENCE NOT SERVED BY LAPSE OF TIME.**—Under a sentence that the accused do work in the chain-gang for a term of six months, "this sentence to begin and be counted from the time of the reception of said defendant in the chain-gang under this sentence and judgment, sentence of six months suspended until further order of the court," the person upon whom such sentence is imposed has not served out his sentence if he has never been placed in the chain-gang, although more than six months may have elapsed since the date of the sentence, and he may thereafter be compelled under order of court to serve the whole sentence. (Neal v. State, 175.)

8. **CRIMINAL LAW—SENTENCE—LAPSE OF TIME.**—A legal sentence of a convicted person to imprisonment or labor for a term expressed only by designating a certain length of time can be satisfied only by his actual imprisonment or service for that length of time, unless remitted by lawful authority, and the time of the sentence does not run while he is at liberty unlawfully. (Neal v. State, 175.)

9. **CRIMINAL LAW—VENUE OF CRIME.**—If sewage is deposited in a stream in one county, in violation of a statute making

such act a crime, a prosecution of the offender therefor may be maintained in an adjoining county, into which such sewage is carried by the current of the stream and there deposited, to the damage of the inhabitants thereof. In such case, the prosecution may be maintained in either county under a statute providing that "when a public offense is committed partly in one county and partly in another, or when the acts or effects constituting, or requisite to, the consummation of the offense, occur in two or more counties, jurisdiction is in either county. (State v. Herring, 351.)

10. **CRIMINAL LAW—VENUE OF CRIME.**—If an act is committed in one county, from which injurious effects follow in another, and such effects constitute a criminal offense under the statute, a prosecution of the offender may be in either of such counties. (State v. Herring, 351.)

11. **CRIMINAL LAW—INCLUDING A LESSER OFFENSE WITHIN A GREATER.**—A jury is not authorized to return a verdict of "assault," under an indictment for "striking with a dangerous weapon with intent to kill and murder. (State v. Ballard, 461.)

12. **CRIMINAL LAW—ALIBI—INSTRUCTIONS CONCERNING.** An instruction to the jury in a criminal case to carefully scrutinize any evidence in relation to an alibi, because an alibi is a defense that is easily proven and hard to disprove, is not erroneous. (People v. Tice, 560.)

See Action, 2, 3; Arrest; Constitutions, 1, 3; Homicide; Indictment; Injunctions, 1, 2; Instructions, 1; New Trial, 4; Pardon; Railroad Companies, 7; Seduction; Statutes, 5; Trial, 1, 6, 7, 9.

DAMAGES.

1. **DAMAGES FOR PERSONAL INJURIES ENHANCED BY TREATMENT OF A PHYSICIAN.**—In an action to recover for personal injuries it is not error for the court to instruct the jury that the plaintiff is not held responsible for the errors or mistakes of a physician or surgeon in treating her injury, if she exercised ordinary care in procuring the services of such physician, and that if her damages have not been increased by her own subsequent want of ordinary care, she would be entitled to recover, in consequence of the wrong done, to the full extent of the damage, although a physician so employed omitted to employ the remedies most approved in similar cases, and by reason thereof the damage of the injured party was not diminished as much as it otherwise would have been. (Selleck v. Janesville, 906.)

2. **DAMAGES—DEATH BY FAULT OF ANOTHER.**—Although the right of action conferred by statute upon an executor or administrator to recover for the death of his decedent caused by wrongful act, is but a continuation of the same cause of action which the deceased would have had if death had not ensued, yet the personal representative has no right to recover the same kind of damages which the deceased would have had, especially when the statute creating the right to maintain such action has in terms prescribed what kind of damages may be recovered. (Garrick v. Florida etc. R. R. Co., 874.)

3. **NEGLIGENCE—EXEMPLARY DAMAGES.**—If a personal injury is caused by gross carelessness, or recklessness or willfulness, the jury may assess exemplary damages in a proper case. (Garrick v. Florida etc. R. R. Co., 874.)

4. **DAMAGES, EXEMPLARY—DEATH BY FAULT OF ANOTHER.**—The personal representative of a decedent cannot recover exemplary damages for the death of such decedent by the fault of another when the statute which gives the right to maintain such

action provides for the recovery of compensatory damages only. (Garrick v. Florida etc. R. R. Co., 874.)

5. DAMAGES—PENALTY—HOW REGARDED IN EQUITY.—The rule that in actions ex contractu, where the breach of an agreement admits of compensation, the recovery may be limited to the loss actually sustained, notwithstanding a stipulation for a penalty, is founded upon the principle that one party should not be allowed to profit by the default of the other, and that compensation, and not forfeiture, is the equitable rule. Equity will regard a penalty or forfeiture as intended to secure the fulfillment of a contract, and it may preclude the injured party from recovering more than a just compensation, or from obtaining a collateral advantage. (Kunkel v. Wherry, 802.)

6. DAMAGES—PENALTY OR LIQUIDATED DAMAGES—HOW DETERMINED—NO GENERAL RULE.—Whether a sum named as compensation for the breach of a contract is to be considered as a penalty to secure its fulfillment, from which equity will relieve, or as damages liquidated by the parties themselves, is a question which cannot be answered by the application of any general rule, but is always one of intent and construction. Uncertainty as to the extent of the injuries which may ensue is, however, a criterion by which to determine whether it is a case of liquidated damages or a penalty. (Kunkel v. Wherry, 802.)

7. DAMAGES—PENALTY OR LIQUIDATED DAMAGES—PRESUMPTION—INQUIRY BY THE COURT.—The general principle upon which the law awards damages is compensation for the loss suffered. The amount may be fixed by the parties in advance, but where a lump sum is named by them, the court will always look into the question whether this is really liquidated damages, or only a penalty, the presumption being that it is the latter. The name by which it is called is of but slight weight, the controlling elements being the intent of the parties and the special circumstances of the case. (Kunkel v. Wherry, 802.)

8. DAMAGES — WHEN LIQUIDATED—ILLUSTRATION.—If a contractor binds himself to complete the construction of a building within eleven months, agreeing to receive one hundred dollars for each day less than the time limit, and to pay one thousand dollars for each day that he shall exceed it in completing the work, and he contracts with third persons, who agree to furnish the materials and to finish the work to the top of the second story ready for the bricklayers in six weeks' time after three stories of iron work have been erected, and bind themselves, by stipulation in their contract, "to pay the sum of one hundred and fifty dollars per day as a penalty for each and every day thereafter that the said work remains unfinished, as and for liquidated damages," such stipulation in the latter contract must be regarded as liquidated damages, and not as a penalty, for the damages named are not disproportionate to the loss which may probably result from a failure to carry out the contract respecting the stone and granite work. (Kunkel v. Wherry, 802.)

9. DAMAGES—MEASURE OF FOR AN UNLAWFUL ARREST.—Where the justification for an arrest fails, the plaintiff is entitled to recover at least compensatory damages for the necessary consequences of the act complained of, although the defendant may have acted in good faith, without malice, and upon reasonable ground to believe that the plaintiff was guilty. If punitive damages or damages for injured feelings are claimed, the spite and conduct of the defendant may be inquired into, to enhance or aggravate, and the conduct of, and prosecution by, the plaintiff, to mitigate damages. (Palmer v. Maine Cent. R. R. Co., 513.)

10. DAMAGES—PUNITIVE—LIABILITY TO OF PERSON ACTING IN GOOD FAITH.—Where a passenger on a railway train refuses to answer questions properly asked by a conductor respecting the ticket presented, and thereby causes him to believe that such passenger is attempting to evade the payment of his fare and to procure his arrest without a warrant on that charge, he is not entitled to recover damages for injury to his wounded sensibilities. (Palmer v. Maine Cent. R. R. Co., 513.)

11. DAMAGES—MEASURE OF FOR FAILURE TO ASSIGN LEASE.—If one who agrees to assign a lease refuses to do so, the measure of damages for which he is answerable is the difference between the agreed price and the fair value of the leasehold interest, subject to the payment of the rent reserved. (Kingsley v. Siebrecht, 486.)

See Eminent Domain; Municipal Corporations, 14; Railroad Companies, 3; Receiver, 1; Sales, 2, 3; Trial, 4.

DEADLY WEAPON.

See Criminal Law, 3; Homicide, 12, 13.

DEATH.

See Building and Loan Associations, 8; Burden of Proof; Damages, 2, 4; Negligence, 5.

DECLARATIONS.

See Evidence, 2, 8, 9.

DEDICATION.

1. DEDICATION—NECESSITY OF INTENTION AND ACCEPTANCE.—A dedication is not good unless the acts of both the donor and of the public authorities are unequivocal and satisfactory of the design to dedicate on the one part and to accept and appropriate to public use on the other. (Carlinville v. Castle, 212.)

2. DEDICATION—NECESSITY OF DEFINITE DESCRIPTION.—A dedication is not good without a definite description of the property to be dedicated. (Carlinville v. Castle, 212.)

3. DEDICATION—ILLUSTRATION OF LACK OF INTENTION AND WANT OF DESCRIPTION.—If a lot, shown by a town plat to be fifty-five feet wide, is conveyed by describing the tract conveyed as commencing at the southeast corner of said lot; thence running north thirty-nine feet to a public alley; thence west to the western boundary; thence south thirty-nine feet; thence east to the place of beginning, the deed does not dedicate, for a public alley, that part of the lot not conveyed, for there is no evidence of a design to dedicate, and no description given. (Carlinville v. Castle, 212.)

DEEDS.

1. DEEDS—FAILURE TO RECORD TITLE—RECITALS AS NOTICE.—If an owner of property neglects to record his title, every presumption is in favor of a subsequent purchaser, and vague and indefinite recitals are not sufficient notice to put him on inquiry outside the record. (Pyles v. Brown, 794.)

2. DEEDS—RECORD OF CONVEYANCES AND MORTGAGES AS NOTICE—DUTY AS TO SEARCH—INDEXES.—A grantee or mortgagee must search for conveyances and mortgages made by anyone who has held the title; with conveyances and mortgages to them he has nothing to do; and this rule is not changed by a statute which requires recorders of deeds to prepare and keep in their of-

files direct and adsectum indexes of deeds and mortgages, and makes the entry of recorded deeds and mortgages in such indexes, respectively, notice to all persons of the recording of the same. (Pyles v. Brown, 794.)

3. **DEEDS—CONVEYANCE.—AN UNBORN CHILD HAS NO SUCH EXISTENCE** as enables it to take a present grant of lands by deed, although en ventre sa mere when the deed is executed. (Morris v. Caudle, 282.)

4. **DEEDS—DELIVERY.**—If one of the grantors in a deed merely placed it in the hands of the other for safekeeping, it cannot be held to have been delivered to a grantee who was born but afterward died while the deed was thus in the grantor's possession. (Morris v. Caudle, 282.)

5. **DEEDS—CONVEYANCE TO UNBORN GRANTEE.**—A deed to a grantee in being and to his unborn brother or sister, delivered and recorded after the birth and death of a sister, is valid as to the grantee living at the time of the execution of the deed, but not as to such deceased grantee. (Morris v. Caudle, 282.)

6. **DEEDS—VOID COVENANTS—EFFECT OF DIVORCE.**—A covenant of warranty in a deed or mortgage which is void, cannot be given life as an effectual conveyance by a subsequent decree of divorce. (Rogers v. Day, 593.)

See Judicial Sales; Partition, 2.

DEFINITIONS.

DEFINITIONS — RECONSTRUCTION — REPAIRS. — Work done on a building which has been merely damaged constitutes "repairs," but work done on a building which has been demolished as a whole, or in part, constitutes "reconstruction." (Vincent v. Frellich, 436.)

"Chastity." (People v. Kehoe, 52.)

"Crime." (Patterson v. Natural etc. Ins. Co., 899.)

"Deadly Weapon." (State v. Bowles, 598.)

"Estate." (Messmore v. Williams, 791.)

"Purpresture." (Revell v. People, 257.)

"Reconstruction." (Vincent v. Frellich, 436.)

"Repairs." (Vincent v. Frellich, 436.)

"Regular Indorsement." (Metropolitan Bank v. Miller, 475.)

"Understanding." (Sykes v. City Sav. Bank, 562.)

"Voluntary Exposure." (Johnson v. London Guarantee etc. Co., 549.)

DELIVERY.

See Deeds, 4; Gifts, 3.

DEPOSIT OF TITLE DEEDS.

See Mortgages, 3.

DESTRUCTION OF SUBJECT MATTER.

See Contracts, 21.

DURESS.

1. **DURESS—EMBEZZLEMENT—NOTE GIVEN IN SETTLEMENT.**—An embezzler of money, who gives his note in settlement and acknowledgment of the debt, cannot defend against the note on the ground that his signature thereto was obtained by duress of threats to arrest and imprison him. (Beath v. Chapoton, 589.)

2. DURESS.—THREATS OF CRIMINAL PROSECUTION, un-
accompanied by threats of immediate imprisonment, do not consti-
tute duress. (Beath v. Chapoton, 589.)

DWELLING HOUSE.

See Fixtures.

DYING DECLARATIONS.

See Homicide, 10.

EASEMENTS.

1. EASEMENTS.—USE AND ENJOYMENT of what is claimed as an easement must have been adverse, under a claim of right, exclusive, continuous, and uninterrupted, besides being within the knowledge and with the acquiescence of the owner of the estate over which the easement is claimed. (Cleveland etc. Ry. Co. v. Huddleston, 385.)

2. EASEMENTS BY PRESCRIPTION—PLEADING.—An averment that a culvert was constructed for the purpose of allowing the waters therein to flow and to continue in the channel of a specified ditch, "as had been done for twenty years," is not an allegation of facts constituting a right by prescription. (Cleveland etc. Ry. Co. v. Huddleston, 385.)

See Private Ways, 1, 3.

EJECTMENT.

EJECTMENT, BY CITY, TO RECOVER PUBLIC ALLEY.—**ABANDONMENT AND NONUSER** may be set up in bar of a city's action of ejectment to recover its rights in a public alley, where it has permitted the adjoining owner to occupy it adversely for a period of twenty years or more, without making any effort to regain possession, or to assert any right to the property. (Carlinville v. Castle, 212.)

See Landlord and Tenant, 1.

ELECTIONS.

1. ELECTIONS—SCHOOL—WOMEN AS ILLEGAL VOTERS—ALIENS—SUFFICIENCY OF EVIDENCE.—If women vote at a school election, and they are charged with illegal voting, evidence that they were foreign-born and wives of foreign husbands does not establish such charge, although there is no record proof of their naturalization, or of their husbands, if there is no affirmative proof tending to show that they were not naturalized. (Dorsey v. Brigham, 228.)

2. ELECTIONS—SCHOOL—WOMEN AS ILLEGAL VOTERS—QUALIFICATIONS.—A woman who has not resided in the county ninety days preceding a school election, or who is not twenty-one years of age at the time of such election, is not a legal voter. (Dorsey v. Brigham, 228.)

3. ELECTIONS—SCHOOL—WOMEN AS ILLEGAL VOTERS—RESIDENCE IN COUNTY.—A woman is not a legal voter at a school election, where she has not been an actual resident of the county for ninety days preceding the election, although her husband has been a resident thereof for the full period. (Dorsey v. Brigham, 228.)

4. ELECTIONS—SCHOOL—WOMEN AS ILLEGAL VOTERS—RESIDENCE IN SCHOOL DISTRICT.—A residence in a place is not acquired without an intention of making it a place of perma-

ment abode. Hence, if a married woman, who is a resident of a certain school district, loses her residence there and gains one at another place, her subsequent presence in such district, as on a visit, with no intention of remaining and making it her permanent abode, does not make her a resident there, within the meaning of the election laws, and she is, therefore, not entitled to vote at a school election in such district, although she has remained therein more than thirty days before the election. (Dorsey v. Brigham, 228.)

5. ELECTIONS—SCHOOL—WOMEN AS ILLEGAL VOTERS—ALIENS—MARRIAGE AFTER ELECTION--RETROACTIVE EFFECT.—Although a woman, who is an unnaturalized alien, marries in about five months after a school election, at which she cast a vote, citizenship conferred by virtue of the marriage relation would have no retroactive effect. She was not a citizen when she voted, and for that reason was not a legal voter. (Dorsey v. Brigham, 228.)

6. ELECTIONS—SCHOOL—WOMEN AS ILLEGAL VOTERS—ALIENS NOT MARRIED OR NATURALIZED.—An alien woman, who has not married, and who has not been naturalized, is not a legal voter at a school election. (Dorsey v. Brigham, 228.)

7. ELECTIONS—SCHOOL—WOMEN AS ILLEGAL VOTERS—MARRIAGE—NATURALIZATION OF HUSBANDS.—Marriage does not make a woman a citizen, unless her husband is a citizen. Hence, although he has declared his intention to become a citizen of the United States, she is not entitled to vote at a school election where he is not yet entitled to receive his naturalization papers. (Dorsey v. Brigham, 228.)

8. ELECTIONS—SCHOOL—WOMEN AS ILLEGAL VOTERS—FATHER'S NATURALIZATION AFTER WOMAN'S MAJORITY. A father's naturalization after his daughter has attained her majority does not make her a citizen, and she is, therefore, not a legal voter at a school election. (Dorsey v. Brigham, 228.)

9. ELECTIONS—SCHOOL—WHEN WOMAN IS QUALIFIED TO VOTE.—Under the constitution and statutes of Illinois, a woman above the age of twenty-one years, who is a citizen of the United States, and has been a resident of the state one year, of the county ninety days, and of the election precinct thirty days, is qualified to vote at school elections; but if she does not possess these qualifications she is not a qualified voter. (Dorsey v. Brigham, 228.)

10. ELECTIONS—PRESUMPTION IS THAT VOTE WAS LEGAL—BURDEN OF PROOF.—As one who votes without qualification is liable to punishment criminally, the presumption is that he voted legally and did not commit a crime. Hence, the burden of proof is upon him who alleges that another has voted illegally. (Dorsey v. Brigham, 228.)

See Action, 1.

ELECTRIC LIGHT COMPANIES.

See Private Ways.

ELEVATORS.

See Master and Servant, 1-3; Negligence, 1, 2

EMBEZZLEMENT.

See Duress, 1; Negotiable Instruments, 12

EMINENT DOMAIN.

1. EMINENT DOMAIN — CONSTRUCTION OF PUBLIC WORKS—BRIDGE—MEASURE OF DAMAGES—MATTERS AFFECTING MARKET VALUE.—If property is injured by the construction of public works, the measure of damages is the difference in the market value of the property before and after the construction. The creation of noise and dust, the invasion of privacy, the deprivation of light and means of access, the burden of additional fencing, and like matters are to be taken into consideration as affecting the market value. They are not to be separately estimated, item by item, and a result to be reached by adding together the different estimates; nor is the effect upon the particular owner, because of anything peculiar to himself or his business to be taken into consideration. The owner's loss is measured by the difference in the market value of his property, which includes all the elements of depreciation and represents the whole loss; but the separate items are to be considered, not as distinct items of loss, but as they affect the market value. (*Shano v. Fifth Ave. etc. Bridge Co.*, 808.)

2. EMINENT DOMAIN — CONSTRUCTION OF PUBLIC WORKS—BRIDGE—DAMAGE FROM NOISE, DUST, ET CETERA—ERRONEOUS INSTRUCTION.—In fixing damages caused by the construction of public works, such as a bridge, the jury have a right to consider evidence of noise, dust, invasion of privacy, obstruction of light, and interference with means of access, as showing how the market value of property has been affected by the building of the bridge. Hence, it is error for the court to charge that these matters are only circumstances to be considered by the jury in determining the credibility of witnesses, who have testified to market value as it was before and after the structure. (*Shano v. Fifth Ave. etc. Bridge Co.*, 808.)

See Railroad Companies, 10.

EQUITY.

1. EQUITY—FORECLOSURE—BAR OF PRIOR LIENS—NOTICE.—The general practice, in equity, in cases of foreclosure, is, that liens are not barred unless the holder has notice of the proceeding, and this proposition applies to sales by receivers. (*Fidelity etc. Co. v. Schenley etc. Ry. Co.*, 815.)

2. EQUITY—REMEDY IN FAVOR OF A COUNTY DOES NOT PREVENT ITS CITIZENS FROM RESORTING TO.—Though a county might maintain an action at law to recover moneys to which it was entitled, yet if its governing board refused to act in its behalf, any of its citizens may sue in behalf of himself and the other citizens in a court of equity, and thereby enforce the right to which the county is entitled and which its governing board wrongfully refused to assert. (*Land, Log etc. Co. v. McIntyre*, 915.)

See Bailment, 2; Corporations, 3; Damages, 5; Injunctions, 1; Jurisdiction, 2; Officers, 4, 5; Private Ways, 2; Receivers, 7, 8; Shipping, 1; Vendor and Purchaser, 2.

ESTATES.

1. ESTATES IN REMAINDER—VALUE.—An estate in remainder after a life estate may be valued at one-half of the value of the fee. (*Cain v. Cain*, 863.)

2. ESTATES IN REMAINDER.—The value of a vested estate in remainder is the difference between the value of the estate in fee and the value of the life estate. (*Cain v. Cain*, 863.)

See Advancements.

ESTATES OF DECEDENTS.

See Jurisdiction, 2; Scire Facias, 2, 3, 5; Specific Performance, 1.

ESTOPPEL.

1. **ESTOPPEL IN PAIS—QUESTION FOR JURY.**—An estoppel in pais, well pleaded, presents a question of fact for the jury. (Gaylord v. Nebraska Sav. etc. Bank, 705.)

2. **ESTOPPEL BY CONDUCT DOES NOT EXIST** where the party claiming the estoppel has not relied upon the conduct of the other and been induced by it to do something which he otherwise would not have done. (First Nat. Bank v. Maxwell, 64.)

See Associations, 2; Bailment, 3; Building and Loan Associations, 2; Execution, 10; Gifts, 2; Highways, 4; Husband and Wife, 4; Insurance, 9, 18; Mechanics' Liens, 3.

EVICTIION.

See Landlord and Tenant, 1.

EVIDENCE.

1. **EVIDENCE—RES GESTAE—WHAT IS PART OF TRANSACTION.**—In an action to enforce the specific performance of an agreement made by a deceased person, before his death, to leave a little girl a child's portion of his estate, upon his death, in return for her companionship and obedience, if she would come and live in his family, he and his wife having no children, the conduct of the parties toward each other during the entire time from the date of the contract is part of the transaction, and whatever either party did or said during that time which sheds light upon the matter, and aids in disclosing the relations the parties sustained, and understood that they sustained, toward each other, must be construed as a part of the res gestae and admitted as such, under a statute which provides that if a "declaration, act, or omission forms part of a transaction which is itself the fact in dispute, or evidence of that fact, such declaration, act, or omission is part of the transaction." (Burns v. Smith, 653.)

2. **EVIDENCE—RES GESTAE.—DECLARATIONS OF AN AGENT** made after the happening of an event, and not in the course of his agency, are not part of the res gestae, and are inadmissible in evidence. (Garrick v. Florida etc. R. R. Co., 874.)

3. **EVIDENCE — ADMISSION OF — HARMLESS ERROR.**—If a fact is first proved by incompetent evidence, the error in admitting such evidence is rendered harmless if such fact is afterward proved by competent evidence. (Garrick v. Florida etc. R. R. Co., 874.)

4. **EVIDENCE—HYPOTHETICAL QUESTIONS.**—The fact that a hypothetical question was in part based on the personal examination and knowledge of the witness to whom it was addressed does not make it objectionable. (Selleck v. Janesville, 906.)

5. **FRAUD—EVIDENCE.**—Parol evidence is admissible to prove that a contract was procured by fraud, and upon such proof it may be set aside. (Barrie v. Miller, 171.)

6. **EVIDENCE—PROOF OF NEGATIVE—SUFFICIENCY OF.** Full and conclusive proof is not required where a party has the burden of proving a negative, but it is necessary that the proof should be at least sufficient to render the existence of the negative probable. (Dorsey v. Brigham, 228.)

7. **EVIDENCE—ADMISSION OF JOINT MAKER OF NOTE.**—A letter from a joint maker of a note to the payee, containing an

admission, is admissible in evidence in an action on the note by the assignee thereof. (*Cooper v. Hocking Val. Nat. Bank*, 365.)

8. EVIDENCE—AGENT—DECLARATIONS OF.—The declaration of an agent is not admissible against his principal when not made in the presence of the latter, not as a part of any business transaction. It is not material whether such declaration is sought to be proved by the agent himself or by another witness. (*Morrow v. Goodrich*, 512.)

9. EVIDENCE—RES GESTAE—EXCLAMATIONS OF THIRD PERSONS.—When a difficulty occurs, resulting in a shooting, killing, or other alleged offense, the exclamations of bystanders, made at the time, are not admissible in evidence, as part of the *res gestae*, though it is claimed that they "characterized" the act, showing that it was not done by the accused, but by others. (*State v. Bellard*, 461.)

10. EVIDENCE—SYNONYMS.—If a wife testifies that money given by her to her husband was advanced upon the "understanding" that it was to be repaid to her, the word "understanding" may be treated as synonymous with the word "agreement." (*Sykes v. City Sav. Bank*, 562.)

See Adverse Possession; Appeal, 5, 6; Contracts, 16, 17, 20; Elections, 1; Homicide, 9, 10, 15, 16; Insurance, 8, 9, 13; Marriage and Divorce, 2, 3, 4; Negotiable Instruments, 10; Partition, 2; Seduction, 8, 5, 6, 7; Trial, 4.

EXCEPTIONS.

See Appeal, 10, 11; Homicide, 1.

EXECUTION.

1. EXECUTION—PRESUMPTION IN SUPPORT OF THE ISSUING OF.—Where a clerk is prohibited from issuing execution until some condition precedent has occurred, there is no presumption of the happening of such condition from the fact that he has issued the writ. (*Langford v. Few*, 606.)

2. EXECUTION.—THE RETURN OF NULLA BONA SIGNIFIES that the officer made strict and diligent search, and was unable to find any property of the defendant liable to seizure under the writ, whereof to levy the same, but the return "not satisfied" conveys only the idea that it has not been paid. (*Langford v. Few*, 606.)

3. AN EXECUTION ISSUING OUT OF A COURT When a transcript is filed, without a pre-existing return of nulla bona, is void, if the statute provides that no execution shall be issued on such transcript until an execution issued out of the court wherein the judgment was rendered has been returned that the defendant had no goods or chattels whereof to levy the same. (*Langford v. Few*, 606.)

4. EXECUTION—RETURN OF NULLA BONA, WHAT IS NOT.—An indorsement on an execution that it has been executed by reading to the defendant and scheduling his property, and that it is returned not satisfied, accompanied with a copy of the schedule showing and describing three hundred dollars' worth of property, but which schedule is not signed nor sworn to by anyone, does not constitute a sufficient return of nulla bona to support subsequent proceedings. The statement that the writ is returned not satisfied is not equivalent to a statement that the defendant had no goods or chattels whereof to levy the same. (*Langford v. Few*, 606.)

5. EXECUTION.—GROWING ANNUAL CROPS ARE PERSONAL PROPERTY and subject to levy and sale as such, for the satisfaction of the indebtedness of the owner. (*Sims v. Jones*, 749.)

6. EXECUTIONS—PROPERTY NOT SUBJECT TO.—Intoxicating liquors shipped into the state for an unlawful purpose are not subject to attachment or execution, when the statute of such state makes any sale of such liquor unlawful. (*Lanahan v. Bailey*, 884.)

7. EXECUTION SALE—CHANGE OF POSSESSION.—Upon the sale of personal property under execution to a stranger to the writ it is not necessary that there be a change of possession. The property may be left in the possession of the former owner on any contract of bailment that the law allows in any other case. (*Matteucci v. Whelan*, 60.)

8. EXECUTION, EXEMPTION OF PROCEEDS OF LIFE INSURANCE WHERE THE PREMIUMS EXCEED THE AMOUNT SPECIFIED IN THE STATUTE.—If a statute exempts from execution all moneys arising out of any life insurance on the life of the debtor, if the annual premium paid does not exceed five hundred dollars, and a policy is obtained, the annual premium on which is a greater sum, no part of the proceeds of such policy is exempt. (*Estate of Brown*, 74.)

9. AN EXECUTION NOT SIGNED by the officer authorized to issue it is not a valid process of court. (*Rawles v. Jackson*, 185.)

10. EXECUTION SALES UNDER VOID PROCESS—ESTOPPEL.—If an execution under which property is sold on foreclosure is not signed by the proper officer, and the defendant therein, who is present at the sale knowing this fact, makes no objection to the sale on that ground, and, after the purchase of the property thereat by the execution plaintiff, surrenders possession to him, he is bound by the sale and estopped to maintain ejectment, or set up that the sale was made under void process, as against an innocent purchaser for value from the execution plaintiff. (*Rawles v. Jackson*, 185.)

11. EXECUTION—LEVY ON LAND—NATURE OF LIEN.—As there is no manual seizure or possession by a levy of execution upon real estate, the lien created by such levy is merely constructive and arises only by a compliance with the statute. (*Union Nat. Bank v. Lane*, 216.)

12. EXECUTION—RECORDING CERTIFICATE OF LEVY—LIEN ON LAND FRAUDULENTLY CONVEYED.—The mere levy of an execution upon land, or the recording of a certificate of such levy, with the return of the execution nulla bona, does not give or create a lien upon the property, where it lies in the same county in which the judgment was rendered, but was conveyed by the debtor, before the judgment was rendered, to defraud his creditors. (*Union Nat. Bank v. Lane*, 216.)

13. EXECUTION—RECORDING CERTIFICATE OF LEVY—EFFECT OF.—The recording of a certificate of levy on land lying in the same county where the judgment was recovered does not, where the statute makes no provision, in such a case, for the recording of a certificate of levy, give any additional force or efficacy to the levy as a lien, or to the certificate as notice to parties of such levy. (*Union Nat. Bank v. Lane*, 216.)

14. EXEMPTIONS—CHATTEL MORTGAGE—SIGNATURE OF WIFE.—If a husband, owning five cows and having a right to two of them as exempt from execution, executes a mortgage on two of the cows without the consent or signature of his wife, the cows mortgaged must be deemed a selection of those not exempt, and the mortgage is valid, although the statute provides that a mori-

gage on exempt property is void, unless signed by the wife. (Harley v. Procunier, 546.)

15. **EXEMPTIONS—RIGHT OF SELECTION.**—The right to determine which of several cows owned by a husband shall be exempt from execution rests with him, and is not subject to the control of the wife. She has a remedy only when the husband fails to claim the exemption. (Harley v. Procunier, 546.)

See Fraudulent Conveyances, 1; Homestead, 4; Husband and Wife, 1, 3; Landlord and Tenant, 12.

EXECUTORS AND ADMINISTRATORS.

1. **AN EXECUTOR MAY MAINTAIN AN ACTION IN HIS OFFICIAL CAPACITY**, to recover moneys paid out by him by mistake to a supposed legatee. Other existing remedies to recover moneys wrongfully paid out do not exclude the remedy by an action in the name of the executor. (Phillips v. McConica, 753.)

2. **EXECUTORS AND ADMINISTRATORS — SHARES OF STOCK HERE MAY BE TRANSFERRED BY FOREIGN EXECUTRIX WITHOUT LETTERS DE BONIS NON, CUM TESTAMENTO ANNEXO.**—If a citizen and resident of Great Britain dies in England, the executrix of his executrix may transfer the stock of a Pennsylvania corporation, belonging to the estate of the testator in that commonwealth, without any grant to her of letters of administration de bonis non, cum testamento annexo, as such letters are unnecessary, either in that state or in England, for the purpose named. (Grimes v. Pennsylvania R. R. Co., 830.)

3. **JUDGMENT AGAINST AN ADMINISTRATOR** ascertaining and directing the payment of a final balance against him in a suit for an accounting and settlement of the estate, is a judgment against him personally. (Verner v. Bookman, 870.)

See Payment, 4; Scire Facias, 2, 3.

EXEMPTION.

See Execution, 8, 14, 15.

EX POST FACTO LAWS.

See Constitutions, 1, 3; Statutes, 4, 5.

FALSE IMPRISONMENT.

FALSE IMPRISONMENT — LIABILITY FOR.—One procuring the arrest of an innocent person upon a charge of misdemeanor is liable in an action for false imprisonment, unless he can show a legal justification for causing the arrest. It is not sufficient that he acted in good faith, without malice, and upon his belief in guilt founded upon reasonable cause. (Palmer v. Maine Cent. R. R. Co., 513.)

FELLOW SERVANTS.

See Master and Servant, 6, 7, 8.

FINDINGS.

See New Trial, 3.

FIXTURES.

1. **FIXTURES—DWELLING-HOUSE.**—The manner in which a dwelling-house is placed on and attached to blocks as a foundation has no bearing in determining the question as to whether it is to be regarded as personal property or a fixture. (Dutton v. Ensley, 340.)

2. FIXTURES.—A HOUSE BUILT BY MISTAKE on the land of another becomes a fixture thereon, and follows the tenure of the soil whereon it stands. (Dutton v. Ensley, 340.)

3. FIXTURES—HOUSE BUILT ON LAND OF ANOTHER.—If the owner of land executes a mortgage thereon and builds a house by mistake on the land of another, and, after knowledge of his mistake, sells and conveys the land under false representations that the house is on the land conveyed, he cannot, after foreclosure of the mortgage, and removal of the house onto the land purchased at such foreclosure sale, maintain an action for its conversion. (Dutton v. Ensley, 340.)

FORCIBLE ENTRY AND DETAINER.

See Landlord and Tenant, 9-11.

FORECLOSURE.

See Cotenancy, 13; Equity, 1.

FORGERY.

See Banks and Banking, 3, 4; Guaranty.

FRAUD.

See Corporations, 4, 5; Evidence, 5; Mines and Mining, 2; Negotiable Instruments, 13; Sales, 1.

FRAUDULENT CONVEYANCES.

1. FRAUDULENT TRANSFER WHERE THE DEBTOR OWNS OTHER PROPERTY SUBJECT TO EXECUTION.—If a transfer is made with an actual intent to defraud the creditors of the grantor, it is void as against them, though he has other property sufficient to satisfy their demands. (First Nat. Bank v. Maxwell, 64.)

2. JUDGMENT LIEN—EFFECT OF UPON PROPERTY PREVIOUSLY FRAUDULENTLY TRANSFERRED.—A judgment against one who has transferred real property for the purpose of defrauding his creditors has a lien thereon, and a judgment creditor is entitled to redeem such real property from execution sale. (First Nat. Bank v. Maxwell, 64.)

3. A FRAUDULENT TRANSFER IS VOID AGAINST ALL THE CREDITORS OF THE DEBTOR, and, as against the fraudulent transferee, the creditor may seize the property as that of the fraudulent grantor. (First Nat. Bank v. Maxwell, 64.)

4. FRAUDULENT TRANSFERS—WAIVER OF RIGHT TO ASSAIL.—If a transfer has been made by a debtor for the purpose of defrauding his creditors, one of them who, with knowledge of the transfer, subsequently accepts a promissory note for his debt secured by a mortgage on the property, does not thereby waive his right to assail the transfer as void under a judgment recovered for a deficiency remaining after foreclosing his mortgage and selling the mortgaged premises. (First Nat. Bank v. Maxwell, 64.)

5. FRAUDULENT CONVEYANCES—BILL TO SET ASIDE—LIS PENDENS—EQUITABLE LIENS.—If a debtor conveys his real estate to defraud his creditors, and they subsequently obtain judgments against him in the county where the land lies, the filing of bills in equity by them to set aside the conveyance as fraudulent, and the obtaining of service thereon, constitute lis pendens

and create equitable liens on the land in the order in which the bills are filed and the service obtained. (Union Nat. Bank v. Lane, 216.)
See Execution, 12; Judgment, 15.

GARNISHMENT.

See Attachment, 3, 4, 5.

GIFTS.

1. GIFTS—PROMISSORY NOTE—WANT OF CONSIDERATION—DEFENSE OF.—A promissory note intended by the maker as a mere gift or donation to the payee is not enforceable, and, as a gift, it is always revocable until it is executed, and it is not executed until it is paid. It is open to the defense of a want of consideration, in the absence of any element of estoppel, and such defense may be interposed either by the maker or his representatives. (Beatty v. Western College, 242.)

2. GIFTS—PROMISSORY NOTE—ESTOPPEL AGAINST SETTING UP WANT OF CONSIDERATION AS A DEFENSE.—The defense of a want of consideration cannot be made in an action upon a promissory note which is intended by the maker as a mere gift, where money has been expended, or liabilities have been incurred, in reliance upon the note. Thus, if the gift is for the erection of a college building, both the donor and his personal representatives are estopped from raising such defense, after the institution has expended money and incurred liabilities on the faith of the promise, and the gift will be upheld on the ground of estoppel and not by reason of any valid consideration in the original undertaking. (Beatty v. Western College, 242.)

3. GIFTS—CONDITION AS TO DELIVERY—EFFECT OF. If a condition, as to the vesting of title, is attached to the delivery of a gift of money, it will invalidate the gift as one in present, but a promise by the donee, such as to pay interest or annuities, does not invalidate the gift, because it does not constitute a condition of delivery of title, but is consistent with it. (Beatty v. Western College, 242.)

4. GIFTS—WHEN EXECUTED—EFFECT OF CONDITION AS TO PAYMENT OF ANNUITY.—If money is deposited with a college "for the benefit of, and to become and be" its property, and "to be used as the board of trustees or executive committee thereof may direct," in consideration of a specified annuity to be paid to the depositor, the transaction is an executed gift, not invalidated by the reservation of the annuity to be paid to the donor. (Beatty v. Western College, 242.)

GROWING CROPS.

See Chattel Mortgage, 5-7; Cotenancy, 9-11; Execution, 5; Homestead, 1; Insolvency; Landlord and Tenant, 12.

GUARANTY.

GUARANTY—GENUINENESS OF SIGNATURE—STATUTE OF LIMITATIONS—FORGERY.—If a person, acting in good faith, guarantees that the signature to an irrevocable power of attorney to transfer shares of stock in a company is genuine, such guaranty raises an implied promise upon the part of the guarantor to be answerable to any party who purchases the certificate and power, or makes a transfer of it; but if the signature is, in fact, a forgery, the implied promise of the guarantor is broken when it is made, the right of action accrues immediately, and the statute of limitations begins to run from the date of the guaranty. (Lehigh Coal etc. Co. v. Blakeslee, 788.)

GUARDIAN AD LITEM.

See Infants, 5.

GUARDIAN AND WARD.

1. **GUARDIAN AND WARD—JUDGMENT AGAINST GUARDIAN FOR TOO MUCH INTEREST—COLLATERAL ATTACK.**—The fact that too much interest was allowed in a judgment against a guardian, for misappropriation of the proceeds of his ward's real estate, such sale having been made under order of court, cannot be considered in a collateral action brought against the sureties on the guardian's bond to enforce their liability. (Botkin v. Kleinschmidt, 641.)

2. **GUARDIAN AND WARD — JUDGMENT AGAINST A GUARDIAN IS CONCLUSIVE AGAINST HIS SURETIES.**—The sureties on a guardian's bond, given in compliance with an order authorizing him to sell real estate belonging to his ward, and conditioned that he will faithfully execute the duties of the trust according to law, are answerable for the guardian's misappropriation of funds realized from such sale; and a judgment against the guardian declaring him to be indebted to the ward's estate, in a given sum, the amount of such misappropriation, is binding upon the sureties, though they were not parties to the suit. (Botkin v. Kleinschmidt, 641.)

3. **GUARDIAN AND WARD—LIABILITY OF SURETIES ON GUARDIAN'S BOND.**—If the sureties on a bond of a guardian, who is empowered, by an order of court, to sell the real estate of his ward, obligate themselves that he will faithfully perform the duties of such trust according to law, a literal interpretation of the bond requires that the sureties should stand good for its performance; and it would be unauthorized and unjust to so construe statutes concerning bonds which guardians are required to give, as to relieve the sureties of their plain liability. (Botkin v. Kleinschmidt, 641.)

HEIRS.

See Wills, 2.

HIGHWAYS.

1. **HIGHWAYS—TRESPASS AGAINST ABUTTING OWNER.** An owner of lands abutting upon a public highway has such a proprietary right to the center of the highway as to render one who is unlawfully upon such part of the highway, and who refuses to depart therefrom upon notice, liable to a prosecution for criminal trespass. (Huffman v. State, 368.)

2. **HIGHWAYS—ADDITIONAL SERVITUDE—PIPE LINE.**—The construction of a pipe line upon a highway is an imposition of an additional servitude upon the fee from that embraced in the easement for highway purposes, and compensation therefor must be made to the owner of the fee. (Huffman v. State, 368.)

3. **HIGHWAYS — TRESPASS UPON—CONSTRUCTION OR REMOVAL OF PIPE LINE.**—One who enters upon a public highway and constructs a pipe line thereon without the consent of the owner of the fee, or grant from the proper county officers, is a trespasser and has no right to remove such pipe line without the permission of such owner of the fee. (Huffman v. State, 368.)

4. **HIGHWAYS—UNLAWFUL OBSTRUCTION OF—ESTOPPEL.**—If a pipe line is unlawfully constructed upon a public highway without the knowledge or consent of the owner of the fee therein, the fact that after such construction he made no objection

and create equitable liens on the land in the order in which the bills are filed and the service obtained. (*Union Nat. Bank v. Lane*, 216.)
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to it, or its maintenance, does not estop him from asserting his right to prohibit the removal of the pipe line. (Huffman v. State, 368.)

5. **HIGHWAYS—UNLAWFUL USE OF—TRESPASS.**—Neither a private citizen, nor a corporation, has any inherent right to use a public highway for a purpose not contemplated by law, and when the proper steps have not been taken to acquire such right, it is a trespass to do so. (Huffman v. State, 368.)

See Ejectment; Municipal Corporations, 24; Private Ways, 4; Statutes, 10.

HOMESTEAD.

1. **HOMESTEAD.—A DECLARATION OF HOMESTEAD ON PREMISES DESCRIBED IN A CHATTEL MORTGAGE** of crops growing and to be grown thereon does not affect such mortgage with respect to crops planted after such declaration. (Hall v. Glass, 77.)

2. **HOMESTEADS—ABANDONMENT BY WIFE.**—A letter from a wife to her husband, who has driven her from home by his cruelty, to the effect that she will not go back to live with him, and that he can use the place to help himself with, but that she will have what she took away, does not constitute a declaration of abandonment of her homestead interest. (Rogers v. Day, 593.)

3. **HOMESTEADS.—ABANDONMENT** of a homestead by a husband or wife does not validate a conveyance of the homestead by one of them without the other's signature. (Rogers v. Day, 593.)

4. **HOMESTEADS—PURCHASE OF, UNDER EXECUTION—RIGHTS ACQUIRED.**—A purchaser of a homestead at execution sale, under a decree for alimony in favor of the owner's wife, succeeds to her rights, and may attack a prior mortgage as invalid, because she did not join therein. (Rogers v. Day, 593.)

5. **HOMESTEADS—RIGHTS OF WIFE—CRUELTY OF HUSBAND.**—A wife loses none of her rights in the homestead by being driven therefrom through the cruelty of her husband. (Rogers v. Day, 593.)

See Marriage and Divorce, 1.

HOMICIDAL MANIA.

See Homicide, 7.

HOMICIDE.

1. **HOMICIDE—APPEAL—ASSIGNMENT OF ERROR.**—If the rulings and instructions of the court, on a murder trial, are not objected to at the time, and their relevancy to the defense, set up in the defendant's account of the murder, is not denied, they furnish no basis for an assignment of error, or for just criticism, on an appeal from a verdict of guilty. (Commonwealth v. McGowan, 836.)

2. **HOMICIDE—INSTRUCTIONS—EXPRESSION OF OPINION BY COURT.**—When justified by the evidence, a court's mere expression of opinion, in a murder trial, that there is nothing in the case to reduce the crime to manslaughter, furnishes no ground of complaint, where the same is not given as a binding instruction, and where the jurors are instructed that the questions of fact depending upon the evidence are determinable by them, and not by the court. (Commonwealth v. McGowan, 836.)

3. **HOMICIDE — SELF-DEFENSE.**—A murder purposely committed, is not excusable on the ground of self-defense, unless the slayer reasonably believed the killing to be necessary to save his

own life, or to avoid great bodily harm. (Commonwealth v. McGowan, 836.)

4. **HOMICIDE—INTOXICATION AS A DEFENSE—INSTRUCTIONS.**—It is not error, on a trial for murder, to charge that "the jury must bear in mind that it is only the effect the intoxication in this case had upon the prisoner's mind in regard to his ability to design, deliberate, and meditate upon, and fully comprehend the act he did, previous to its performance, which is material." (Commonwealth v. McGowan, 836.)

5. **HOMICIDE—INSTRUCTIONS — INTOXICATION—REDUCING OFFENSE.**—The intoxication of one accused of murder will not reduce the grade of the murder to that of the second degree, where the evidence shows that the act was committed with deliberation and premeditation. (Commonwealth v. McGowan, 836.)

6. **HOMICIDE—INSTRUCTIONS—REDUCING DEGREE OF MURDER.**—If the defendant, in a murder case, requests a charge substantially as follows: If the jury believe that the prisoner, at the time of the killing, though he intellectually comprehended right and wrong, and knew the killing to be forbidden and punishable by law, was yet so disordered mentally as to be unable to adjust his conduct to the law and avoid that forbidden thing, he is not answerable, at least, for murder in the first degree; it is not error for the court to give the instruction modified as follows: "If the mental condition of the defendant was such that he could not consciously form the purpose to kill and deliberately execute that purpose, he is not guilty of murder in the first degree. (Commonwealth v. Hillman, 827.)

7. **HOMICIDE—PROOF OF HOMICIDAL MANIA.**—To establish homicidal mania as a justification for the killing of a human being in any particular case, it is necessary either to show, by clear proof, its contemporaneous existence, evidenced by present circumstances, or the existence of an habitual tendency developed in previous cases, becoming in itself a second nature. (Commonwealth v. Hillman, 827.)

8. **HOMICIDE—DEFENSE OF INSANITY—WHEN NOT SUSTAINABLE.**—In a murder case, where the commission of the crime by the accused is undisputed, and it is shown that he made preparation for it by his purchase, a few days before the murder, of the revolver and cartridges he used in the perpetration of it, a verdict of murder in the first degree should be sustained, notwithstanding the defense of insanity, where such defense is not established; and it is not established by the testimony of the prisoner's mother and sister, two brothers and his uncle, that, before the murder, he was subject to frequent attacks of epileptic fits, which had affected his mind, and that they regarded him as insane, added to the testimony of two physicians, who had no knowledge of the prisoner's condition before the murder, that, in their opinion, he was insane, where neighbors of the defendant testify that they were well acquainted with him, and never saw anything in his conduct suggestive of insanity. (Commonwealth v. Hillman, 827.)

9. **CRIMINAL TRIAL—HOMICIDE—EVIDENCE OF PHYSICAL DISPARITY OF THE DEFENDANT.**—If, upon a trial for murder, the accused claims to have acted in self-defense, evidence tending to show great disparity in the physical condition of the two combatants should be admitted in favor of the defendant. (State v. Bowles, 598.)

10. **DYING DECLARATIONS** are admissible when they relate only to the identification of the prisoner, his perpetration of the homicide, and the circumstances immediately attending it, and are

made by the decedent when he was fully convinced that there was no hope of his recovery. (State v. Bowles, 598.)

11. **CRIMINAL LAW—MALICE—PRESUMPTION.**—It is not essential, in the case of the killing of one person by another, to justify the jury in inferring malice and premeditation, to show that the slayer had predetermined his crime any considerable time before it was committed, if, without any adequate provocation, he began to abuse the deceased, assaulted and provoked him to fight, and then stabbed him, inflicting a mortal wound. If he had time to think and to conceive the intention to kill, this is sufficient to justify the inference of malice and premeditation, though he had the intention to kill but for a minute before executing it. (State v. Bowles, 598.)

12. **MURDER IN THE SECOND DEGREE—MALICE IMPLIED FROM THE USE OF A DEADLY WEAPON.**—If one intentionally stabs another in a vital part with a deadly weapon, the law presumes that he intends the natural consequences of his act. From the use of a deadly weapon malice may be inferred, and, if death results, the slayer will be guilty of murder in the second degree, in the absence of qualifying or mitigating circumstances, or the proof of circumstances showing premeditation. (State v. Bowles, 598.)

13. **MURDER—INDICTMENT FOR.**—It is not necessary to charge, in an indictment for murder, that the act charged was committed with a deadly weapon. (State v. Bowles, 598.)

14. **HOMICIDE — INSTRUCTIONS — REVERSAL.**—After the jury, in a murder case, has been fully and correctly instructed as to the law of self-defense, its verdict will not be disturbed because the trial judge refused instructions, as to self-defense, requested by the accused, where they were covered by the general charge. (State v. Fontenot, 455.)

15. **HOMICIDE — BAD CHARACTER OF DECEASED FOR PEACE AND QUIETNESS.**—When one indicted for murder sets up in support of his plea of self-defense that the deceased was a man of violent and dangerous character, the testimony must be confined to proof of the general character of the deceased for peace and quietness, and particular acts of violence on his part must, therefore, be excluded. (State v. Fontenot, 455.)

16. **HOMICIDE—OPENING THE DOOR FOR EVIDENCE OF PARTICULAR ACTS OF VIOLENCE ON THE PART OF THE DECEASED.**—Although a witness in a murder case, where the plea is self-defense, and the bad character of the deceased for peace and quietness is relied upon, testifies as to particular acts of violence, on the part of the deceased, the prosecuting officer does not open the door for the admission of such testimony by merely asking the witness, on cross-examination, whether he ever heard that the deceased had harmed anyone. (State v. Fontenot, 455.)

17. **HOMICIDE—EXPERT TESTIMONY—CUTS IN CLOTHING OF THE DECEASED.**—Upon the trial of a person accused of murder, the question as to whether cuts in the clothing of the deceased indicate that he was stabbed while erect, confronting the accused, or after he had been pushed and had fallen backward into the arms of a witness, is not a proper one for expert testimony, and there is no error in excluding the opinion of a witness concerning it. (State v. Fontenot, 455.)

18. **HOMICIDE—INSTRUCTIONS ASSUMING FACTS.**—A request in a murder case which assumes that the accused has made out a case of self-defense is properly refused. (State v. Fontenot, 455.)

19. HOMICIDE—DUTY TO RETREAT.—If a person is attacked suddenly, fiercely, and violently, he is not obliged to retreat, especially where it would increase, rather than diminish his danger. On the contrary, he may instantly kill his adversary, without retreating at all, and, if he does so, it will be justifiable homicide. (State v. Robertson, 393.)

20. HOMICIDE—INSTRUCTIONS—DUTY TO RETREAT.—It is proper to instruct the jury, in a homicide case, that one suddenly attacked is not compelled to retreat when imminent danger would follow, and is apparent. (State v. Robertson, 393.)

See Criminal Law, 1, 2; Trial, 9.

HUSBAND AND WIFE.

1. HUSBAND AND WIFE—EXECUTIONS.—That a wife's property has been increased largely and rapidly through the sagacity and industry of her husband does not give his creditors any right to reach such increment. (Martin v. Remington, 941.)

2. MARRIED WOMAN—BURDEN OF PROOF.—In a contest between a wife and the creditors of her husband wherein she claims that property is her separate estate, and therefore not subject to a writ in favor of such creditor, she has the burden of showing by clear and satisfactory evidence that she paid for the property out of her separate estate. (Martin v. Remington, 941.)

3. EXECUTION — CONVEYANCE OF PROPERTY IN ACCORDANCE WITH NONENFORCEABLE TRUST, WHETHER CREDITORS MAY COMPLAIN OF.—If a husband purchases property with the separate funds of his wife, taking title in his own favor, a resulting trust arises in her favor, which has been made nonenforceable by the statutes of Wisconsin. If, however, he chooses to respect the trust and to convey the property to her in pursuance thereof, the conveyance is valid as against his creditors, and not tainted with fraud. (Martin v. Remington, 941.)

4. HUSBAND AND WIFE—LOANS BETWEEN—ESTOPPEL. If a wife advances money to her husband with the expectation that he will repay it, but without a special agreement as to the time of repayment, the transaction does not constitute a gift, unless the facts are such as to show an estoppel against her. (Sykes v. City Sav. Bank, 562.)

5. HUSBAND AND WIFE—LOANS BETWEEN.—If a wife gives her husband money at his request, the law implies a promise on his part to repay her, if there are no circumstances tending to show a different understanding between the parties. (Sykes v. City Sav. Bank, 562.)

See Citizenship, 4, 5; Homestead, 2, 3, 5; Seduction, 5, 6.

HYPOTHETICAL QUESTIONS.

See Evidence, 4.

IMPEACHMENT.

See Witnesses, 2.

INDICTMENT.

INDICTMENT—STRIKING WITH A DANGEROUS WEAPON WITH INTENT TO KILL—SUFFICIENCY.—In an indictment for "striking with a dangerous weapon with intent to kill and murder," it is unnecessary to qualify both the striking and then the intent by the words "willfully, feloniously, and of his malice aforethought." If these words are used to qualify the intent, and

the word "feloniously" to qualify the striking, the indictment is sufficient. (*State v. Bellard*, 461.)

See Homicide, 13.

INFANTS.

1. **AN ACTION FOR MONEY HAD AND RECEIVED** may be sustained where the defendant has received money under a contract which is for any reason void, as where a minor obtains money by virtue of a contract which is void because of his minority and his refusal to affirm the contract on arriving at his majority. (*Whyte v. Rosencrantz*, 90.)

2. **MINORS—ACTIONS AGAINST FOR MONEY HAD AND RECEIVED.**—If a minor, more than eighteen years of age, receives money under a contract which is void because of the statute of frauds, or which cannot be enforced against him because he refuses to affirm it on reaching his majority, an action may be maintained against him to recover such money, though he does not retain the identical money in his hands, if the statute of the state provides that if a contract is made by a minor more than eighteen years of age, it may be disaffirmed upon restoring the consideration to the party from whom it was received, or paying its equivalent. (*Whyte v. Rosencrantz*, 90.)

3. **PARTNERSHIP — INFANT MEMBER — WHETHER RETAINS PROPERTY ON INSOLVENCY OF.**—If a partnership exists between an adult and a minor, the latter cannot, on an adjudication of the insolvency of the firm, disaffirm his personal liability for its debts, and maintain that he has an undivided interest in the property of the partnership, which had been fully paid for when the insolvency proceedings were instituted. Though a minor, he has no interest except in the assets which remain after the payment of the debts of the partnership. (*Conary v. Sawyer*, 525.)

4. **AN INFANT MEMBER OF A PARTNERSHIP** cannot, by disaffirming his liability for its debts, prevent the application of all the assets of the partnership to the satisfaction of its liabilities. (*Conary v. Sawyer*, 525.)

5. **INFANTS—GUARDIAN AD LITEM FOR—WHEN UNNECESSARY.**—Where proceedings in insolvency are commenced against a partnership, one of whose members is a minor, it is not necessary to appoint a guardian ad litem to represent his interest. (*Conary v. Sawyer*, 525.)

6. **INSOLVENCY—INFANT PARTNER.**—On an adjudication of insolvency against a partnership, one of whose members is an infant, and the assignment by a proper officer pursuant to such adjudication, the title to the entire personal property vests in the assignee. The infant cannot disaffirm his liability and recover a share of such property. (*Conary v. Sawyer*, 525.)

7. **INFANCY OF PLAINTIFF.**—The defense of the infancy of the plaintiff must be pleaded in abatement, and if not pleaded within the time allowed for pleas of that class, is waived, and cannot afterward be urged by a plea in bar. (*McMullin v. McMullin*, 511.)

8. **INFANCY—JUDGMENTS—WHEN NOT REVERSIBLE BECAUSE OF.**—A judgment in favor of an infant in a personal action is not reversible on the ground of infancy, where it was not pleaded in abatement. The want of *prochein ami* may be cured by amendment, even when pleaded in abatement. (*McMullin v. McMullin*, 511.)

See Citizenship, 3; New Trial, 5; Seduction, 1, 2.

INJUNCTION.

1. INJUNCTIONS AGAINST CRIMINAL PROSECUTIONS.—Equity cannot by injunction restrain quasi-criminal proceedings by the authorities of a municipality, for violations of an alleged invalid ordinance. (Paulk v. Mayor, 128.)

2. INJUNCTIONS AGAINST CRIMINAL PROSECUTIONS.—An injunction cannot be granted to restrain a criminal proceeding. (Paulk v. Mayor, 128.)

3. INJUNCTION, BY TAXPAYER, AGAINST EXPENDITURE OF PUBLIC FUNDS UNDER AN UNLAWFUL CONTRACT.—If a contract for work on a public school building requires the employment of men belonging to a certain labor organization, and such men only, a taxpayer may enjoin the expenditure of the school fund under such unlawful agreement, although neither the contractor nor any excluded laborer questions it. (Adams v. Brenan, 222.)

4. INJUNCTION AGAINST EXPENDITURE OF PUBLIC FUNDS UNDER AN UNLAWFUL CONTRACT—PLEADING.—If a contract which calls for the expenditure of public funds is unlawful, the contractor is bound to it, and a taxpayer's right to enjoin the expenditure of public funds, under such a contract, is not violated by the failure of his bill to show whether the contractor had entered upon the performance of his contract when the bill was filed. (Adams v. Brenan, 222.)

5. INJUNCTION — BOARD OF EDUCATION — MISAPPROPRIATION OF SCHOOL FUNDS—SUIT BY TAXPAYER.—A board of education may be enjoined by a taxpayer from appropriating the school fund to a purpose not warranted by law. (Adams v. Brenan, 222.)

See Municipal Corporations, 27.

INSANITY.

See Homicide, 8.

INSOLVENCY.

INSOLVENCY PROCEEDINGS DO NOT SO DISCHARGE A DEBT SECURED BY A CHATTEL MORTGAGE ON UNPLANTED CROPS as to prevent the lien of the mortgage from attaching to such crops when subsequently planted by the mortgagor. (Hall v. Glass, 77.)

See Building and Loan Associations, 3, 4, 6; Corporations, 7-14; Infants, 8, 6.

INSTRUCTIONS.

1. INSTRUCTIONS — CRIMINAL CASES—IDENTICAL LANGUAGE—REPEATING.—A court, in a criminal case, is not required to instruct the jury in the words requested by counsel for the accused, nor to repeat charges which have, in effect, already been given. (State v. Fontenot, 455.)

2. INSTRUCTIONS.—REQUESTS for instructions having no legitimate bearing on the case on trial are properly refused. (Sykes v. City Sav. Bank, 562.)

See Criminal Law, 1, 12; Damages, 1; Homicide, 2, 4, 5, 6, 14, 18, 19; Trial, 5-9.

INSURANCE.

1. INSURANCE, LIFE—SUICIDE.—A condition that the insurer shall not be answerable if the death of the insured was in conse-

quence of, or in violation of, law does not avoid a policy because death results from suicide. (Patterson v. Natural etc. Ins. Co., 899.)

2. **INSURANCE, LIFE—INCONTESTABLE CLAUSE.**—If a policy of insurance provides that it is absolutely incontestable from the date of its delivery and acceptance, except for nonpayment of premiums or misstatements of age, it cannot be avoided on account of misstatements of the assured respecting his health, or of the grounds upon which he had made an application for a pension. (Patterson v. Natural etc. Ins. Co., 899.)

3. **INSURANCE, LIFE—SUIOCIDE, WHEN NO DEFENSE.**—If life insurance is effected for the benefit of wife and children, suicide, while sane, is not a defense in the absence of a condition or exception to that effect in the policy. Especially is this true if the policy provides that it shall be incontestable for any cause save for nonpayment of premium. (Patterson v. Natural etc. Ins. Co., 899.)

4. **INSURANCE, LIFE—EFFECT OF ASSIGNMENT OF POLICY TO CHILDREN OF THE ASSURED.**—If a policy is issued on the life of the insured, payable to his administrators or assigns, and he afterward, with the consent of the insuring corporation, assigns the policy to his children, it must subsequently be given the same construction and effect as if they had originally been named therein as beneficiaries, and it cannot be avoided by any act of the insured which would not have avoided it had they been named in the policy as beneficiaries. (Patterson v. Natural etc. Ins. Co., 899.)

5. **INSURANCE, LIFE—CONSTRUCTION OF POLICY.**—When a policy is capable of two meanings, that which is most favorable to the insured must be adopted. (Patterson v. Natural etc. Ins. Co., 899.)

6. **INSURANCE—RULES AS TO COMPUTATION OF TIME.**—It is lawful for the parties to a contract of insurance to stipulate in the policy that the insurance shall begin at noon and expire at noon of the days named, and such an agreement becomes the special rule for the fixing of dates so referred to, for its object is to avoid possible dispute on the fundamental basis of any liability for loss; but such rule should not be applied to the five days' notice of cancellation, and other collateral questions of time, in the policy, as the better rule to apply to these computations is the general one of excluding the first day, and counting the days as legal days, beginning and ending at midnight. (Penn Plate etc. Co. v. Spring Garden Ins. Co., 810.)

7. **INSURANCE—NOTICE OF CANCELLATION OF POLICY—WHEN INSUFFICIENT AS A DEFENSE.**—In an action upon a policy of insurance, which contains a clause that the insurance shall begin at noon and expire at noon of certain days named, and a clause that the policy shall be canceled at any time at the request of the insured, or by the company by giving five days' notice of such cancellation, a notice of cancellation by the company is no defense when it appears that the property was destroyed on April 12th, by a fire which started at 10:30 o'clock P. M., and the notice is averred to have been given to the plaintiff on April 7th, without any specification of the hour when it was given. (Penn Plate etc. Co. v. Spring Garden Ins. Co., 810.)

8. **INSURANCE—APPRAISEMENT AS EVIDENCE OF LOSS.** An appraisement provided for by a policy of fire insurance is never conclusive as to the fact or amount of loss, and is not even evidence unless made so by the parties uniting in it. It gets its entire force from the joint act of the parties through their agents, and where it is ex parte and, though averred by the plaintiff in his statement,

is denied by the defendant, it goes for naught and is not evidence at all, either on a motion for judgment or at the trial. (Penn Plate etc. Co. v. Spring Garden Ins. Co., 810.)

9. **INSURANCE COMPANY MAY REQUIRE AMOUNT OF LOSS TO BE PROVED BY COMPETENT EVIDENCE, THOUGH IT FAILED TO JOIN IN APPRAISEMENT AND DENIES LIABILITY—ESTOPPEL.**—A condition as to appraisement, in a policy of fire insurance, is revocable by either party to the contract. Hence, the rights of the company are not prejudiced by its omission or refusal to join in an appraisement, notwithstanding a provision in the policy that no action shall be brought on it until after compliance with all its requirements, among which is that relating to appraisers, and a total denial of liability on its part does not estop it from requiring that, if its liability is established, the amount of it shall be proved by competent evidence. (Penn Plate etc. Co. v. Spring Garden Ins. Co., 810.)

10. **INSURANCE—CONTRACT FOR, WHEN COMPLETE.**—A contract of insurance is consummated upon the unconditional written acceptance of the application for insurance by the insurer. Actual delivery of the policy to the insured is not essential to its validity, unless expressly made so by the terms of the contract. (New York Life Ins. Co. v. Babcock, 134.)

11. **INSURANCE—DELIVERY OF POLICY—ACTS OF AGENT.** An unconditional delivery of a policy of insurance by the insurer to his agent for delivery to the insured, binds the insurer, and is tantamount to a delivery to the insured, although the agent never parts with possession of the policy, and its delivery to the insured is, by the policy, made essential to the validity of the contract of insurance. (New York Life Ins. Co. v. Babcock, 134.)

12. **INSURANCE—QUESTION OF MEDICAL EXAMINER'S AGENCY—HOW DETERMINED.**—If one acts as a medical examiner for an insurance company, where an application is made for insurance, the question as to whose agent he is is one of fact, to be determined from all the evidence bearing on that subject, notwithstanding any statement in the application that he is the agent of the insured. (Royal Neighbors etc. v. Boman, 201.)

13. **INSURANCE—WHAT STIPULATION DOES NOT ESTOP BENEFICIARY FROM SHOWING THAT MEDICAL EXAMINER INSERTED FALSE ANSWERS.**—The beneficiary of an insurance policy is not estopped, by a stipulation in the application for insurance that the medical examiner is the agent of the applicant, from showing that the examiner inserted false answers to questions which were, in fact, correctly answered by the applicant. (Royal Neighbors etc. v. Boman, 201.)

14. **INSURANCE—WHEN FALSE ANSWERS INSERTED BY MEDICAL EXAMINER DO NOT INVALIDATE POLICY.**—If an applicant for insurance answers questions truthfully, false answers inserted by the medical examiner, in the application, do not invalidate the insurance, although it is stipulated therein that he is the agent of the applicant. (Royal Neighbors etc. v. Boman, 201.)

15. **INSURANCE—MEDICAL EXAMINER IS AGENT OF INSURANCE COMPANY NOTWITHSTANDING STIPULATION IN APPLICATION.**—Notwithstanding an express stipulation, in an application for insurance, that the applicant makes the regular examining physician of the company his agent, such examiner, in making a medical examination of the applicant, on behalf of the insurance company, is the latter's agent, and the company is bound by his report to it, where no fraud or intent to deceive on the part of the applicant is shown. (Royal Neighbors etc. v. Boman, 201.)

16. **INSURANCE—DOUBLE AGENCY.**—A contract by which a fire insurance agent, without the consent of his company, agrees to become, in his individual character, the agent for a property owner who desires to obtain insurance in that company, is against public policy and void, and, in such case, in the event of loss to the property owner of property which he has supposed to be insured, he cannot recover damages of such agent for his negligence in failing to obtain or complete the insurance according to his contract. (*Ramspeck v. Pattilo*, 197.)

17. **INSURANCE—CONSTRUCTION OF CONTRACT.**—Stipulations and conditions in policies of insurance are to be so construed, if possible, as to avoid forfeitures. (*New York Life Ins. Co. v. Babcock*, 134.)

18. **INSURANCE—INSURABLE INTEREST—WAGERING POLICY.**—A policy of insurance issued to one upon the life of another, the former having no insurable interest in the life of the latter, is void, as being a wagering policy and in contravention of public policy. (*Prudential Ins. Co. v. Hunn*, 380.)

19. **INSURANCE—INSURABLE INTEREST.**—If an insurer contracts with the person whose life is insured to pay the insurance to another person, it is not necessary for the latter, in an action brought by him upon the policy to show that he had an insurable interest in the life insured. (*Prudential Ins. Co. v. Hunn*, 380.)

20. **INSURANCE—INSURABLE INTEREST.**—A person has an insurable interest in his own life, and he may effect such insurance, and appoint anyone to receive the money in case of his death during the existence of the policy. (*Prudential Ins. Co. v. Hunn*, 380.)

21. **INSURANCE—INSURABLE INTEREST IN THE LIFE OF ANOTHER** must be a pecuniary interest, and though such interest need not appear on the face of the policy, it must be pleaded and shown in an action thereon. (*Prudential Ins. Co. v. Hunn*, 380.)

22. **INSURANCE—INSURABLE INTEREST—SUFFICIENCY OF COMPLAINT.**—A complaint upon an insurance policy by a mother upon the life of her son, alleging that she was the contracting party, is bad on demurrer, unless it also shows she had an insurable interest in the life of her son. (*Prudential Ins. Co. v. Hunn*, 380.)

23. **INSURANCE—INSURABLE INTEREST—WAGERING POLICY.**—In case the person insured is only nominally the contracting party, while the beneficiary has in reality procured the insurance and paid the premiums, then, in order that the transaction may be taken out of the category of wagering contracts, the beneficiary must have had an insurable interest of a pecuniary character, either present or prospective, at the time the policy had its inception. (*Prudential Ins. Co. v. Hunn*, 380.)

24. **INSURANCE—PLEADING.**—A complaint must proceed upon some definite theory, and the plaintiff, in an action on a life insurance policy, cannot claim that the complaint declares upon a policy issued to him, and also that it declares upon a policy issued to the person whose life is insured. (*Prudential Ins. Co. v. Hunn*, 380.)

25. **INSURANCE—ACCIDENT.—VOLUNTARY EXPOSURE TO UNNECESSARY DANGER**, within the meaning of an accident insurance policy, is a conscious or intentional exposure involving gross or wanton negligence on the part of the insured. (*Johnson v. London Guarantee etc. Co.*, 549.)

26. **INSURANCE—ACCIDENT—CLASSIFICATION OF RISKS.** If a person engaged as a clerk in a city, and insured against accident as such, has his home upon a farm, where he spends three

nights and one day per week, the farm being entirely carried on by others, hired by him, he is not a farmer, within the meaning of an accident insurance policy classifying the occupation of farmer as more hazardous than that of clerk. (*Johnson v. London Guarantee etc. Co.*, 549.)

27. INSURANCE—ACCIDENT—CHANGE OF OCCUPATION.—If a person while engaged as a clerk in a city takes out accident insurance as such, and has his home on a farm, the fact that his employers sell their business and he ceases to draw a salary from them does not thereby necessarily make him a farmer, so as to limit his recovery under a policy making farming a more hazardous risk than clerking, if he has the farm work carried on by his employéa. (*Johnson v. London Guarantee etc. Co.*, 549.)

See Appeal, 8; Execution, 8.

INTERSTATE COMMERCE

See Taxation, 3.

INTERVENTION.

See Negotiable Instruments, 6.

INTOXICATING LIQUORS.

See Execution, 6.

INTOXICATION.

See Homicide, 4, 5.

JUDGMENT.

1. A JUDGMENT FOR THE POSSESSION OF LAND MAY BE REVIVED by a civil action, and the judgment should be that the plaintiff have execution against the defendant and his successors. (*Haupt v. Burton*, 698.)

2. JUDGMENT—ACTION UPON—CONSTRUCTION OF STATUTE.—A state statute providing that an action on a judgment of "any court of the United States, or of any state or territory within the United States," shall be commenced within six years, is applicable to judgments rendered by the courts of the state having such a statute, where it contains no exception. (*Haupt v. Burton*, 698.)

3. JUDGMENT—REVIVOR OF—CUMULATIVE REMEDY.—The mode of enforcing a judgment by execution, obtained by leave of court after a lapse of five years from the entry of judgment, is a cumulative remedy, in no way affecting the right to revive the judgment by suit for that purpose. (*Haupt v. Burton*, 698.)

4. JUDGMENT—REVIVOR OF, BY ACTION.—A judgment may be revived by a civil action, under a statute providing that there shall be but one form of civil action, notwithstanding the existence of another statute authorizing an execution to issue, by leave of court, after five years from the entry of judgment. (*Haupt v. Burton*, 698.)

5. JUDGMENT LIEN—ENTRY OF JUDGMENT IS ESSENTIAL TO.—Under a statute declaring that lands within a county where a judgment is entered shall be bound for the satisfaction thereof from the first day of the term at which judgment is rendered, and that all judgments shall be entered in the journals of the court, a judgment must be regarded as incomplete until such entry, and cannot operate as a lien relating to the first day of the term at which it was pronounced if not entered on the journals

during such term. Within the meaning of this statute a judgment is not rendered until it is entered. (Coe v. Erb, 764.)

6. JUDGMENT.—THE ENTRY OF A JUDGMENT NUNC PRO TUNC will not be allowed to work detriment to the rights of an innocent third person acquiring interests without notice of the rendition of any judgment. Hence it will not be effective for the purpose of creating a lien against a purchaser of real property from the judgment debtor before such entry and without notice of the judgment. (Coe v. Erb, 764.)

7. JUDGMENTS—IMPEACHMENT OF.—Persons who are not parties to an action, nor privies to the judgment therein, nor entitled to manage the cause or prosecute an appeal, are allowed to impeach it whenever it is attempted to be enforced against them. (Coe v. Erb, 764.)

8. JUDGMENT ENTRY—WHO MAY COLLATERALLY ATTACK.—A purchaser of real property from a judgment debtor may, for the purpose of avoiding the lien of the judgment, collaterally attack the entry by proving, notwithstanding the date which it bears, that it was not in fact entered at such date, but at a time long subsequent thereto and after he had received his conveyance from the judgment debtor. (Coe v. Erb, 764.)

9. JUDGMENT—ENTRY OF AFTER THE ADJOURNMENT OF THE TERM.—If a judgment has not been entered by the clerk before the adjournment of the court for the term, he cannot subsequently enter it so as to make it operative as a lien of a judgment of that term as against one who has purchased real property from the judgment debtor prior to such entry. (Coe v. Erb, 764.)

10. JUDGMENTS—RENEWAL OF MORTGAGES.—Under a statute providing that "final judgments hereafter entered in any court of record in this state shall constitute a lien upon the real estate of the judgment debtor for ten years from the date of entry, provided that the plaintiff in such judgment may at any time within three years after its active energy has expired revive the judgment with like liens as in the original for a like period," a judgment revived under the statute within three years after its active energy has expired, has, upon its revival, a continuous lien from the date of its entry, and preserves its rank of priority as against all liens existing against the judgment debtor during the period of its original active energy. Hence, a sale of land under a judgment renewed after its active energy has expired divests the lien of a mortgage executed during the active energy of the judgment. (Verner v. Bookman, 870.)

11. JUDGMENTS—RENEWAL.—SCIRE FACIAS on a judgment must pursue the terms of the judgment as it is a continuance of the action, and must conform to the record. The authority to issue execution on a judgment is derived from the original judgment, which revived, continues its vitality with lien and other incidents from the time of its rendition. (Verner v. Bookman, 870.)

12. JUDGMENTS—RES JUDICATA.—A judgment of a court of competent jurisdiction directly on the point is res judicata between the same parties upon the same matter directly in question in another court, while a judgment of a court of exclusive jurisdiction directly upon the point is res judicata of the same matter between the same parties coming incidentally in question in another court for a different purpose, but the judgment of neither court is conclusive of any matter which comes collaterally in question, nor of any matter to be inferred only by argument from the judgment. (Mauldin v. City Council, 855.)

13. JUDGMENTS—RES JUDICATA.—To make out the defense of res judicata the subject matter of the judgment set up must be the same, and it must be between the same parties or their privies, and the precise point must have been determined. (Mauldin v. City Council, 855.)

14. JUDGMENTS—RES JUDICATA.—A judgment of foreclosure against a mortgagor is not res judicata as to the grantee of the mortgagee not a party to the action and holding under a deed executed before such action was commenced. (Zelgler v. Maner, 842.)

15. JUDGMENT—LIEN—FRAUDULENT CONVEYANCE.—A judgment is not a lien on real estate which the judgment debtor conveyed away, before the rendition of the judgment, to defraud his creditors, for, as between the parties to the conveyance, it is valid and binding, and no interest, legal or equitable, remains in the grantor upon which the lien can rest. (Union Nat. Bank v. Lane, 216.)

16. VOID JUDGMENT—APPEAL.—A void judgment is appealable and reversible on that ground. (Trustees v. Williams, 912.)

See Action, 2, 8; Appeal, 2; Executors and Administrators, 3; Fraudulent Conveyances, 2; Guardian and Ward, 1, 2; Infants, 8; Jurisdiction, 1; Justice of the Peace; Negotiable Instruments, 7; Scire Facias, 2, 3, 5.

JUDICIAL SALES.

JUDICIAL SALES—TITLE TO RENTS.—A deed executed pursuant to an order confirming a judicial sale takes effect by relation as of the date of the sale, and vests in the purchaser the title to the intermediate rents. (Jashenosky v. Volrath, 786.)

See Execution, 7, 10.

JURISDICTION.

1. JURISDICTION OF COMPLAINT TO REVIVE A JUDGMENT.—Under statutes providing that a civil action is commenced by filing a complaint, and that the life of a judgment is six years, a complaint to revive a judgment, filed within six years after the date thereof, confers jurisdiction, though the summons is not served until after that time has expired, and notwithstanding a statute providing that the court is deemed to have jurisdiction in a civil action from the time of the service of the summons. (Haupt v. Burton, 698.)

2. JURISDICTION—ESTATES OF DECEDENTS—EQUITY—PROBATE COURTS.—The jurisdiction of chancery over the estates of decedents, though it may have been displaced, in ordinary cases, by the probate system of courts, is not abrogated by statutes conferring jurisdiction in such cases, on probate courts. (Burns v. Smith, 653.)

3. JURISDICTION—GRANT OF—EXCLUSIVENESS.—There is nothing in the nature of jurisdiction, as applied to courts, which renders it exclusive. Jurisdiction is not a right or privilege belonging to the judge, but an authority or power to do justice in a given case, when it is brought before him; and the mere grant of jurisdiction to a particular court, without any words of exclusion, does not oust any other court of the powers which it before possessed. (Burns v. Smith, 653.)

See Appeal, 7; Corporations, 7; Private Ways, 2; Specific Performance, 3.

JURY.

See Estoppel, 1.

JURY TRIAL.

JURY TRIAL—ACTS AND EXHIBITIONS CALCULATED TO PREJUDICE THE JURY.—The fact that the plaintiff in an action to recover for personal injuries, when testifying in the presence of the jurors, was lying on a lounge attended by her physician, and that her sister was present and wept during the continuance of the evidence, does not show that the jury was improperly prejudiced, or that sympathy was raised in favor of the plaintiff to which she was not entitled. (*Selleck v. Janesville*, 906.)

See Criminal Law, 1; New Trial, 5.

JUSTICE OF THE PEACE.

1. JUDGMENTS OF JUSTICES—COLLATERAL ATTACK.—A judgment of a justice's court, regular upon its face, cannot be impeached, in a collateral proceeding, by showing that neither of the parties to the case in such court was a resident of the county where the justice resided. (*Miller v. Smith*, 583.)

2. JUDGMENTS—JUSTICES' COURTS—COLLATERAL ATTACK.—A judgment of a justice of the peace which, on its face, shows jurisdiction, imports absolute verity, when attacked collaterally. (*Miller v. Smith*, 583.)

3. JUDGMENTS—JUSTICES' COURTS—COLLATERAL ATTACK.—A judgment of a justice of the peace, regular upon its face, cannot, in a collateral proceeding, be impeached by parol. (*Miller v. Smith*, 583.)

LANDLORD AND TENANT.

1. LANDLORD AND TENANT—EVICTION.—The commencement of an action of ejectment by a landlord against his tenant is not an eviction, if the subtenants continue in undisturbed possession, and, by the advice and consent of the landlord, pay to their immediate lessor all rents accruing by the terms of their leases, though their lessor is a sublessee of the original lessor, and does not pay to the latter his rents, he taking no proceeding for their collection. (*Agar v. Winslow*, 84.)

2. LANDLORD AND TENANT—RIGHT TO TERMINATE LEASE.—DAMAGE TO A BUILDING, different from partial destruction, gives to neither the lessor nor the lessee the right to terminate the lease. (*Vincent v. Frellich*, 436.)

3. LANDLORD AND TENANT—LIABILITY OF TENANT FOR RENT AFTER OCCUPANCY AND PREVENTING NEEDFUL REPAIRS.—If one rents two brick buildings, connected by an open archway, and a fire occurs, which damages one of the buildings in a small degree, but not enough to render the buildings in their un-restored condition unfit for the purposes for which they were leased, the work required to restore them consists of "repairs," and, if the tenant continues in their occupancy, after the fire, more days than it would take to make such repairs, he is answerable for rent, especially when he interposes hindrances and obstacles to prevent the lessor from making the needful repairs, for he has no right to do this. (*Vincent v. Frellich*, 436.)

4. LANDLORD AND TENANT.—THE TERMINATION OF A LEASE is not favored when the lessor is not at fault. (*Vincent v. Frellich*, 436.)

5. LANDLORD AND TENANT—TERMINATION OF LEASE—OFFER TO ACCOMMODATE TENANT.—A lessor does not manifest any desire to terminate a lease, after a fire, by offering to the lessee another building in which he may store his property left, during the time required for making needful repairs, especially where

the offer is made to accommodate the tenant. (Vincent v. Frellich, 436.)

6. LANDLORD AND TENANT—TERMINATION OF LEASE—PUTTING UP SIGN "TO LET."—If a lessee, after a fire, abandons the premises, the act of the lessor in putting up a "to let" sign thereon, for the purpose of minimizing the damages, does not amount to a termination of the lease. (Vincent v. Frellich, 436.)

7. LANDLORD AND TENANT—ACTION FOR RENT—PLEADING—CORRECTION OF ERROR.—A petition and document annexed thereto, and forming a part thereof, are construed together. Hence, an error in a petition to recover rent, as to the rate of interest to be allowed on a contract of lease, may be corrected by reference to the contract annexed to the petition. (Vincent v. Frellich, 436.)

8. LANDLORD AND TENANT—NOTICE TO QUIT—RE-ENTRY.—If a tenant, holding over after the termination of his term, fails to pay the rent due within the time fixed by a statutory notice to quit, served upon him, his right to occupy the premises terminates, and the landlord may then peaceably re-enter and take possession, to the exclusion of the tenant. Such common-law right of re-entry is not abridged by the Michigan statutes: Howell's Annotated Statutes, sec. 8299, et seq. (Smith v. Detroit Loan etc. Assn., 575.)

9. LANDLORD AND TENANT—NOTICE TO QUIT—RE-ENTRY.—At the expiration of a notice to quit, after the termination of the term, the tenant becomes a trespasser, and the landlord may enter the premises during the tenant's absence, take possession, and remove the tenant's goods, without legal process, and the tenant has no right to re-enter. (Smith v. Detroit Loan etc. Assn., 575.)

10. LANDLORD AND TENANT—FORCIBLE ENTRY AND DETAINER.—An entry by a landlord, which has no other force than that implied in every trespass, is not within the meaning of a forcible entry and detainer statute. (Smith v. Detroit Loan etc. Assn., 575.)

11. LANDLORD AND TENANT—TERMINATION OF LEASE—RIGHT OF LANDLORD TO RE-ENTER.—A landlord who has peaceably regained possession, during the temporary absence of the tenant, who is in default in payment of rent, and on whom notice has been served to terminate the lease, and whose goods have been removed from the premises, may defend such possession against the tenant, using no more force than is necessary, and is not liable for injury inflicted upon the tenant in repelling his efforts to regain possession, unless more force is used than is necessary. (Smith v. Detroit Loan etc. Assn., 575.)

12. LANDLORD AND TENANT—GROWING CROPS—LEVY OF EXECUTION.—A landlord and tenant are tenants in common of growing crops when rent is reserved in a share thereof, and the interest of either is subject to levy and sale for the payment of the debts of the respective parties. (Sims v. Jones, 749.)

LEASE.

See Contracts, 12, 13; Cotenancy, 12; Damages, 11; Landlord and Tenant, 2, 4-7.

LEGACY.

See Adoption.

LIENS.

1. LIEN FOR THE VALUE OF THE WORK OF A HORSE OR TEAM.—If a statute provides that a person may have a lien for

personal services and services performed by his team, one who lets his horse by the month to another, to work in hauling lumber, is not entitled to any lien on the lumber hauled, the horse, by virtue of the hiring, becoming the horse of the lessee for the time being, and he is the one entitled to the lien. (McMullin v. McMullin, 510.)

See Bailment; Carriers, 2; Chattel Mortgages, 2; Equity, 1; Execution, 11, 12; Fraudulent Conveyances, 2, 8; Judgments, 5, 15; Mortgages, 1; Receivers, 7, 9; Shipping.

LIMITATIONS OF ACTIONS.

1. LIMITATIONS OF ACTIONS.—LIMITATIONS FIXED BY CONTRACT other than the period prescribed by the statute of limitations are void. (Miller v. State Ins. Co., 709.)

2. LIMITATIONS OF ACTIONS—SPECIAL LIMITATIONS BY CONTRACT.—A contract which provides that no action shall be brought thereon, or for a breach thereof, unless within a time therein specified, which is different from the time fixed by statute for bringing an action on such contract or for a breach thereof, is against public policy and cannot be enforced. (Miller v. State Ins. Co., 709.)

See Corporations, 8; Guaranty.

LIS PENDENS.

See Fraudulent Conveyances, 5.

LOTTERIES

LOTTERIES—SALE OF REAL ESTATE BY LOT.—If parties enter into a written agreement to purchase certain parcels of land at a specified price per parcel, such parcels to be distributed to the several purchasers in such manner as they may thereafter agree upon, the agreement is valid, but is rendered invalid and unenforceable as tainted with the vice of a lottery, if the purchasers and the vendor subsequently meet and agree that the parcels shall be distributed to them by lot, under the direction of the vendor, and such distribution is then made. (Emshwiler v. Tyner, 860.)

MALICE.

See Criminal Law, 2; Homicide, 11, 12.

MANDAMUS.

1. MANDAMUS—ILLEGAL EXPULSION OF MEMBER OF MUTUAL BENEFIT ASSOCIATION — RESTORATION. — Mandamus lies to restore a member of an incorporated mutual benefit association, such as a musical protective union, who has been illegally expelled therefrom, where the association has a surplus fund in its treasury, and a property right, the interest of the member in such fund, is involved. (Weiss v. Musical etc. Union, 820.)

MANSLAUGHTER.

See Trial, 9.

MARKETS.

See Municipal Corporations, 19-26.

MARRIAGE AND DIVORCE.

1. HOMESTEAD—COMPELLING SALE OF TO PAY ALIMONY.—A husband cannot be compelled to sell or encumber his homestead for the purpose of paying alimony. If an order of im-

prisonment until he pays such alimony fails to show that he can pay it otherwise than by such sale or encumbrance, he is entitled to his release on habeas corpus. (Ex parte Sylvia, 58.)

2. MARRIAGE AND DIVORCE—SECOND MARRIAGE OF EACH SPOUSE—PRESUMPTION—BURDEN—NEGATIVE EVIDENCE—PROOF OF NO DIVORCE—HEIRS.—If a man and a woman are legally married, but they separate, never living together again, and, after a long period of years, each becomes married to another person, the woman is not, upon the death of the first husband, entitled to maintain an action for a decree adjudging her to be his surviving widow, without proving that his last marriage was invalid, and, to do this, she must prove that there never had been any divorce between her and the deceased, for the presumption is, that his last marriage was legal. She is not, therefore, without proof of being the legal surviving widow, entitled to share in the distribution of her first husband's estate, though her children by him would be entitled to share in such distribution. (Hadley v. Rash, 649.)

3. MARRIAGE AND DIVORCE—SECOND MARRIAGE OF EACH SPOUSE—PRESUMPTION—BURDEN—NEGATIVE EVIDENCE—PROOF OF NO DIVORCE.—If a man and a woman are legally married, but they separate, never living together again, and, after a long period of years, each becomes married to another person, and the woman, upon the death of her first husband, brings an action for a decree adjudging her to be his surviving widow, and, as such, entitled to share in the distribution of his estate, and there is no evidence of any divorce, although the complaint alleges that no divorce dissolving the marriage relation between the plaintiff and the deceased had ever been granted, which allegation is denied by the answer, the presumption is, in the absence of any evidence to the contrary, that the marriage between the intestate and his second wife was valid, and the burden is on the plaintiff to prove that no divorce had ever been granted. (Hadley v. Rash, 649.)

4. MARRIAGE—ILLEGALITY OF—BURDEN—PROOF OF NEGATIVE.—The law requires the party who asserts the illegality of a marriage to take the burden of that issue, and prove it, though it may involve the proving of a negative. (Hadley v. Rash, 649.)

5. MARRIAGE—LEGALITY OF—PRESUMPTION.—The presumption in favor of the legality of a marriage is one of the strongest known to the law. (Hadley v. Rash, 649.)

See Deeds, 6; Elections, 5, 6, 7; Parent and Child.

MASTER AND SERVANT.

1. MASTER AND SERVANT—ELEVATOR ACCIDENT—ASSUMPTION OF RISKS.—A servant employed by the owner of a building and elevator to receive goods in the basement and to carry them to an upper floor on such elevator, but not to operate the latter, does not assume the risk of injury arising from the negligence of the master in failing to keep the safety devices on the elevator in good working order, especially when such servant has no knowledge of the danger attending the use of the elevator, and does not have charge of it at the time of the accident. (McGregor v. Reid, 832.)

2. MASTER AND SERVANT—NEGLIGENCE—QUESTION OF FACT.—Whether the owner knows of the defective condition of the safety devices upon his elevator used by his servant, and whether it had been in this defective condition long enough before an accident for him, by the exercise of ordinary care and diligence, to have discovered it, are questions of fact for the jury to determine, and

not for the court to declare as matters of law. (*McGregor v. Reid*, 832.)

3. MASTER AND SERVANT—ELEVATOR ACCIDENT—NEG-LIGENCE.—The fact that elevator cables are put in by independent contractors does not exempt the owner of the elevator from liability for injury to his servant caused by the falling of the elevator, arising from the pulling out of the cables, if the elevator is equipped with safety devices to keep it from falling and the master is guilty of negligence in not keeping them in working order. (*McGregor v. Reid*, 332.)

4. MASTER AND SERVANT—ASSUMPTION OF RISKS.—An employé does not assume all the risks of a service in which he may be engaged, but he assumes such risks only as are ordinary, obvious, or known and incidental to his employment. (*Illinois Steel Co. v. Bauman*, 316.)

5. MASTER AND SERVANT—ASSUMPTION OF RISKS.—A person employed in a steel mill to cool molten metal by pouring water upon molds, does not, as a matter of law, assume the risk of an explosion occasioned by the intentional act of another employé in purposely permitting slag to pass into the molds in large quantities known to be dangerous. (*Illinois Steel Co. v. Bauman*, 316.)

6. MASTER AND SERVANT—FELLOW-SERVANTS.—If the business of an employer is divided into separate departments, a laborer in one department is not necessarily a fellow-servant with a laborer in another and separate department, though both are servants of the same master. (*Illinois Steel Co. v. Bauman*, 316.)

7. MASTER AND SERVANT—FELLOW-SERVANTS.—In order to constitute fellow workmen fellow-servants, it is not sufficient that they are serving the same master. It is essential that they shall, at the time of the injury complained of, be actually co-operating with each other in the particular business in hand in the same line of employment, or that their duties be such as to bring them into habitual association, so that they may exercise a mutual influence upon each other, promotive of proper caution. (*Illinois Steel Co. v. Bauman*, 316.)

8. MASTER AND SERVANT—FELLOW-SERVANTS—QUESTION FOR JURY.—If servants of the same master are not stationed in the same building or within sight or hearing of each other, and the usual duties of their respective employments do not bring them into habitual or even temporary association with each other, it is properly left to the jury to decide whether or not they are fellow-servants. (*Illinois Steel Co. v. Bauman*, 316.)

9. MASTER AND SERVANT—ASSUMPTION OF RISK—OBSTRUCTING CARS LEFT ON RAILROAD TRACK WITHIN "YARD LIMITS."—A master cannot invoke the servant's assumption of usual risks, where he has not complied with the obligations resting on him to secure the safety of the servant in performing his duties. Hence, if cars have been switched, at night, onto the main track of a railroad, though within the "yard limits," and an extra freight train, with an insufficient number of air-brake cars, is dispatched to pass through the yard at night, with no preceding notice of the obstruction blocking the way, and no warning given of it, and injury is caused to a fireman, who jumps from the engine a moment before a collision to avoid it, the company cannot invoke the defense, in an action for such injury, that the accident was one of the risks assumed incident to the fireman's employment. (*McGraw v. Texas etc. R. R. Co.*, 450.)

10. MASTER AND SERVANT—RISKS ASSUMED.—An employé of mature years and of ordinary mental capacity and intelli-

gence is presumed to know, appreciate, and assume the ordinary risks of injury from the machinery and appliances with and about which he is working. (Jones v. Mfg. and Investment Co., 535.)

11. MASTER AND SERVANT.—A servant injured through the slipping of a stick of wood from hooks or arms on which it was placed, to be carried by an endless chain, cannot recover therefor from his employer, if the danger from which he suffered was open to ordinary observation, and he, nevertheless, placed himself in a position where such slipping would probably cause an injury. (Jones v. Mfg. and Investment Co., 535.)

12. MASTER AND SERVANT.—It is not necessary for a master to caution a servant of ordinary intelligence and mental capacity respecting the risks of injury from machinery with or about which he works, if such risks are apparent to ordinary observation. If the servant neglects to observe, and therefore remains in ignorance of the risks, he cannot thereby create a liability against his master when injured through his disregard of obvious danger. (Jones v. Mfg. and Investment Co., 535.)

13. MASTER AND SERVANT.—The fact that machinery with or about which an employé works might be made less dangerous to him does not expose his employer to liability for injury through disregarding such danger, if it is obvious to ordinary observation. (Jones v. Mfg. and Investment Co., 535.)

See Railroad Companies, 9-15.

MECHANICS' LIENS.

1. MECHANICS' LIEN—BUILDING LEFT UNCOMPLETED.—A statute giving a lien upon a building, and the land upon which it stands for labor done or materials furnished creates a lien, where the foundation of the building is commenced, but not completed, and the work is then abandoned. The reason for the statute applies just as strongly to a building partially completed as to one wholly finished. (Baker v. Waldron, 483.)

2. MECHANIC'S LIEN—OWNER OF BUILDING—WHEN CONSIDERED AS ASSENTING TO.—If a contract for the purchase of land requires that the purchaser shall construct a building thereon, the landowner must be considered as assenting to the purchasing of material and the hiring of labor for the purposes of the contemplated building, and hence his interest in the land is subject to a lien for labor done and materials furnished for such building under such contract with the purchaser. (Baker v. Waldron, 483.)

3. MECHANIC'S LIEN—INTEREST OF PURCHASER WITHOUT A CONVEYANCE OF THE TITLE MUST BE TREATED AS REALTY.—If the owner of land contracts to sell it, and provides that the purchaser shall erect a building thereon, and the statute creates a lien on any interest which the owner has, the owner's consent to the erection of the building estops him from denying that the purchaser is the owner, and an attachment against the latter is properly levied upon the land as real estate instead of against the materials and the land as personal property. (Baker v. Waldron, 483.)

MINES AND MINING.

1. MINES—MINING COMPANIES—HOLDER OF SHARES, WHO IS—LIABILITY FOR UNPAID STOCK.—If mining stock is issued to a person having knowledge of all the surrounding facts, he becomes its holder and cannot escape his statutory, individual liability to creditors of the corporation, for an unpaid balance, on the ground that he did not sign the stock subscription list; and especially is this true where he accepted the stock issued to him with

knowledge that it was issued for a mine worth only about one and two-thirds per cent of the total stock subscribed. (Kelly v. Clark, 668.)

2. MINES—MINING COMPANIES—FRAUD UPON CREDITORS—ILLUSTRATION—LIABILITY FOR UNPAID STOCK.—Notwithstanding a statute which enables the trustees of a corporation to purchase mines necessary for their business, and to issue stock to the amount of the value thereof, which stock so issued shall be declared and taken to be the full paid stock, and not liable to any further call, if they purchase a mine which the stockholders know is worth not over one hundred and twenty-five thousand dollars, and pay for it in stock whose par value is seven million five hundred thousand dollars, which stock the shareholders, with full knowledge of the facts, repurchase at two and one-half per cent of its par value, the transaction is fraudulent as to a creditor, and the stock will be treated as unpaid to the extent of the difference between the actual value of the mine and the nominal value of the stock, where the constitution prohibits the issue of stock for property not actually received, and declares void all fictitious increase of stock, and where the statute makes all the stockholders individually liable to creditors, to the amount of their unpaid stock, for all acts of the company, until the whole amount of stock subscribed for shall have been paid. (Kelly v. Clark, 668.)

3. MINES—MINING COMPANIES—LIABILITY FOR UNPAID STOCK.—The doctrine that the shareholders of a corporation are liable for unpaid subscriptions, when stock has been issued for property at an overvaluation, is applicable to mining corporations as well as to others. (Kelly v. Clark, 668.)

MISTAKE OF LAW.

See Payment, 4.

MOB LAW.

See Municipal Corporations, 1, 2, 2.

MONOPOLY.

See Contracts, 2.

MORTGAGES.

1. RAILWAY MORTGAGES—VALIDITY OF—PRIOR LIENS.—Under the laws of Pennsylvania, a railway mortgage, given after debts to "contractors, laborers, and workmen" have been incurred, is illegal and void only as against such persons. As against all other persons, and as between the parties to it, the mortgage is valid. (Fidelity etc. Co. v. Schenley etc. Ry. Co., 815.)

2. MORTGAGES—RECORD OF, AS NOTICE—RECITALS IN SATISFIED MORTGAGE AS NOTICE.—A mortgagee is not bound to go back over the records of satisfied mortgages to look for recitals therein; and, as they do not affect him, it is unnecessary to consider what is their effect, if any, where the mortgagee has had a clear search against every one who appears, at any time, to have held the title. (Pyles v. Brown, 794.)

3. MORTGAGES.—THE MERE PAROL DEPOSIT OF TITLE DEEDS as security for a debt does create an equitable mortgage on land. (Parker v. Carolina Sav. Bank, 888.)

4. MORTGAGES—JUNIOR AND SENIOR—COMPELLING ASSIGNMENT.—A judgment creditor of a mortgagor, having equities at least equal to those of the mortgagee, cannot be compelled to assign to the latter an older mortgage executed by their common

debtor, and to which the judgment creditor has acquired title for the express purpose of protecting his junior judgment lien. (*Tillman v. Stewart*, 192.)

5. **MORTGAGES—JUNIOR AND SENIOR ASSIGNMENT.**—The rule under which the holder of a junior mortgage is entitled to tender to the holder of a senior mortgage the amount due thereon and demand an assignment thereof, is not applicable unless the junior mortgagee shows that such an assignment is necessary to his protection. (*Tillman v. Stewart*, 192.)

See Chattel Mortgages; Corporations, 15; Cotenancy, 10-13; Equity, 1; Fixtures, 3; Judgment, 10-14; Suretyship, 2, 8; Usury, 2.

MUNICIPAL CORPORATIONS.

1. **CONSTITUTIONAL LAW—MOB LAW—LIABILITY.**—A statute providing that cities and counties shall be liable to an action for three-fourths of the damages sustained by a property-owner by reason of the destruction of, or injury to, property real or personal, not in transit, by any mob or rioters composed of twelve or more persons, is constitutional and valid as a police enactment or regulation. (*Chicago v. Manhattan Cement Co.*, 321.)

2. **CONSTITUTIONAL LAW—MOB LAW.**—A statute providing that cities and counties may be held liable for damages sustained by a property-owner by reason of the destruction of, or injury to, property real or personal, not in transit, by any mob, is constitutional and valid, and does not create a debt against cities or counties, nor amount to a donation to private corporations, but merely gives the property-owner a right of recovery upon proving all the facts prescribed by the act as necessary to fix the liability of the city or county. (*Chicago v. Manhattan Cement Co.*, 321.)

3. **CONSTITUTIONAL LAW—MOB LAW—CONSTITUTIONAL LIMIT OF INDEBTEDNESS.**—Although a city is indebted beyond the constitutional limit, that fact has no bearing upon the constitutionality, nor does it affect the validity, of a statute making such city liable for injury to, or the destruction of, property within its limits by mobs or rioters. (*Chicago v. Manhattan Cement Co.*, 321.)

4. **MUNICIPAL CORPORATIONS CAN EXERCISE ONLY SUCH POWERS** as are conferred upon them by their charters. All persons dealing with them must see that they have power to perform the proposed act. (*Danville v. Danville Water Co.*, 304.)

5. **MUNICIPAL CORPORATIONS—POWER TO FIX WATER RATES.**—A statute empowering a city to authorize a private corporation to construct waterworks, and to contract for a supply of water for a period not to exceed thirty years, gives no power to the city to bind itself by fixing a rate which it must pay for such supply for such entire period, and an ordinance fixing the rate for the entire thirty years is void. (*Danville v. Danville Water Co.*, 304.)

6. **MUNICIPAL CORPORATIONS—ORDINANCES—WHEN UNREASONABLE.**—A municipal ordinance which prohibits dealers in fruit, berries, or vegetables from covering the boxes or baskets containing them with colored netting or other material having a tendency to conceal the true color or quality of the goods offered for sale, is void as a vexatious and unreasonable interference, with, and restriction upon, the rights of dealers in certain articles of trade and commerce. (*Frost v. Chicago*, 301.)

7. **MUNICIPAL CORPORATIONS.—THE POWERS AND OBLIGATIONS** of municipal corporations are twofold in character—those which are of a public nature, and those which are of a private nature. (*New Orleans v. Kerr*, 442.)

8. MUNICIPAL CORPORATIONS—OBLIGATIONS OF A PUBLIC NATURE.—A municipal corporation, as to the public character of its powers and obligations, represents the state, discharging duties incumbent on the state. Hence, where it acts as the agent of the state, it becomes the representative of sovereignty, and is not answerable for the nonfeasance or malfeasance of its officers. (New Orleans v. Kerr, 442.)

9. MUNICIPAL CORPORATIONS—OBLIGATIONS OF A PRIVATE NATURE.—A municipal corporation, with respect to the private character of its powers and obligations, represents the pecuniary and proprietary interests of individuals, and the rules which govern the responsibility of individuals are properly applicable. (New Orleans v. Kerr, 442.)

10. MUNICIPAL CORPORATIONS—LIABILITY FOR BREACH OF CONTRACT.—If a city, having the right to impound cattle, grants such right by contract, stipulating therein, as part of the contract, that it will furnish police protection to enable its contractor to perform his duty and to carry out the contract, but fails to do so, it is answerable as for breach of the contract. (New Orleans v. Kerr, 442.)

11. MUNICIPAL CORPORATIONS—MALFEASANCE OF OFFICERS—LIABILITY.—A municipal corporation is not answerable, in an action for damages, arising *ex contractu*, for the illegal arrest and imprisonment of the plaintiff, by the police, under the direction of the city officers. Such an act is a tort, and the action based thereon arises *ex delicto*. (New Orleans v. Kerr, 442.)

12. MUNICIPAL CORPORATIONS—ACTION UPON CONTRACT—CROSS-ACTION.—If a city sues one having a contract with it for money due upon the contract, the defendant may bring a cross-action, and, so far as his claim is one sounding in damages arising *ex contractu*, he is entitled to be reimbursed for the loss he has sustained and the profit of which he has been deprived, to the extent that the proof substantiates the same. That is to say, he may recover such damages as were contemplated or may reasonably be supposed to have entered into the contemplation of the parties at the time of the contract. (New Orleans v. Kerr, 442.)

13. MUNICIPAL CORPORATIONS—LIABILITY FOR DEBTS. A city is answerable for debts incurred through its officers, acting within the scope of their authority and the line of their duty. (New Orleans v. Kerr, 442.)

14. MUNICIPAL CORPORATIONS—LIABILITY FOR BREACH OF CONTRACT—ELEMENTS OF DAMAGE.—If a city lets the privilege, for a consideration, of impounding cattle, and agrees to furnish whatever police protection is required to carry out the contract, but fails to do so, and by reason of such failure stock, while being driven to the pound, are forcibly taken from the contractor's possession by mobs and lawless people, the city becomes liable for breach of its contract obligation to furnish the protection necessary in the premises. It is also answerable for the rent of pounds, paid by the contractor, but which pounds he could not use, because of a lack of police protection, and for compensation paid by the contractor to employes, drivers, and poundkeepers, during the time that he was without police protection. (New Orleans v. Kerr, 442.)

15. MUNICIPAL CORPORATIONS—DIVISION OF LIABILITY.—If a part of a town is set off and incorporated into a new town, the old town, though shorn of that part of its territory, still retains all the property, powers, and rights, and remains subject to all the obligations of the old town, unless it is otherwise provided in the

act. If it is provided that the town debt shall be borne by the towns in proportion to the valuation of taxable property in each, it is the duty, primarily, of the old town to liquidate the liability of the original town, and the creditors must look to it alone, the new town being liable, after demand, to refund its proportion. (South Portland v. Cape Elizabeth, 502.)

16. MUNICIPAL CORPORATIONS—DIVISION OF—ASSETS—PUBLIC PROPERTY, WHETHER TO BE TREATED AS.—Where, upon division of one town into two, the statute provides that the town debt shall be borne by such towns in proportion to the valuation of taxable property in each, neither is entitled, on ascertaining its liability, to have a setoff in its favor for the value of schoolhouses and like property situate in, and retained by, the other town. Property not available for the payment of debts cannot be considered as offsetting or reducing gross liabilities. (South Portland v. Cape Elizabeth, 502.)

17. MUNICIPALITIES—DIVISION OF PROPERTY BY THE LEGISLATURE—EQUITABLE ACCOUNTING—LIABILITY TO. If the legislature, in authorizing the division of one town into two, declares that public property situate in each town shall belong thereto, the courts have no power to revise this division. Hence, one of the towns cannot be compelled to go into an equitable accounting in regard to public property retained by it in excess of the property of like character remaining to the other town. (South Portland v. Cape Elizabeth, 502.)

18. MUNICIPAL CORPORATIONS—DIVISION OF—DELAYING ACCOUNTING AS TO LIABILITIES.—If a statute provides for the creating of two towns out of one, and that each shall be liable for the town's indebtedness in proportion to the taxable property remaining within its limits, the ascertaining of the liability of the new town for its share of the indebtedness need not be postponed, at its request, until all available assets shall be realized and all debts of the old town paid. (South Portland v. Cape Elizabeth, 502.)

19. MUNICIPAL CORPORATIONS—ORDINANCES—POWER TO REGULATE SALE OF FOOD COMMODITIES—PLACE.—A municipal corporation has power to fix by ordinance the places at which food commodities, in quantities adapted for the daily wants of the community, may be sold, and such sales may be restricted to the markets designated by the city council. (State v. Davidson, 478.)

20. MUNICIPAL CORPORATIONS—ORDINANCES VALID IN PART AND VOID IN PART—SEPARATE CONSIDERATION OF. An ordinance, like a statute, may be valid in part and void as to the residue, and the valid part may be considered separately from the other. (State v. Davidson, 478.)

21. MUNICIPAL CORPORATIONS—ORDINANCES—SALE OF PERISHABLE FOOD COMMODITIES AT RAILROAD DEPOTS MAY BE PROHIBITED.—That portion of an ordinance which prohibits the sale of onions, cabbages, potatoes and other perishable food commodities in the railroad depots or landings of a city is valid, whatever may be the validity of other prohibitions of the ordinance. (State v. Davidson, 478.)

22. MUNICIPAL CORPORATIONS—ORDINANCES—VALIDITY OF—EXTENT OF INQUIRY BY THE COURTS.—Courts will not inquire into the motives which may have prompted an ordinance. The only inquiry is whether its declared purpose is lawful, and whether the ordinance is restricted within the scope of that purpose. (State v. Davidson, 478.)

23. MUNICIPAL CORPORATIONS—ORDINANCES—SALE OF PERISHABLE FOOD COMMODITIES AT RAILROAD DEPOTS — OPPRESSIVENESS OR UNREASONABLENESS — POLICE POWER.—An ordinance to prohibit the sale of onions, cabbages, potatoes, and other perishable commodities of food at landings or railroad depots in a city is not an oppressive or unreasonable municipal regulation, but a mere exercise of the police power, presenting no conflict with the constitution, state or federal. (State v. Davidson, 478.)

24. A MUNICIPAL CORPORATION IS ANSWERABLE for injuries caused by the unsafe condition of a public way under its control, which it has suffered to remain, after notice, when the defect arose in the execution of a plan adopted by the corporation for local improvement. (Circleville v. Sohn, 777.)

25. MUNICIPAL CORPORATIONS—INDEBTEDNESS.—If the governing body of a municipality is authorized by vote of the people, and only thereby to incur a debt for a particular purpose, such purpose must be strictly complied with, and the terms of the authority granted be strictly and fully pursued. (Tukey v. Omaha, 711.)

26. MUNICIPAL CORPORATIONS—INCURRING UNAUTHORIZED DEBT—BONDS.—If a proposition contemplating the purchase of land and the issue of bonds to secure a site for a market place and the erection thereon of a market house is adopted by vote by the electors of a city, an attempt by the municipal authorities to erect a market house on land already belonging to the city, and used for another purpose, is a substantial departure from the terms of the vote and unauthorized. (Tukey v. Omaha, 711.)

27. MUNICIPAL CORPORATIONS—UNLAWFUL DISPOSITION OF PUBLIC MONEY—INJUNCTION BY TAXPAYER.—A resident taxpayer may maintain suit to restrain the municipal authorities of a city from illegally disposing of the moneys of the municipality, or the illegal creation of a debt which he, in common with other property owners, may otherwise be compelled to pay by taxation. (Tukey v. Omaha, 711.)

See Private Ways, 4; Statutes, 8-10.

MURDER.

See Homicide.

MUNICIPAL BENEFIT SOCIETIES.

See Associations; Mandamus.

NATIONAL BANKS.

See Banks and Banking, 1, 2.

NATURALIZATION.

See Citizenship; Elections, 6, 7, 8.

NEGLIGENCE.

1. NEGLIGENCE.—INSPECTION OF ELEVATORS by city officers and indemnity companies at certain times does not, as a matter of law, exempt the owners of such elevators from all liability for the defective condition of the safety devices on them, especially when such devices are not tested as to their condition at any time. (McGregor v. Reid, 332.)

2. NEGLIGENCE—ELEVATOR ACCIDENT — PROXIMATE CAUSE.—If the pulling out of elevator cables and the defective condition of a safety device operate together, and neither alone would

have caused the elevator to fall, and if the pulling out of the cables is attributable to the negligence of a third person, and still the elevator would not have fallen without the negligence of its owner in regard to keeping the safety device in working order, the latter is liable. (*McGregor v. Reid*, 832.)

3. **NEGLIGENCE—PLEADING.**—A complaint based upon negligence must state facts showing a specific duty owing to the party complaining, and a wrongful breach of such duty by the defendant. (*Cleveland etc. Ry. Co. v. Huddleston*, 385.)

4. **NEGLIGENCE—PRESUMPTION.**—If acts complained of were done by a party on his own land, and in the use of his own property, the presumption is that they were rightfully, and not wrongfully or negligently, done. (*Cleveland etc. Ry. Co. v. Huddleston*, 385.)

5. **NEGLIGENCE—DEATH BY WRONGFUL ACT—PLEADING.**—If in an action to recover for a death caused by a wrongful act, the complaint discloses that the deceased left a widow, or next of kin as minor children, in whose favor the law devolved upon him a legal obligation for their support, it is sufficient to raise a legal presumption of pecuniary loss, caused by his death, and it is not necessary to plead facts showing special damage. (*Omaha etc. R. R. Co. v. Crow*, 741.)

6. **NEGLIGENCE—PLEADING AND PROOF.**—A general averment of negligence is sufficient unless attacked by motion, and plaintiff is entitled to prove every act of negligence falling within such averment. (*Omaha etc. R. R. Co. v. Crow*, 741.)

7. **NEGLIGENCE—PLEADING.**—If a complaint is general in its allegations of negligence, and the defendant desires to know upon what particular acts of negligence the plaintiff relies, he must move to have the complaint made more definite and certain, and failing in this, the plaintiff may introduce any competent evidence tending to show the negligence of the defendant. (*Johnson v. Southern Ry. Co.*, 849.)

8. **NEGLIGENCE—ORDINARY CARE—WHAT OTHERS MAY BE ACCUSTOMED TO DO.**—What persons customarily do under certain circumstances is usually a test of ordinary care, but to this rule there is the familiar exception, that where the doing of an act is so obviously dangerous as to constitute negligence as a matter of law, as going upon railway tracks, or walking thereon without looking and listening, or jumping off of a moving train, or the doing of any other of the many things dangerous in themselves, then it must be deemed inconsistent with ordinary care, regardless of custom. (*Douglas v. Chicago etc. Ry. Co.*, 930.)

See Agency, 5; Carriers, 1; Damages, 3; Master and Servant, 2, 3; Railroad Companies, 4, 5, 6, 8, 13, 18, 19; Receivers, 2-5; Trial, 5; Waters and Watercourses, 13.

NEGOTIABLE INSTRUMENTS.

1. **ACCEPTANCE OF A PROMISSORY NOTE—WHAT IS NOT.**—If one offers a promissory note to another in consideration of pre-existing indebtedness, which the latter refuses to accept, and the note is left in his custody and is indorsed by him to his attorney for the purpose of being surrendered to the maker, such note does not become operative, and there is no necessity for the person named as payee of rescinding the note before bringing an action based upon such pre-existing indebtedness. (*Whyte v. Rosenkrantz*, 90.)

2. NEGOTIABLE INSTRUMENTS—INDORSEMENT IN BLANK—WRITING ASSIGNMENT OVER—RIGHT OF HOLDER FOR COLLECTION.—One who holds a promissory note for collection, with the payee's indorsement in blank, has authority to write over the indorsement, an assignment of the note to himself, and such indorsement places the legal title to the note in the indorsee. (Illinois Conference etc. v. Plagge, 252.)

3. NEGOTIABLE INSTRUMENTS—DEFENSE THAT OTHER THAN PLAINTIFF HAS AN INTEREST.—It is no defense to an action on a promissory note, by the holder of the legal title to it, that one, not the party plaintiff, is entitled to the proceeds of the collection of the note, which has been assigned to the plaintiff. (Illinois Conference etc. v. Plagge, 252.)

4. NEGOTIABLE INSTRUMENTS—HOLDER'S RIGHT OF ACTION—ABATEMENT—SURVIVORSHIP.—An action upon a promissory note, brought by the holder of the legal title to it, does not abate upon the death of the plaintiff, but survives to his administrator. (Illinois Conference etc. v. Plagge, 252.)

5. NEGOTIABLE INSTRUMENTS—ACTION—HOLDER NEED NOT DISCLOSE INTEREST IN OTHERS.—When the holder of the legal title to a promissory note brings suit upon it, he need not disclose whether others have an equitable or beneficial interest in the proceeds of its collection. (Illinois Conference etc. v. Plagge, 252.)

6. NEGOTIABLE INSTRUMENTS—ACTION—RIGHT TO INTERVENE.—Persons who have a beneficial interest in a promissory note may intervene in a suit brought thereon by the holder of the legal title, and their rights will be protected, but, in the absence of such interference, the defendants have no concern therewith. (Illinois Conference etc. v. Plagge, 252.)

7. NEGOTIABLE INSTRUMENTS—ACTION—JUDGMENT IN FAVOR OF HOLDER AS A DEFENSE AGAINST THE PAYEE. A judgment in favor of one who has possession of a promissory note, and legal title thereto, will constitute a legal defense against the payee of the note, though possession and title are held merely for the purpose of accomplishing the collection of the paper. (Illinois Conference etc. v. Plagge, 252.)

8. NEGOTIABLE INSTRUMENTS BECOMING DUE ON DEATH OF MAKER ARE NOT OF A TESTAMENTARY CHARACTER.—A written promise to pay a fixed sum of money to the order of a person named, on or before a certain day, is a promissory note, and not a testamentary instrument requiring the formalities of a will, although it provides that it shall become due in case of the death of the maker before the maturity thereof. (Beatty v. Western College, 242.)

9. NEGOTIABLE INSTRUMENTS—STATEMENT OF CONSIDERATION OR OBJECT OF PAYMENT—NEGOTIABILITY. The negotiable character of a promissory note is not affected by a statement in the instrument of the consideration upon which it is founded, or of the object for which the money is to be expended. (Beatty v. Western College, 242.)

10. NEGOTIABLE INSTRUMENTS—PAROL PROOF OF CONSIDERATION.—Whether a promissory note, upon its face, imports a consideration or not, parol evidence is admissible to show the facts in regard to the consideration. (Beatty v. Western College, 242.)

11. NEGOTIABLE INSTRUMENTS—INTEREST DUE AT TIME OF PURCHASE.—A bona fide purchaser for value of negotia-

ble paper before maturity is within the protection of the law merchant, although interest on the note purchased is due and unpaid at the time of the purchase. (*Cooper v. Hocking Val. Nat. Bank*, 365.)

12. **NEGOTIABLE INSTRUMENTS—NOTE GIVEN IN SETTLEMENT OF CRIME.**—A note given in settlement of a charge of embezzlement is valid only to the extent of the amount embezzled. (*Beath v. Chapoton*, 589.)

13. **NEGOTIABLE INSTRUMENTS—FRAUD IN INDORSEMENT.**—If an indorsement on a note given in settlement of a charge of embezzlement is induced, through the maker's representation that the note is given for the purchase of an interest by him in the payee's business, the indorser is not liable to such payee, if the latter knew of the false representations inducing the indorsement. (*Beath v. Chapoton*, 589.)

14. **NEGOTIABLE INSTRUMENTS—REGULAR INDORSEMENT—WHAT IS.**—A regular indorsement is where a payee, acquiring a note from the maker, indorses it to convey title to another, who, in turn, transfers the note by placing his name upon it. (*Metropolitan Bank v. Muller*, 475.)

15. **NEGOTIABLE INSTRUMENTS—IRREGULAR INDORSERS—WHO ARE—SURETIES.**—If a person makes a note to his own order and indorses it, and it is then indorsed by others for the accommodation of the maker, who hands it to his creditor, the latter having full knowledge of all the facts, such other persons are irregular indorsers, and are regarded as sureties for the maker. (*Metropolitan Bank v. Muller*, 475.)

16. **NEGOTIABLE INSTRUMENTS—ASSIGNMENT.**—If a negotiable note is assigned by a writing separate and distinct from the note itself, the title is thereby transferred, but the assignee is not entitled to protection as a bona fide purchaser of negotiable paper transferred before due. (*Gaylord v. Nebraska Sav. etc. Bank*, 705.)

17. **NEGOTIABLE INSTRUMENTS—SPECIAL INDORSEMENT.**—An indorsement of a note in the words, "pay to the order of ———, Mary W. Gaylord," the signer being the payee of the note, is not a general indorsement, and does not transfer the legal title by mere delivery of the note. (*Gaylord v. Nebraska Sav. etc. Bank*, 705.)

See *Banks and Banking*, 3, 4, 5; *Checks*; *Duress*, 2; *Evidence*, 7; *Gifts*, 1, 2; *Partnership*, 2, 3; *Payment*, 1, 2.

NEW TRIAL.

1. **NEW TRIAL.—NEWLY-DISCOVERED EVIDENCE**, if entirely of an impeaching character, is not necessarily ground for a new trial. (*Savannah etc. Ry. Co. v. Godkin*, 187.)

2. **NEW TRIAL—EXCESSIVE VERDICT.**—If, upon motion for a new trial, the plaintiff, who has recovered a verdict for personal injuries, voluntarily reduces it by striking off a part, and the court thereupon denies the motion, such ruling cannot be disturbed on appeal when it does not appear that the action of the court was caused by the striking off of part of the verdict which does not appear so excessive as to lead to the inference that it was influenced by bias, prejudice, or passion. (*Savannah etc. Ry. Co. v. Godkin*, 187.)

3. **NEW TRIAL.—FAILURE TO FIND MATERIAL FACTS** is construed as a finding against the party upon whom rests the burden of proving them, and is no ground for a *venire de novo*. (*Meyer v. Green*, 344.)

4. CRIMINAL LAW—NEW TRIAL.—Although the verdict is not sustained by the evidence in a criminal case, this is not cause for a new trial. (*Huffman v. State*, 368.)

5. NEW TRIAL ON GROUND THAT ONE OF THE JURY WAS A MINOR.—It is too late, after the verdict in a criminal case, to urge the disqualification of a juror, as ground for a new trial, where a full opportunity was afforded to make the objection when the juror was examined on his voir dire, and this rule applies where one of the jurors was a minor, although neither the accused nor his counsel knew of his minority at the time he was tendered, and did not, therefore, interrogate him on the point. (*State v. Button*, 470.)

See Appeal, 5-9.

NOTICE.

See Agency, 2, 8; Deeds, 1, 2; Insurance, 7; Landlord and Tenant, 8, 9; Mortgages, 2.

OBSTRUCTIONS.

See Highways, 4.

OFFICERS.

1. OFFICERS MUST NOT SURRENDER PUBLIC MONEY OR RIGHTS.—A public officer, acting as a trustee, has no right to give away public money, and no right to surrender to a committee, or anyone else, the rights of those for whom he acts. (*Adams v. Brennan*, 222.)

2. PUBLIC OFFICERS, WHEN LIABLE FOR MISCONDUCT IN THE PERFORMANCE OF QUASI-JUDICIAL DUTIES.—If a member of an auditing board of a county, in passing on a claim which the board has the right to audit, acts negligently or corruptly, for that there is no liability; but if there is fraud in contracting the indebtedness itself, because not authorized by law, or intentionally excessive, or fraudulently contracted for any other cause, liability attaches from the first act of infidelity to the public trust for the actual damage flowing therefrom. Hence, the members of a county board of supervisors cannot shield themselves from liability on the ground that they acted judicially as members of its auditing board in allowing claims and converting to their own use moneys for improving roads having no existence, for fraudulent or excessive charges pursuant to a previously formed fraudulent scheme, for their private expenses, for compensation allowed to officers in excess of that provided by law and in direct violation of the statute, and for claims which the board was prohibited from considering, because not properly made out, verified, and filed. Members of such board are not, however, personally liable for allowing claims which were legitimate county expenses, though in excess of the constitutional limitation, if a tax levy was made and the claims paid therefrom. (*Land, Log etc. Co. v. McIntyre*, 925.)

3. PUBLIC OFFICERS, SUCH AS SUPERVISORS OF A COUNTY, are personally liable to it for moneys which they have fraudulently misapplied, misappropriated, or lost. (*Land, Log etc. Co. v. McIntyre*, 925.)

4. PUBLIC OFFICER—REMEDY AT LAW, WHEN INSUFFICIENT.—A statute giving a person who is aggrieved by an officer's demanding and receiving illegal fees a remedy to recover them back with a penalty, applies only in favor of the person directly aggrieved, and hence does not prevent the maintenance of a suit in equity brought by a private citizen in behalf of the county to charge

a public officer as trustee for moneys illegally exacted and received by him. (Land, Log etc. Co. v. McIntyre, 915.)

5. PUBLIC OFFICER—SUIT TO RECOVER MONEYS RECEIVED BY ON FORBIDDEN CONTRACT.—If a statute forbids a county supervisor from being a party or in any manner interested in a contract with the county for the purchase of any article whatever, and provides that all contracts in violation of the prohibition shall be void, it is as applicable to executed as to executory contracts, and if a supervisor has dealt with the county and has furnished it labor and supplies and received compensation therefor, it has been received without the support of any valid contract, express or implied, and he may be compelled in equity to refund the moneys received without the county's accounting for the value of the labor and supplies actually furnished and retained. One who does an act forbidden by law cannot acquire any rights therefrom. (Land, Log etc. Co. v. McIntyre, 915.)

6. PUBLIC OFFICERS—CONTRACTS OF, WHEN VOID.—A statute which declares all contracts for furnishing labor or supplies to a county, to which one of its supervisors is a party, or in which he is interested, shall be void, does not make the contracts voidable only, but absolutely void, and hence, though such contracts are fully executed, he has no right to retain the moneys received thereunder. (Land, Log etc. Co. v. McIntyre, 915.)

See Municipal Corporations, 11.

PARDON.

PARDON—EFFECT OF IN THE EVENT OF THE COMMISSION OF A SECOND OFFENSE.—If a second offense is by statute more heavily punishable than the first, the pardon of the first obliterates it. It cannot be considered in the determination of the punishment for the second, and if the statute provides that every person who has been twice convicted, sentenced, and imprisoned for a felony shall be deemed an habitual criminal and shall be detained in the penitentiary for life, an offense which has been unconditionally pardoned cannot be considered in determining whether the offender is an habitual criminal within the meaning of this statute. (State v. Martin, 762.)

PARENT AND CHILD.

BASTARDS—ADULTERINE—LEGITIMATION OF.—A statute declaring that when a man has by a woman one or more children, and afterward intermarries with her, such issue, if acknowledged by him as his child or children, shall be deemed legitimate, and the issue of persons whose marriage is null in law shall nevertheless be legitimate, authorizes the legitimation of a child by its father, though when it was begotten and born, the mother was the wife of another, and therefore incapable of contracting marriage with the father, if subsequently she was divorced from her husband and then married the father of the child, who, on his part, acknowledged it as his child. (Ives v. McNicoll, 780.)

See Adoption; Citizenship, 4; Cotenancy, 4; Elections, 8; Seduction, 5-7.

PARTIES.

PRACTICE—SUIT BY ONE PERSON FOR THE BENEFIT OF MANY.—Where thirty-one persons enter into a written agreement to purchase and sell a contract of land, and for that purpose to contribute certain sums at times specified, one of them cannot sue for the benefit of all to recover a sum due from one of the members

law entitles such child to the moneys so paid, they cannot be recovered from him. (*Phillips v. McConica*, 753.)

See Attachment, 4.

PENALTY.

See Damages, 5-8.

PHYSICIANS AND SURGEONS.

See Contracts, 8; Damages, 1.

PLEADING.

1. PLEADING—DISREGARDING SURPLUS ALLEGATIONS. If a plaintiff avers more than is necessary, and fails to sustain immaterial and redundant averments, but does prove all the material facts upon which a right to relief is based, and no motion to correct the pleading has been made, it will be treated as sufficient, and the surplus allegations disregarded. (*Kelly v. Clark*, 668.)

2. PRACTICE.—AN AMENDMENT OF AN ANSWER MAY BE PERMITTED after a motion has been made by the plaintiff for judgment on the pleadings. (*Matteucci v. Whelan*, 60.)

3. PLEADING.—A DEMURRER TO SPECIAL PLEAS which admit part of the sum claimed as an entire indebtedness cannot be carried back to an alleged defect in the complaint, which would affect the indebtedness admitted as well as denied. (*Danville v. Danville Water Co.*, 304.)

4. PLEADING—SUFFICIENCY OF ANSWER.—Each paragraph of an answer must respond to the entire complaint, or to so much of the cause of action as it purports to answer, and if it purports to be in bar of the entire cause of action stated in the complaint, but answers only a part thereof, it is insufficient and subject to demurrer. (*Emswiler v. Tyner*, 360.)

See Adverse Possession; Corporations, 6; Easements, 2; Infants, 7; 8; Injunctions, 4; Insurance, 21, 22, 24; Landlord and Tenant, 7; Negligence, 3, 5, 6, 7; Railroad Companies, 6; Usury; Waters and Watercourses, 10, 12.

POLICE POWER.

POLICE POWER—UPON WHAT OPERATES.—The police power, when the public health, public morals, and the public safety or other public purpose is concerned, operates directly upon the person or property of the citizen so as to require that such person or property shall not prove injurious to other citizens, and it may be invoked although the first named citizens are not at fault. (*Mauldin v. City Council*, 854.)

See Municipal Corporations, 23.

POSSESSION.

See Cotenancy, 6; Execution, 7.

PRESCRIPTION.

See Easement, 1, 2.

PRESUMPTIONS.

See Appeal, 1; Carriers, 1; Damages, 7; Elections, 10; Execution, 1; Homicide, 11; Marriage and Divorce, 2, 3, 5; Negligence, 4; Partnership, 1.

PRINCIPAL AND AGENT.

See Agency.

PRIVATE WAYS.

1. EASEMENT OF TRAVEL IN PRIVATE ALLEY—ERECTION OF LIGHT WIRES AND POLES—ADDITIONAL SERVITUDE.—If an easement of travel only exists over a private alley, the fee of which is in the abutting owners, the erection of electric light wires and poles therein and over the fee of an abutting owner without his consent, for the purpose of supplying light to a private party, imposes an additional servitude, for which the owner of the fee may demand compensation. (Carpenter v. Capital Elec. Co., 286.)

2. EQUITY JURISDICTION — REMOVAL OF ELECTRIC LIGHT POLES FROM PRIVATE ALLEY.—The owner of the fee in a private alley, subject only to an easement of travel, may maintain a suit in equity to compel the removal of electric light wires and poles erected therein without his consent. (Carpenter v. Capital Elec. Co., 286.)

3. EASEMENT OF TRAVEL—ERECTION OF ELECTRIC LIGHT WIRES AND POLES.—An easement of travel over a private alley, the fee of which is in the abutting owners, confers no right to have electric light wires and poles erected therein, and over the fee of an abutting owner, without his consent. (Carpenter v. Capital Elec. Co., 286.)

4. MUNICIPAL CORPORATIONS—STREETS AND ALLEYS—RIGHT TO STRING ELECTRIC LIGHT WIRES IN.—An electric company authorized by a city to erect electric light wires and poles in the public streets and alleys has no authority to erect such poles and wires in a private alley without the consent of the owner of the fee. (Carpenter v. Capital Elec. Co., 286.)

PROCESS.

PROCESS—EXEMPTION FROM SERVICE OF.—A nonresident witness or suitor, who comes within the jurisdiction of the court for the sole purpose of attending the trial of a case therein as a party or witness, is privileged from service of civil process not only while coming to, returning from, and attending upon, the court, for the purposes of the trial, but also for a reasonable time after the hearing to prepare for departure. What constitutes such reasonable time must depend upon, and be determined by, the evidence and circumstances of each particular case. (Linton v. Cooper, 727.)

See Arrest, 3, 4; Attachment, 2, 3; Execution, 9, 10.

PROOF.

See Corporations, 4, 5; Evidence, 6; Homicide, 7; Marriage and Divorce, 2, 3, 4; Negligence, 6.

PROXIMATE CAUSE.

See Negligence, 2.

PUBLIC WORKS.

See Eminent Domain.

PUNISHMENT.

See Pardon.

PURPRESTURE.

1. PURPRESTURE—WATERS—RIGHT TO BUILD PIERS TO PROTECT LAND FROM EROSION.—A shore-owner, on Lake Michigan, in the state of Illinois, may, no doubt, erect on his own land such structures as may be necessary to protect his land from erosion, if they do not interfere with navigation, but he has no right to intrude upon the lands of the state, without its consent, and cannot, therefore, "wharf out," or build piers, to protect the shore of his land from erosion. (Revell v. People, 257.)

2. PURPRESTURE—WHAT IS AND REMEDY FOR ABATEMENT OF.—Any structure placed upon land of the state below or beyond the water's edge of any of the Great Lakes is a purpresture and should be abated, on application of the attorney general in the name of the people, whether it is detrimental to public interest or not. The state would be false to its trust should it permit shore-owners to encroach on the public domain and gradually appropriate such property to their own use. (Revell v. People, 257.)

3. PURPRESTURE—CONSTRUCTION OF PIERS WITHOUT CONSENT OF STATE.—A shore-owner, on Lake Michigan, in the state of Illinois, has no right, by virtue of being such an owner, to construct piers upon the submerged lands in front of his premises, without the consent of the state. (Revell v. People, 257.)

4. PURPRESTURE—WHAT IS, AND JURISDICTION TO ENJOIN OR ABATE.—If a shore-owner on Lake Michigan, without a grant or other authority from the state, erects piers in the lake in front of his premises, the piers constitute a purpresture, and, though not injurious, or not a public nuisance, may be enjoined or abated in a court of equity, upon suit of the attorney general. (Revell v. People, 257.)

RAILROAD COMPANIES.

1. RAILROADS—EXPULSION FROM FREIGHT TRAIN.—The forcible expulsion of a person from a freight train while it is in rapid motion, by an employé of a railway company engaged in its service on such train, gives the person thus expelled a right of action against the company to recover for personal injury thus received, whether he is on such train as a passenger or merely as a trespasser. (Savannah etc. Ry. Co. v. Godkin, 187.)

2. RAILROADS—EXCURSION TICKETS—IDENTIFICATION. A railway excursion ticket, signed by the purchaser, stipulating that it shall not be valid for the return trip unless signed by the purchaser in the presence of a designated agent, and also witnessed and officially executed by such agent for the return trip, and also containing another stipulation by which the purchaser agreed to sign his name and otherwise identify himself as the purchaser of the ticket whenever called upon to do so by an agent or conductor of the roads named on the ticket, makes it incumbent on the purchaser to use all reasonable means of identifying himself as such to the validating agent, and, if required, to identify himself to such agent otherwise than by simply signing his name. (Southern Ry. Co. v. Barlow, 166.)

3. RAILROADS—EXCURSION TICKETS—EXPULSION FROM TRAIN—DAMAGES.—One holding the return portion of a railway excursion ticket required to be validated by a designated agent for such return is entitled to ride thereon, although the ticket is not properly validated, if the failure to validate is due to the fault of the railway company. Such holder has a right in good faith to board a train belonging to the company, although he may know that the ticket will not be accepted for passage, and if, under

such circumstances, he is unlawfully ejected from the train, he may recover all damages which he may show by the evidence he has suffered; but if he boards the train with no bona fide intention of returning, and simply to have himself ejected, and thus lay the foundation for an action, he is entitled to recover nominal damages only. (*Southern Ry. Co. v. Barlow*, 166.)

4. RAILWAYS—NEGLIGENCE IN ENTERING UPON TRACK OR.—When gates across the approach of a railway track are down, this is notice that the tracks are presently to be used for the passage of a train, and one who, notwithstanding such notice, enters upon and undertakes to cross the track, assumes the risk of doing so, and, if injured by a passing train, is precluded from recovering by his own contributory negligence, though other persons have been in the habit of taking the same risk. (*Douglas v. Chicago etc. Ry. Co.*, 930.)

5. RAILROAD COMPANIES—PASSENGERS—NEGLIGENCE. A person holding a ticket entitling him or her to transportation as a passenger on a railroad train, if feeble, or encumbered with heavy baggage or other impediments, is entitled to have assistance in boarding the train, and if it is not afforded by the railway officials or servants, the escort of such person may render the necessary assistance, and is entitled to enter the train for such purpose, and also to a reasonable time to leave the train before it is put in motion. Failure to afford such reasonable time in which to leave the train is negligence, provided the railway servants have notice of the purpose of the escort in entering the train and of his desire to leave it. (*Johnson v. Southern Ry. Co.*, 849.)

6. RAILROAD COMPANIES—PLEADINGS—NEGLIGENCE.—An allegation in a complaint against a railroad company to recover for personal injury received in alighting from a train and caused by "negligently and carelessly starting the train," supports an instruction that a railway company is liable for injuries to persons lawfully on its cars caused by negligent "jolting and jerking" of which there is proof. (*Johnson v. Southern Ry. Co.*, 849.)

7. RAILWAY FARE—FRAUDULENT EVASION OF, WHAT IS NOT.—If one having a thousand-mile ticket, and owing the duty of identifying himself as the person to whom it was issued, presents it to a conductor of a train, but refuses to state that he is the person named therein, or to otherwise identify himself, and on the conductor's refusing to accept the ticket, leaving the train without payment of any fare, such ticket-holder is not guilty of the crime of fraudulently evading payment of his fare, but only of willful, unreasonable obstinacy. (*Palmer v. Maine Cent. R. R. Co.*, 513.)

8. RAILROADS — LEAVING OBSTRUCTING CARS ON TRACK WITHIN "YARD LIMITS"—NEGLIGENCE—LIABILITY OF COMPANY.—If cars have been switched, in the night-time, onto the main track of a railroad, even within the yard limits, so as to obstruct the track, menacing the lives and limbs of trainmen, and an extra freight train, dispatched to pass through the yard, at night, comes into it, at reduced speed, and collides with such obstruction, which was not seen until a few moments before the collision and too late to avoid it, the railroad company must be deemed to have been negligent where there was no preceding notice, or light displayed, or flagman posted, to make known the obstruction to the approaching train, and especially where the train was dispatched with an insufficient number of air-brake cars. The company is, therefore, answerable in damages to a fireman who jumped from the engine, in the presence of imminent danger, and was injured. (*McGraw v. Texas etc. R. R. Co.*, 450.)

9. RAILROADS—TRAINMEN ARE ENTITLED TO NOTICE OF OBSTRUCTING CARS LEFT ON TRACK WITHIN "YARD LIMITS"—ASSUMPTION OF RISK.—The trainmen of an extra freight train, dispatched at night to pass through "yard limits," though at reduced speed, may well deem themselves entitled to notice of cars, blocking their way and menacing their lives and limbs, which have been switched onto the main track, particularly where it is customary to flag obstructed tracks in the daytime. Such obstructions are not one of the risks assumed as incident to their employment. (*McGraw v. Texas etc. R. R. Co.*, 450.)

10. RAILROAD COMPANIES—RIGHT TO MAKE CHANGES IN ROADBED.—The law presumes that land-owners have received full compensation for all injuries resulting from the construction and operation of a railroad, and that the railroad company acquires all the estate, interest, and right necessary thereto, and the construction and operation of a railroad includes the right to make necessary changes in the roadbed and culverts. (*Cleveland etc. Ry. Co. v. Huddleston*, 385.)

11. RAILROAD COMPANIES—STREET RAILWAYS—LIABILITY FOR FRIGHTENING HORSES.—Licensed railroad companies have as much right to run their cars in the streets of a city as others have to drive through them with their horses and vehicles, and cannot ordinarily be held responsible for horses taking fright at the appearance, movement, or noise of the cars, unless the conduct complained of in the management of the cars is attributable only to a wanton or malicious disregard for the safety of the occupants of the vehicle. (*Terre Haute etc. Ry. Co. v. Yaut*, 376.)

12. RAILROAD COMPANIES—STREET RAILWAYS—LIABILITY FOR FRIGHTENING HORSES.—If a horse attached to a vehicle on a public highway is frightened by a street-car operated thereon, and through such fright becomes unmanageable and injures the driver, the railway company is not liable therefor on the ground of negligence, unless the car is being operated in an unusual, unnecessary, and improper manner, in wanton disregard for the safety of the person thus injured. (*Terre Haute etc. Ry. Co. v. Yaut*, 376.)

13. RAILROAD COMPANIES — LIABILITY FOR NEGLIGENCE OF CONNECTING CARRIER.—If a railroad company issues a through ticket contracting to carry a passenger beyond its own terminus, it is liable for the negligence of the connecting carrier, through whose agency the contract for through transportation is being performed. (*Omaha etc. R. R. Co. v. Crow*, 741.)

14. RAILROAD COMPANIES—DUTY TO SHIPPER WITH PASS.—A shipper of livestock who receives from the railroad company transporting such stock a shipper's ticket or pass, to enable him to care for his stock while in transit, assumes only such risks as necessarily attend upon such care, and does not assume the risk of the negligence of the carrier. As thus modified, the liability of the railroad company to the shipper for injury received through its negligence is that of a common carrier for hire. (*Omaha etc. R. R. Co. v. Crow*, 741.)

15. RAILROAD COMPANIES—SHIPPER OF LIVESTOCK—FELLOW-SERVANTS.—A shipper of livestock by railroad who accepts a shipper's ticket or pass from the company to enable him to care for his stock while in transit does not thereby become a servant of the railroad company, nor a fellow-servant with the railroad employes on the train. (*Omaha etc. R. R. Co. v. Crow*, 741.)

16. RAILROAD COMPANIES—STATUTES.—A statute imposing upon railroad companies the duty to erect and maintain fences along their lines for the protection of domestic animals, and providing

that "every railroad company as aforesaid shall be liable for all damages inflicted upon the person of passengers while being transported over its road, except in cases where the injury done arises from the criminal negligence of the person injured," has no application to street railway companies. (Lincoln Street Ry. Co. v. McClellan, 736.)

17. **RAILROAD COMPANIES—STREET RAILWAY** companies are common carriers of passengers and answerable only for failure to exercise the highest degree of care, while other railroad companies are insurers, and absolutely liable for injuries to a passenger resulting from the operation or management of trains, unless gross negligence on the part of the passenger is shown, or a violation by him of some known rule or regulation of the company, causing the injury. (Lincoln Street Ry. Co. v. McClellan, 736.)

18. **RAILROAD COMPANIES — CONTRIBUTORY NEGLIGENCE OF PASSENGER.**—A passenger on a street railway cannot recover if the accident from which he received an injury resulted in part from his own want of ordinary care. In such case, the carrier, to escape liability, need not prove that the passenger was guilty of gross contributory negligence. (Lincoln Street Ry. Co. v. McClellan, 736.)

19. **RAILROAD COMPANIES—NEGLIGENCE—STREET RAILWAY COMPANIES** are common carriers of passengers, and as such are bound to exercise the utmost skill, diligence, and foresight consistent with the business in which they are engaged, and are liable for the slightest negligence. (Lincoln Street Ry. Co. v. McClellan, 736.)

See Damages, 10; Master and Servant, 9; Mortgages, 1; Taxation, 8, 4; Waters and Watercourses, 9, 11, 12.

REAL PROPERTY.

See Contracts, 1, 12; Lotteries; Mechanic's Lien, 8; Partnership, 6; Scire Facias, 4; Vendor and Purchaser, 1; Waters and Watercourses, 5.

RECEIVERS.

1. **RECEIVERS—DAMAGES FOR TORTS AS OPERATING EXPENSES OF CORPORATION.**—If a receiver has been placed in charge of a corporation, damages for injuries to persons or property during the receivership, caused by the torts of the receiver's agents and employes, are classed as a part of the operating expenses of the corporation, and payable as other necessary expenses of the receivership, first out of the net income, if that is sufficient, but, in the event of a deficiency, to be paid out of the corpus. (Bartlett v. Cicero Light etc. Co., 206.)

2. **RECEIVERS—DISCHARGE OF, DOES NOT AFFECT CORPORATE LIABILITY FOR TORTS DURING RECEIVERSHIP.** The discharge of a receiver for a corporation does not exonerate it from liability for injuries to persons or property during the receivership, caused by the negligence of the receiver or his subordinates. It is answerable as well after the discharge of the receiver as while he is in office. (Bartlett v. Cicero Light etc. Co., 206.)

3. **RECEIVERS—CORPORATE LIABILITY FOR TORTS DURING RECEIVERSHIP.**—A corporation is answerable for injuries to persons or property during the time that the corporation is in the hands of a receiver, caused by the negligence of his agents and employes. (Bartlett v. Cicero Light etc. Co., 206.)

4. RECEIVERS — CORPORATIONS — CLAIMS FOR TORTS DURING RECEIVERSHIP FOLLOW THE PROPERTY.—A receiver of a corporation not being personally liable, upon his discharge, for injuries to persons or property during the receivership, caused by the negligence of his subordinates, claims for such injuries follow the property or fund, which alone can be used to satisfy them. (*Bartlett v. Cicero Light etc. Co.*, 206.)

5. RECEIVERS — CORPORATE LIABILITY, AFTER DISCHARGE OF, FOR TORTS DURING RECEIVERSHIP.—If the receiver of a corporation is discharged, and its property is restored to its possession, with improvements, the corporation is answerable for injuries to persons or property, occurring during the receivership through the negligence of the receiver or his subordinates, at least to the extent to which the net income was applied by the receiver to the permanent improvement of the property, and, if the corporation desires to limit its liability to this amount, the question must be raised by its pleadings. (*Bartlett v. Cicero Light etc. Co.*, 206.)

6. RECEIVERS — COLLATERAL ATTACK ON APPOINTMENT OF.—If it appears, upon the face of the proceedings, that a court's order appointing a receiver was without authority of law, and therefore void, the order may be assailed collaterally, and with impunity, by anybody. (*State v. District Court*, 645.)

7. RECEIVERS—SALES BY—BAR OF PRIOR LIEN—EQUITY JURISDICTION.—By the laws of Pennsylvania, the jurisdiction under which corporation mortgages are foreclosed, so as to sell the property and franchises of railroad and other designated corporations, is the general equity jurisdiction, and not the common-law jurisdiction of the courts. Hence, it follows that a lien is not barred, in that state, by a receiver's sale, unless the holder has notice of the proceeding. (*Fidelity etc. Co. v. Schenley etc. Ry. Co.*, 815.)

8. RECEIVERS—SALES BY—EQUITY JURISDICTION.—The jurisdiction to appoint receivers and to order sales by them of the property and franchises of corporations resides in courts of equity, and is conducted according to the principles of equity practice. (*Fidelity etc. Co. v. Schenley etc. Ry. Co.*, 815.)

9. RECEIVERS — SALES BY — DIVESTURE OF PRIOR LIENS.—Liens upon property held by a receiver are not divested by virtue of a sale made by him. If the order of sale makes no mention of such prior lien, or of encumbrances of any kind, the sale passes the title in the property as it is in the receiver, and subject to whatever encumbrances there may be existing upon it. (*Fidelity etc. Co. v. Schenley etc. Ry. Co.*, 815.)

See Contempt, 1.

RECORDING.

See Deeds, 1, 2; Execution, 12, 13.

RELIGIOUS SOCIETIES.

1. RELIGIOUS SOCIETIES, INCORPORATED—RATIFICATION OF TREASURER'S ACT IN BORROWING MONEY—WHAT CONSTITUTES.—The act of the treasurer of a religious corporation, in borrowing money for the purposes of the organization, must be considered as ratified where its records show that he received the money as a loan to the association and issued its notes as evidence thereof; that the trustees used the money for the purposes of the association and paid interest on the notes; and that the association, as a body, was advised of the indebtedness, and pay-

ments of interest, and approved the action of its trustees. (Illinois Conference etc. v. Plagge, 252.)

2. RELIGIOUS SOCIETIES—POWER TO BORROW MONEY—CONSTRUCTION OF STATUTE.—Under a statute authorizing a corporation, society, or association not formed "for pecuniary profit," to borrow money for the purposes of its organization, upon consent of the body, "expressed by a vote of the majority of the members thereof," it is not indispensably necessary to hold a religious corporation, not formed for "pecuniary profit," answerable for the act of its treasurer, in borrowing money for the society, and giving its notes therefor, that the records of the society should expressly show that a majority of the members voted to borrow the money, or to ratify the treasurer's action. (Illinois Conference etc. v. Plagge, 252.)

REMAINDER.

See Advancements; Estates.

REMEDIES.

See Associations, 8; Equity, 2; Vendor and Purchaser.

RENT.

See Cotenancy, 1, 2, 4, 5, 6; Judicial Sales; Landlord and Tenant, 8, 7.

REPLEVIN.

See Cotenancy, 7.

RES GESTÆ.

See Evidence, 1, 2, 2.

RESIDENCE.

See Elections, 8, 4.

RES JUDICATA.

See Judgments, 12, 13, 14.

RESTRAINT OF TRADE.

See Contracts, 4-9.

RIPARIAN RIGHTS.

See Waters and Watercourses, 1-2.

SALES.

1. CONTRACTS OF SUBSCRIPTION—FRAUD IN.—If a contract of sale stating that the article sold is an "Edition de Luxe of Art and Architecture," a special feature of which is an "aquarelle facsimile matted in separate fascicule," is induced by false representations by the seller to the purchaser that the article described by such expressions, the meaning of which is unknown to the purchaser, is of a certain kind and character, when in fact it is of a different character, of less value, the contract is thus rendered fraudulent, and the purchaser may either rescind the sale and refuse to take the article, or he may set up the fraud in an action against him on the contract. Evidence of such fraudulent representations is admissible, although the contract of sale stipulates that "no other conditions or representations than those herewith printed shall be binding on either of the principals." (Barrie v. Miller, 171.)

2. SALES—BREACH OF WARRANTY—MEASURE OF DAMAGES.—If there is a breach of warranty in the sale of goods, the

measure of damages is the difference between the value of the articles sold and those delivered at the time and place of delivery, and such difference must be found by the jury, or a special verdict is not sufficient to support a judgment for damages. (*Meyer v. Green*, 844.)

3. SALES—REFUSAL OF VENDEE TO PERFORM—MEASURE OF DAMAGES.—On the breach of a contract of executory sale by the vendee by a refusal to receive the property, the vendor's measure of damages, in general, is to the extent of his actual injury, which ordinarily is the difference between the contract price and the market value at the time and place of the breach. (*Funke v. Allen*, 716.)

4. SALES—ORDER FOR GOODS TURNED OVER TO ANOTHER—RIGHTS OF PARTIES—HOW FIXED.—If a purchaser sends a firm an order for goods, which order is turned over to another, the rights of the parties are fixed by the original contract growing out of the order, whether the firm is regarded as a dealer on its own account, or is the agent of an undisclosed principal, and cannot be changed without the introduction of new facts and circumstances. (*Belfield v. National Supply Co.*, 799.)

SATISFACTION.

See Payment, 2, 8.

SCHOOLS.

SCHOOLS—BOARD OF EDUCATION AS TRUSTEE OF SCHOOL FUNDS.—The board of education of the city of Chicago is the agent of the state of Illinois for the purpose of maintaining public schools and school buildings within that subdivision of the state, and holds the school fund received by it as trustee for the taxpayers, who are, in equity, the owners of the fund, and entitled to have it applied to the legitimate purposes of the trust. (*Adams v. Brennan*, 222.)

See Elections, 1-9; Injunctions, 5.

SCIRE FACIAS.

1. SCIRE FACIAS — OBTAINING REMEDY BY ACTION — ABOLISHMENT OF FORM.—Although the form of the ancient writ of scire facias has been abolished by the statutes of Montana, the remedies obtainable by the writ may still be enforced in that state by a civil action. (*Haupt v. Burton*, 698.)

2. SCIRE FACIAS AGAINST HEIRS—JUDGMENT AGAINST ADMINISTRATOR—CHARGING LANDS OF DECEDENT—ADMINISTRATOR AS A PARTY.—If a judgment has been entered against an administrator, an omission to make him, as such administrator, a defendant in a writ of scire facias, to charge the lands of the decedent with the payment of his debts, is not fatal to the proceeding, where he is also an heir, and, as such, has been made a party defendant; where he has full notice of the proceeding, and does not complain; and where the parties to the judgment, as well as its date, number, and term all fully appear in the body of the writ. (*Messmore v. Williamson*, 791.)

3. SCIRE FACIAS AGAINST HEIRS—JUDGMENT AGAINST ADMINISTRATOR—CHARGING LANDS OF DECEDENT—EFFECT OF NAMING INTERMEDIATE HEIRS.—It is not a fatal objection to a scire facias to revive a judgment against an administrator, so as to charge the real estate of the decedent with his debts, that a person is named in the writ as an intermediate heir through whom the interests of other heirs are derived. (*Messmore v. Williamson*, 791.)

4. SCIRE FACIAS—DEFINITIONS—OMISSION OF WORD "REAL" IN DESCRIPTION OF ESTATE TO BE CHARGED—EFFECT OF.—An "estate" is the degree, quantity, nature, and extent of interest which a person has in real property. The word, in its popular sense, includes both real and personal property, but, in a technical sense, it applies to realty only. Hence, the omission of the word "real," before "estate," in a writ of scire facias, in describing the estate to be charged, is unimportant, as realty is meant by the word "estate." (Messmore v. Williamson, 791.)

5. SCIRE FACIAS AGAINST HEIRS—JUDGMENT IS BINDING ONLY TO WHAT EXTENT.—If the heirs of a decedent are made parties defendant in a scire facias to revive a judgment against an administrator, for the purpose of charging the lands of the decedent with the payment of his debts, a judgment against them will bind only the land in their hands as heirs, and cannot be enforced against them personally. (Messmore v. Williamson, 791.)

See Judgment, 11.

SEARCH.

See Arrest, 5.

SEDUCTION.

1. SEDUCTION BY A MINOR MADE UNDER PROMISE OF MARRIAGE.—A boy only sixteen years of age and who is, therefore, incapable of contracting marriage, may be guilty of seduction under promise of marriage. If a previously chaste woman submits herself to the embraces of a man under promise of marriage made by him, upon which she in fact relies, his conviction cannot be avoided by proof that his promise was not legal and binding. (People v. Kehoe, 52.)

2. SEDUCTION—ONE INFANT MAY BE GUILTY OF THE SEDUCTION OF ANOTHER UNDER PROMISE OF MARRIAGE, provided they have reached the age of puberty, though the seducer has not reached the age at which he can contract marriage. (People v. Kehoe, 52.)

3. SEDUCTION—EVIDENCE OF SUBSEQUENT IMPROPER CONDUCT.—In a prosecution for seduction evidence that the prosecutrix had sexual intercourse with other men is not admissible. (People v. Kehoe, 52.)

4. SEDUCTION.—CHASTITY, AS THE TERM IS EMPLOYED in statutes defining the crime of seduction, means, in the case of an unmarried woman, simply that she is virgo intacta. Hence, want of chastity is not established by her permitting familiarities, liberties, or even indecencies at the thought of which other women would blush. (People v. Kehoe, 52.)

5. SEDUCTION—NONACCESS OF HUSBAND—LEGITIMACY OF CHILD.—If a woman is married in April and gives birth to a child in September, and then sues a man not her husband for her seduction, she cannot testify to any state of facts tending to show that she did not have, and could not have had, sexual intercourse with her husband until February of the year in which she was married, as such evidence would tend to bastardize her child born in wedlock, and is against public policy. (Rabeke v. Baer, 567.)

6. SEDUCTION—EVIDENCE OF INTERCOURSE BY MARRIED WOMAN.—If a married woman sues a man not her husband, for her seduction before her marriage, she may testify to what occurred between her and the defendant, such as acts of sexual intercourse, and which she claims constitutes the seduction. (Rabeke v. Baer, 567.)

7. SEDUCTION—EVIDENCE—ADMISSIONS OF PARENTAGE OF CHILD.—If a married woman sues a man, not her husband, for her seduction, evidence is admissible to prove that the defendant has admitted that he is the father of the child born after the alleged seduction. (Rabeke v. Baer, 567.)

8. SEDUCTION—PROMISE OF MARRIAGE, BEGETTING CHILD AS CONDITION.—Recovery for seduction under promise of marriage is not barred although the promise was conditioned upon the begetting of a child as the result of the intercourse. (Rabeke v. Baer, 567.)

SELECTION.

See Execution, 15.

SELF-DEFENSE.

See Homicide, 3, 14.

SENTENCE.

See Criminal Law, 5-8.

SERVITUDES.

See Highways, 2; Private Ways, 1.

SETOFF.

See Agency, 3, 4; Corporations, 10; Cotenancy, 2.

SHIPPING.

1. BAILMENTS—BAILEE'S LIENS—EQUITY JURISDICTION.—If a bill in equity is filed to enforce a bailee's lien for towage charges on a lumber raft, and the defendant therein procures an order giving him possession of such raft upon his giving bond, the proceeding becomes one in personam, over which equity has jurisdiction and which is beyond the jurisdiction of an admiralty court. (Knapp etc. Co. v. McCaffrey, 290.)

2. BAILMENTS—LIEN OF BAILEE—BUSINESS OF TOWING.—If a person engaged in towing a lumber raft divides it, and leaves part of it en route under direction of the owner, in order to hasten the delivery of the remainder, he does not thereby lose his lien for towing upon the part left en route, which he is prevented from delivering by a purchaser from the original owner. (Knapp etc. Co. v. McCaffrey, 290.)

3. BAILMENTS—LIEN OF BAILEE—BUSINESS OF TOWING.—A carrier of goods by means of a towboat is a bailee of the goods transported, and as such has a lien thereon for his hire while they remain in his possession. (Knapp etc. Co. v. McCaffrey, 290.)

SHIPPING.

See Carriers, 2.

SITUS OF PROPERTY.

See Attachment, 1; Taxation, 3, 4.

SPECIFIC PERFORMANCE.

1. SPECIFIC PERFORMANCE OF CONTRACT TO MAKE A WILL—DECREE OF, AGAINST ESTATE OF DECEDENT.—If a husband and his wife, having no children, agree with the mother of a little girl eleven years of age that, if the child will come and live with them, at their home, the husband will, in return for her companionship and obedience, leave her a child's share of his estate at

his death, such contract is based upon a sufficient consideration for the promise, and, if the husband dies, without having made such provision, a court of equity will decree its specific performance against his estate, where the contract is clearly proved and shown to have been complied with on the part of the child, although the agreement contained an invalid contract of adoption. (*Burns v. Smith*, 653.)

2. SPECIFIC PERFORMANCE OF CONTRACT TO MAKE A WILL AS A REWARD FOR PERSONAL SERVICES.—A court of equity will specifically enforce a promise to leave to another the whole or a definite portion of one's estate, as a reward for peculiar personal services rendered or other acts done by the promisee, which are not susceptible of a money valuation, and were not intended to be paid for in money, provided the consideration has been substantially received at the promisor's death; and it is no objection to the enforcement of such a contract that it was entered into with a third party for the promisee's benefit, if the latter has acted under it and executed it. (*Burns v. Smith*, 653.)

3. SPECIFIC PERFORMANCE OF CONTRACT TO MAKE A WILL—JURISDICTION OF COURTS.—A district court, sitting as a court of probate, does not have exclusive jurisdiction to try and determine an action brought against an estate of a decedent to enforce an agreement made by the deceased to devise a certain share of his property; but the district court, sitting as a court of equity, has, at least, a concurrent jurisdiction of such action with the district court, sitting as a court of probate, where the constitution provides that district courts shall have "original jurisdiction in all cases in law and equity where the claim is for fifty dollars or more." (*Burns v. Smith*, 653.)

4. SPECIFIC PERFORMANCE OF CONTRACT TO MAKE A WILL—PERSONAL SERVICES—WHAT IS NO DEFENSE ON PART OF HEIRS.—In an action to enforce the specific performance of an agreement made by a deceased person before his death and who had no children of his own, to leave a little girl a child's portion of his estate upon his death, in return for her companionship and obedience, if she would come and live with him and his wife, it is no defense, on the part of his heirs-at-law, that the child at one time left his home and remained away for some time, or that she did not yield him the companionship and obedience the contract demanded, where there is no intimation that the deceased intended to rescind the contract on account of such conduct. (*Burns v. Smith*, 653.)

See Vendor and Purchaser, 1, 3.

STATUTE OF FRAUDS.

Contracts, 1, 2, 11-20; Partnership, 6.

STATUTE OF LIMITATIONS.

See Limitations of Actions.

STATUTES.

1. CONSTITUTIONAL LAW—QUESTIONS NOT CONSIDERED IN DETERMINING CONSTITUTIONALITY.—Neither the wisdom of a law, nor the hardships which it may impose upon municipalities without any fault or neglect of duty upon their part, are matters for discussion or decision in passing upon its constitutionality. (*Chicago v. Manhattan Cement Co.*, 821.)

2. CONSTITUTIONAL LAW.—EVERY INTENDMENT is made in favor of the constitutionality of a statute, and, to render it void,

It must be clearly violative of the plain provisions of the organic law. (*Chicago v. Manhattan Cement Co.*, 321.)

3. **CONSTITUTIONAL LAW—CONSTRUCTION OF STATUTES.**—Although a city has been empowered by statute to authorize a private corporation to construct waterworks and to contract for a supply of water for a period not to exceed thirty years, a subsequent statute empowering any city in which a private corporation has been or may be authorized to supply water for public use, to fix reasonable water rates, is constitutional, and an ordinance passed under the later statute reducing existing water rates and fixing them at a reasonable price is valid, although the city enacting it has, under the earlier statute, attempted, by ordinance, to fix water rates at a certain figure for the unexpired period of thirty years. (*Danville v. Danville Water Co.*, 304.)

4. **CONSTITUTIONAL LAW—CHANGES IN REMEDY ARE NOT EX POST FACTO.**—Changes in a tribunal or method of procedure relate to the remedy. They are always within the discretion of the law-making power, and are in no sense *ex post facto*, so long as they deprive the accused of no substantial right. (*State v. Caldwell*, 465.)

5. **CONSTITUTIONAL LAW—EX POST FACTO LAW—CRIMES.**—An *ex post facto* law is one which is enacted after the offense has been committed, and which, in relation to it or its consequences, alters the situation of the accused in his disadvantage. The term relates to criminal and not to civil proceedings. (*State v. Caldwell*, 465.)

6. **STATUTES ADOPTED FROM ANOTHER STATE—CONSTRUCTION OF.**—In adopting a statute from another state there is always adopted the construction already placed upon it by the courts of that state, and each subsequent re-enactment of the statute acquiesces in the construction put upon it up to the date of such re-enactment by the courts of the state wherein it was originally enacted. (*Ives v. McNicoll*, 780.)

7. **CONSTITUTIONAL LAW.—REMEDIES MAY BE CHANGED,** but they cannot be so changed as to affect pre-existing contract obligations. (*Peninsular etc. Works v. Union etc. Co.*, 934.)

8. **CONSTITUTIONAL LAW.—A STATUTE TAKING AWAY THE REMEDY BY ATTACHMENT CANNOT BE APPLIED TO PRE-EXISTING DEBTS.** Hence a statute providing that if the property of an insolvent debtor is attached or levied upon by virtue of any process in favor of a creditor, such debtor may within ten days thereafter, make an assignment of his property for the benefit of his creditors, and thereupon the levy shall be dissolved, and the property turned over to his assignee, is void as against pre-existing creditors. (*Peninsular etc. Works v. Union etc. Co.*, 934.)

9. **STATUTES.—TITLES OF STATUTES MAY BE RESORTED TO,** as well as their preamble, to aid in their interpretation. (*Garlick v. Florida etc. R. R. Co.*, 874.)

10. **CONSTITUTIONAL LAW—STREET ASSESSMENTS.**—A statute authorizing a city council to tax the lotowners abutting on a certain street between specified limits for two-thirds of the cost of improvements is unconstitutional and void. (*Mauldin v. City Council*, 855.)

See Citizenship, 1; Constitutions, 1, 3; Corporations, 16, 17; Judgment, 2, 10; Jurisdiction, 1; Liens; Mechanic's Lien, 1, 3; Municipal Corporations, 1, 2, 3; Officers, 4, 5, 6; Pardon; Parent and Child; Parties; Partnership, 9; Railroad Companies, 16; Religious Societies, 2; Seduction, 4; Taxation, 2; Waterworks and Water Companies; Wills, 1.

STOCK.

See Building and Loan Associations, 4, 6, 7; Execution, 2; Mines and Mining.

SUBSCRIPTION.

See Sales, 1.

SUICIDE.

See Insurance, 1, 2.

SUPERVISORS.

See Officers, 2.

SURETYSHIP.

1. SURETYSHIP—RIGHT TO DEMAND DIVISION OF DEBT. While several persons who become sureties for the same debt are liable in solido, they have the right, in Louisiana, upon being sued, except in case of renunciation or insolvency, to demand a division of the debt, so that each shall pay only his proportional part; and where such division is claimed, the court must allow it. (Metropolitan Bank v. Muller, 475.)

2. SURETYSHIP—ASSUMPTION OF MORTGAGE BY CO-TENANT.—If one of several cotenants of land encumbered with a mortgage buys the interest of his cotenants, and covenants to pay the mortgage debt, or as part of the consideration assumes the payment, he becomes, as among the parties to such agreement, the principal debtor, and the vendors become his sureties. (Merriam v. Miles, 731.)

3. SURETYSHIP—ASSUMPTION OF MORTGAGE BY CO-TENANT—EXTENSION OF TIME OF PAYMENT.—A purchaser of notes secured by a mortgage executed by several cotenants, with knowledge that one cotenant has purchased the interest of the others, and assumed and agreed to pay the mortgage debt as part of the consideration, releases the cotenants who have sold their interest, by entering into an agreement with the purchasing cotenant, upon a valid consideration, and without the consent of the other cotenants, to definitely extend the time of payment of the notes and mortgage. (Merriam v. Miles, 731.)

4. SURETYSHIP—RELEASE OF SURETY.—When the relationship between debtors has become that of principal and surety, to the knowledge of the creditor, the duty of the latter to regard the rights of the surety exists, although the creditor may sustain such a relationship that in enforcing his own rights he may treat both as principals; and if, with knowledge of the changed relationship between his debtors, he disregards the rights of the surety, he may thereby release him from all liability. (Merriam v. Miles, 731.)

See Appeal, 2; Guardian and Ward, 2, 3; Negotiable Instruments, 15.

SYNONYMS.

See Evidence, 10.

TAXATION.

1. TAXATION—ASSESSMENT LIST MADE BY TAXPAYER, EFFECT OF.—Though a taxpayer returns a verified list of his property, this does not prevent the assessor who knows of other property belonging to such taxpayer from including it in the assessment, without first issuing a subpoena and holding an examination of the taxpayer in reference thereto. (People v. National Bank, 32.)

2. TAXATION—TAX, WHEN A PROPERTY, AND NOT A LICENSE TAX.—A statute providing for the assessment and taxation of railway cars other than those owned by railway companies, and which makes provision for the ascertainment of the aggregate number of miles run by the cars of any owner in each year over the several lines of railway within the state, and the average number of miles covered by each of the particular class of cars in the ordinary course of business during the year, and the number of cars required to make the total mileage of each owner within one year, and that the number so ascertained shall be assessed to such owner, and upon the assessment there shall be levied and collected, in lieu of all other taxes, a state tax of two per cent, imposes a property and not a license tax, and cannot be sustained where the amount of the tax is greater than the constitution of the state permits to be imposed on property for any one year. (State v. Stephens, 625.)

3. TAXATION—SITUS.—RAILWAY CARS which are in a state only in transitu have no situs therein, and hence cannot be taxed by it. Being instruments of interstate commerce, Congress alone has jurisdiction over them, except that they can be taxed as property by the state in which their owner has acquired a domicile, and in which they have a situs. (State v. Stephens, 625.)

4. TAXATION OF PROPERTY OF FOREIGN CORPORATIONS.—If a corporation organized under the laws of New Jersey establishes a business and thereby acquires a domicile in Kansas, and owns railway cars which are attached to such business as an incident thereto, they can be taxed in the latter state only, and not in any other state, in which they are in transitu merely. (State v. Stephens, 625.)

See Banks and Banking, 1, 2; Statutes, 10.

TAXPAYER.

See Counties.

TIME.

See Contracts, 3, 5, 6, 7; Criminal Law, 7, 8; Insurance, 6; Process; Suretyship, 3; Vendor and Purchaser, 2.

TITLE.

See Chattel Mortgages, 1.

TORTS.

See Corporations, 1; Receivers, 1-4.

TOWAGE.

See Carriers, 2; Shipping, 2, 3.

TRESPASS.

See Highways, 1, 3, 5.

TRIAL.

1. TRIAL—CRIMINAL CASE—CONSTRUCTION OF VERDICT.—In construing a verdict, the court cannot go beyond the words used by the jury, giving to them their natural significance. Hence, a verdict of "striking with intent to kill" will not support a sentence for "striking with a dangerous weapon with intent to kill." (State v. Bellard, 461.)

2. TRIAL—CONTINUANCE—DISCRETION OF COURT.—The granting or refusing of motions to continue a case rest largely in

the sound discretion of the court below, and its rulings in regard thereto will not be disturbed unless clearly erroneous. It cannot be held that there was any abuse of discretion in overruling a motion to continue an injunction suit which had been on the calendar about fifteen months, and which had already been continued several times. (Newell v. Leathers, 395.)

3. TRIAL.—THE CREDIBILITY OF WITNESSES, THE WEIGHT OF TESTIMONY, and the drawing of inferences of fact from facts proven, are all questions for the jury, and not for the court to decide. (McGregor v. Reid, 332.)

4. DAMAGES—EVIDENCE.—In an action by a married woman against a railway company to recover for a wrongful expulsion from a train, it is error to allow her counsel to comment to the jury on evidence tending to show that the company's agent, in her absence, had used insulting and offensive language to her husband when he went to such agent to have her ticket validated for passage. (Southern Ry. Co. v. Barlow, 166.)

5. TRIAL—INSTRUCTIONS ON NEGLIGENCE.—It is not within the province of the court to instruct the jury that any given state of facts would constitute negligence, as that is a question for the jury under all the facts and circumstances of the case. (Garlick v. Florida etc. R. R. Co., 874.)

6. TRIAL—ERRONEOUS CHARGE AS TO REASONABLE DOUBT.—If the court, in defining reasonable doubt to the jury, says that "under the facts and evidence as strong as that in this case, that would be a reasonable doubt," it expresses an opinion as to the weight of the testimony, and commits a reversible error. (State v. Davis, 845.)

7. TRIAL — ERRONEOUS INSTRUCTIONS — OPINION ON WEIGHT OF TESTIMONY.—If the court, in instructing the jury, says that "in this case the question of the right to make an arrest cannot arise, it expresses an opinion on the weight of the testimony, and commits reversible error. (State v. Davis, 845.)

8. TRIAL—ERRONEOUS.—If the court expresses its opinion on the weight of the evidence in giving instructions to the jury, it commits reversible error. (State v. Davis, 845.)

9. TRIAL — ERRONEOUS INSTRUCTIONS — MANSLAUGHTER.—A court commits reversible error in instructing the jury that manslaughter from the accidental, but negligent, killing of a human being cannot arise in the case on trial, as he thus expresses an opinion on the weight of the evidence. (State v. Davis, 845.)

10. TRIAL—SPECIAL FINDINGS—DISCRETION OF COURT. Whether special interrogatories shall be submitted to the jury is a matter within the discretion of the trial court. (Omaha etc. R. R. Co. v. Crow, 741.)

See Appeal, 8; Courts; Criminal Law, 1; Homicide, 2, 14, 15, 17; Instructions; Pleading, 2.

TRUSTS.

See Husband and Wife, 3; Schools.

UNBORN CHILD.

See Deeds, 3, 5.

USURY.

1. USURY.—THE RIGHT TO PLEAD USURY in a contract is personal to the debtor alone. (Zeigler v. Maner, 842.)

2. USURY.—USURIOUS INTEREST PAID TO A MORTGAGEE may be pleaded as a counterclaim against the assignee of the mortgage. (*Zeigler v. Maner*, 842.)

VALUE.

See Estates.

VENDOR AND PURCHASER.

1. VENDOR AND VENDEE.—UPON THE BREACH OF THE VENDEE'S COVENANT TO PAY FOR REAL PROPERTY the vendor may: 1. Stand upon the precise terms of his contract, and sue for its breach; 2. Remain inactive and retain for his own use the moneys paid by the vendee, whether the contract declares that such moneys shall be forfeited or not; 3. Go into equity and seek specific performance; and 4. Agree with his vendee for a mutual abandonment and rescission, in which event alone the vendee, on default, becomes entitled to the repayment of his money. The vendor may also maintain a suit against his vendee to compel him to show why all his rights under the contract should not be at an end. [Per *Henshaw, McFarland, and Temple, judges.*] (*Glock v. Howard etc. Co.*, 17.)

2. VENDOR—RIGHT TO RETAIN MONEY PAID BY THE VENDEE.—If a vendee does not complete his payments as stipulated in his contract to purchase, the vendor may always retain the moneys received by him, unless the vendee shows some equitable ground for relief, and it is not material whether or not the contract stipulated that the vendor may retain such moneys. [Per *Henshaw, McFarland, and Temple, judges.*] (*Glock v. Howard etc. Co.*, 17.)

3. VENDOR AND VENDEE—RIGHTS OF, AFTER DEFAULT.—WHERE TIME IS DECLARED TO BE OF THE ESSENCE OF A CONTRACT for the purchase of real property, a vendee who fails to make his payments as agreed upon loses all rights in the property and in the moneys already paid by him, unless there are equitable circumstances entitling him to relief, and he cannot, by a subsequent tender of the amount remaining unpaid, entitle himself either to the specific performance of the contract or the return of the moneys paid by him before his default. (*Glock v. Howard etc. Co.*, 17.)

See Lotteries; Mechanic's Lien, 2, 3.

VENUE.

See Criminal Law, 9, 10.

VERDICT.

See Criminal Law, 11; New Trial, 2.

VOTING.

See Citizenship, 8; Elections.

WAIVER.

See Bailment, 1; Fraudulent Conveyances, 4.

WARRANTY.

See Sales, 2.

WATERS AND WATERCOURSES.

1. WATERS—RIVER BANK OWNERS AND GREAT LAKE SHORE—OWNERS ARE NOT SUBJECT TO THE SAME RULE.—

The doctrine that a shore-owner, on streams navigable in fact but not navigable in law, may wharf out into the stream, cannot be extended to a shore-owner on Lake Michigan, and other Great Lakes, for the reason that, in the former case, the line of the riparian owner extends to the center thread of the stream, instead of to the high-water line, as in the latter case. (*Revell v. People*, 257.)

2. **WATERS—RIGHT OF SHORE-OWNER TO EXTEND FRONTAGE.**—An owner of land bordering on Lake Michigan has no right to build piers or “wharf out” into the lake for the purpose of making land or increasing the boundaries of his premises, nor has he the right to do any act which will produce that result. If he does so, he inflicts an injury on the rights of the state, because the land covered by the water of the lake belongs to the state. (*Revell v. People*, 257.)

3. **WATERS—LIMIT OF SHORE-OWNER'S RIGHT.**—The only common-law rights possessed by a shore-owner, on Lake Michigan, in the state of Illinois, are the right to pass to and from the waters, within the width of his premises as they border on the lake, and the right to natural accretions. (*Revell v. People*, 257.)

4. **WATERS—SHORE-OWNER'S RIGHTS—STATE CONTROL OVER.**—The common law of England is the law of this country upon the question of the rights of a shore-owner, except where it has been modified by the constitution, statutes, or usages of the different states, or by the constitution and laws of the United States; and the rights of these owners have been committed to the several states, so that each state deals with the land under tide water within its boundaries according to its own notion of right and public policy. (*Revell v. People*, 257.)

5. **WATERS—TITLE TO LAND UNDER THE GREAT LAKES.**—The title to, and dominion over, lands covered by water of the Great Lakes, within the limits of the several states bordering thereon, belong to each state wherein the lands are located. It holds the fee in trust for the public in the same way that it holds the title to soil under tide waters by the common law. (*Revell v. People*, 257.)

6. **WATERS—RIPARIAN RIGHTS—COMMON LAW.**—The common law, as it existed prior to March 24, 1606, the fourth year of James I, is in force in Illinois, and, in the absence of any statute of the state changing the common law in regard to rights of riparian or littoral owners, the common law as it then existed must control. (*Revell v. People*, 257.)

7. **WATERS—ALLUVION—DIVISION OF.**—If alluvion is formed in front of the property of several riparian proprietors, the accretion should be divided between the parties in proportion to the extent of their respective lines on the old frontage, and each proprietor of the original tracts takes the quantity of alluvion that may be between the lines of his old frontage on the watercourse measured forward to the new frontage. The lines by which the new frontage is reached may be parallel, or convergent, or divergent, according as the extent of the newly-formed water line may be the same in the one case, or less in the other, or greater in the third, than the ancient water line of the tracts. This method of division excludes the idea of a proportionate area or acreage system of division between the several tracts fronting on the alluvion to be divided. (*Newell v. Leathers*, 395.)

8. **WATERS—ALLUVION—DIVISION OF—RESPECTIVE IMPORTANCE OF LINES.**—In dividing a batture or alluvion which has been formed in front of the property of several riparian pro-

prietors, the course, or bearing, or direction of the side lines of the tracts or lots of land in front of which the alluvion is formed is of no consequence in the division of the batture formed subsequently to the acquisition of the tracts, but the extent of the old frontage of the tracts on the watercourse is of consequence, because the extent of the new frontage on the watercourse is to be determined from this. (*Newell v. Leathers*, 395.)

9. **WATER AND WATERCOURSES—OBSTRUCTION.**—Railroad companies have no right to obstruct a natural watercourse or a ditch through which flows other than surface water, to the damage of another, without being liable therefor. (*Cleveland etc. Ry. Co. v. Huddleston*, 385.)

10. **WATER AND WATERCOURSES — PLEADING CONCLUSION OF LAW.**—An allegation in a complaint for obstructing a natural watercourse, that plaintiff is entitled to the free and unobstructed flow of the water in the channel, is a statement of a conclusion of law. (*Cleveland etc. Ry. Co. v. Huddleston*, 385.)

11. **WATER AND WATERCOURSES—SURFACE WATER.**—Railroad companies are under no duty to provide an outlet for surface water, nor liable for turning it upon the lands of adjacent proprietors. (*Cleveland etc. Ry. Co. v. Huddleston*, 385.)

12. **WATERS AND WATERCOURSES — OBSTRUCTIONS — PLEADING.**—If a party seeks to recover from a railroad company upon the theory that his land or property has been injured by an overflow caused by the company's obstructing the water in a ditch, he must show that such ditch was rightfully established and constructed through the property of the company, and that the latter was under a duty not to obstruct it. (*Cleveland etc. Ry. Co. v. Huddleston*, 385.)

13. **WATERS AND WATERCOURSES — OBSTRUCTION — PLEADING.**—A complaint alleging that a railroad company, for the purpose of allowing water in a ditch, known as the "Holloway ditch," to flow under its tracks and continue in the channel of the ditch as had been done for twenty years previous thereto, negligently placed in the line of said ditch, immediately below the premises of plaintiff, an insufficient sewer, is insufficient, as it does not show the obstruction of a natural watercourse. (*Cleveland etc. Ry. Co. v. Huddleston*, 385.)

See *Municipal Corporations*, 5; *Purpresture*, 1-4.

WATER WORKS AND WATER COMPANIES.

CORPORATIONS—REGULATION OF WATER RATES.—The legislature has the power to regulate the rates at which water shall be supplied to the public by a water company, especially when such right is reserved by the statute under which such company was incorporated. (*Danville v. Danville Water Co.*, 804.)

See *Statutes*, 8.

WILLS.

1. **WILLS—WHO MAY CONTEST PROBATE OF, AS PARTIES INTERESTED.**—Under a statute authorizing any person interested in the probate of a will to appear within five years after the probate to contest the validity of the will, one who, after the death of the testator, levied upon and sold the interest of one of his heirs in real property, belonging to him at the time of his death, is entitled, as a party interested, to contest such probate, because, if he succeeds he establishes his title to the property so purchased by him. (*Watson v. Alderson*, 615.)

2. **WILLS—HEIRS—WHEN HAVE A RIGHT TO CONTEST.**—

If a testator's widow is bequeathed absolutely all the household furniture and a life estate in the home place or residence, any of his heirs has a right to contest the probate of the will, because they are prejudiced thereby. Though they have an interest in the same property under the will, it is not the same interest therein to which they are entitled as heirs at law. (Watson v. Alderson, 615.)

See Negotiable Instruments, 8; Specific Performance.

WITNESSES.

1. WITNESSES—OPINIONS OF BUILDERS—RECONSTRUCTION—REPAIRS.—If an insured building has been injured by fire, the opinion of skilled builders and contractors as to whether the work required to restore it is "repair" or "reconstruction" work is entitled to more weight than the judgment of persons inexperienced in such matters, however skillful they may be in their own business. (Vincent v. Frellich, 438.)

2. WITNESSES—IMPEACHMENT.—If a witness denies that in a conversation participated in by her and another, in the presence of a third person, she assented to certain statements made by such other person, such third person is competent to contradict and impeach her testimony. (People v. Tice, 500.)

See Homicide, 17; Process; Trial, 2.

WOMEN.

See Citizenship; Elections, 1-3.

WRITS.

See Scire Facias.





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